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RE: Comments in Response to Proposed Rule on CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances From Animal Waste- EPA-HQ-SFUND-2007-0469: FRL-8511-4

The following comments are submitted on behalf of the members of the Dairy Education Alliance and other identified organizations. The Dairy Education Alliance (DEA) is a national coalition which includes farmers and grass-roots activists dedicated to tackling the health, environmental, social and economic problems associated with large dairy operations. The DEA was formed as a natural outgrowth of the work being done around the country by people whose communities have been devastated by the impacts from industrial-sized dairy operations.

The DEA currently has member organizations from at least 10 states. Current member organizations include: Amargosa Citizens for the Environment (NV); Advocates for the West (ID); Center on Race, Poverty and the Environment (CA); Community Association for Restoration of the Environment (WA); Dakota Rural Action (SD); Environmentally Concerned Citizens of South Central Michigan (MI); Family Farms for the Future (MO); Idaho Concerned Area Residents for the Environment (ID); Idaho Rural Council (ID); Neighbors United for the Finger Lakes (NY); Northwest Environmental Defense Center (OR); Ohio Alliance for Responsible Agriculture (OH); Socially Responsible Agricultural Project; the Western Environmental Law Center and Wood County Citizens Opposed to Factory Farms (OH). Additional organizations participating in these comments include the Western Organization of Resource Councils, Clean Water Action Alliance of Minnesota, and the Association of Irrigated Residents (CA).

The Proposed Rule

EPA's proposed rule is fundamentally flawed both in terms of public policy and law. It should be withdrawn in its entirety. The proposed rule violates the public policy of CERCLA and EPCRA to provide the public with information it needs, especially when the EPA fails to do its job, as is the case here. The fundamental legal problem with the proposed regulation is the lack of statutory authority to make such a particular exclusion. No where in CERCLA or EPCRA is EPA given authority to exempt certain classes of dischargers of statutorily identified extremely hazardous substances. In this case, using the example of ammonia, although it applies to all statutorily regulated substances, there is no authority in either statute to exclude certain types of ammonia dischargers.¹ Ammonia is an identified extremely hazardous substance under sections 103 of CERCLA and 304 of EPCRA.

¹ Similarly, there is no authority to exclude other listed extremely hazardous substances (EHS) such as hydrogen sulfide or any other EHS identified at a CAFO. Hydrogen sulfide is one of the most important of the gases arising from the storage, handling, and decomposition of animal

Congress crafted specific exemptions for the CERCLA and EPCRA reporting requirements.² Congress gave EPA no authority to exempt facilities from CERCLA and EPCRA reporting requirements beyond those exemptions specifically authorized by the statutes. Courts have held that EPA has no such authority and yet EPA flouts this case law.³

The concentrated animal feeding operation (CAFO) industry has sought for years to get statutory exemptions put into CERCLA, EPCRA and the Clean Air Act but has failed. The reason the CAFO industry sought legislative action is because it knew there was no existing statutory authority for what is now being proposed as a regulation. Because of its repeated failures to get statutory exemptions through legislation, the CAFO industry has now gone to the friendly political arena of the Bush Administration, including EPA, to try to get what it could not get from Congress. Yet EPA directly contradicts its own prior pronouncements on this topic.⁴ In fact, EPA previously announced that the Air Compliance Agreement was intended to achieve industry-wide compliance with EPCRA and CERCLA.⁵ Now EPA is changing its position again in response to the CAFO industries' cries for exemption from statutes with which they are congressionally required to comply. Exempting these major sources of pollution runs directly

wastes. Hydrogen sulfide smells like rotten eggs, is recognized as both an irritant and an asphyxiant, and is a prominent component of odorants released from AFOs. Exposure to hydrogen sulfide leads to a host of adverse health effects, including headache, nausea, eye irritation, and impaired respiratory function. Chronic low-level exposure is associated with the loss of one's ability to detect odors. Recent research shows that exposure to low concentrations of hydrogen sulfide "leads to significant neuropsychologic abnormalities, including impaired balance, visual field performance, color discrimination, hearing, memory, mood, and intellectual function." Exposure to high levels causes loss of consciousness and death. Permanent neuropsychiatric defects are associated with hydrogen sulfide exposure.

² 42 U.S.C. § 9603(f); 42 U.S.C. § 11004(a)(4).

³ See, e.g., *Sierra Club v. Tyson Foods*, 299 F. Supp.2d 693, 706 (W.D. Ky. 2004) ("The problem with this argument is that Defendants cite no authority which exempts animal production facilities from the reporting requirements of EPCRA and CERCLA. If Congress had intended such a result, it could have excluded animal production facilities, such as poultry and swine, from the reporting requirements.").

⁴ "EPA's publication of the emissions estimating methodologies will trigger the obligation of participating AFOs to determine their emissions and to comply with all applicable CAA requirements, including applying for all required permits, and to make any requisite hazardous release notices under CERCLA and EPCRA. EPA expects to apply these emission estimating methodologies to all AFOs, whether or not they participate in the Air Compliance Agreement." 70 Fed. Reg. 4959 (Jan. 31, 2005).

⁵ "EPA believes that the Air Compliance Agreement will be the quickest and most effective way to address the current uncertainties regarding air emissions from CAFOs and to bring the entire CAFO industry into compliance with the CAA, section 103 of CERCLA, and section 304 of EPCRA." 70 Fed Reg at 4961.

counter to the policies and purposes of these statutes.

Exempting such major pollution sources is a further attempt by EPA to ignore the CAFO plague faced by communities throughout the nation. Large CAFOs emit huge amounts of ammonia,⁶ a defined extremely hazardous substance with a release reporting threshold of 100 lbs/day, as well as other volatile and semi-volatile compounds that present both acute and chronic health implications for people who live within the airsheds affected by these facilities. See “EPA- Emissions From Animal Feeding Operations”, Draft 2001.

The people who live around these facilities need to know the types and quantities of the pollutants to which they are presently being exposed on a daily basis. This information implicates choices people need to make concerning their health and the health of their families. For instance, for people suffering from asthma or other respiratory diseases, they need to know what their neighbors are emitting in making choices about where to live or how to otherwise respond to the pollution. EPA is simply protecting a polluting class of industry- large CAFOs- from making available this information.⁷

While EPA rationalizes that since the 100 lb/day RQ is based on aquatic toxicity it need not worry about ammonia exposures, it also acknowledges that based on “mammalian toxicity (inhalation), ammonia received a tentative RQ value of 1000 pounds.” Both thresholds are critical. The 1000 lb/day threshold is exceeded by numerous individual large CAFOs around the country and is clearly exceeded when aggregated with other neighboring large CAFOs. For example, the Three Mile Canyon Dairy near Boardman, Oregon reports 15,500 lbs/day of ammonia release, while DeRuyter Brothers Dairy in Outlook, Washington reports a range of releases from 943-1,886 lbs/day. In addition, the cumulative effects of clustered CAFOs gives rise to human exposures of many tons of ammonia per day from large CAFOs. Thus, facilities that emit even 100 lbs/day must be required to report so that cumulative exposures can be assessed.

If this were just an occasional small farm, the problems would be fairly minimal. But that is far from the case in reality. Large CAFOs are continuing to get larger and tend to be located in clusters. For instance, large dairy CAFOs overpopulate such areas as the San Joaquin

⁶ For instance, Three Mile Canyon Farms in Boardman, Oregon, 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 is 75,000 pounds more than the nation’s number one manufacturing source of ammonia air pollution according to 2003 Toxics Release Inventory data.

⁷ It should be noted that small livestock farmers do not reach the reportable quantities that trigger reporting responsibility. It is only large CAFOs, each of which that gross millions of dollars per year, that are subject to reporting. Thus, arguments that this exemption helps small farmers is untrue. In fact, it puts the small farmers at a competitive disadvantage when they are farming with good agronomic practices and the large CAFOs are industrializing and causing severe environmental and public health problems by operating with poor agronomic practices and avoiding accountability for their actions.

Valley in California, the Magic Valley in Idaho, the lower Yakima Valley in Washington, the Clovis-Portales and Roswell-Artesia regions of New Mexico, the Waco area of Texas, and many more.⁸ The cumulative impacts of these daily exposures to huge amounts of ammonia, not to mention other pollutants emanating from these facilities, creates an enormous exposure to people living and working in these communities, yet there has been no concerted effort by EPA to quantify the emissions and take steps to reduce these emissions. Instead, EPA has done everything in its power to prolong the gathering of emissions data (through the Air Compliance Agreement), prevent the public from getting the information needed to protect itself (since EPA has refused to do it), and to now exempt an entire industrial class from complying with laws that are intended to provide the public with information necessary to protect itself (when the agencies fail to do the job).

Public health problems from CAFOs have been extensively documented, but the agencies continue to ignore the scope of the problem. For instance, there have been over 70 papers published on the adverse health effects of the confinement environment on swine producers by authors in the United States, Canada, most European countries, and Australia (*see, e.g.* Cormier et al. 1997; Donham 2000; Donham et al. 1977; Donham et al. 1982; Donham et al. 1986; Donham et al. 1990; Donham et al. 2002; Kirkhorn and Schenker 2002; Kline et al. 2004; Preller et al. 1995; Reynolds et al. 1996; Rylander et al. 1989; Schiffman et al. 1995; Schwartz et al. 1992; Thu et al. 1997; Wing and Wolf 2000). It is clear that at least 25% of confinement workers suffer from respiratory diseases including bronchitis, mucus membrane irritation, asthma-like syndrome, and acute respiratory distress syndrome. Much of this is attributable to ammonia.

Adverse human health effects associated with air pollution from CAFOs are manifold and may include respiratory diseases (asthma, hypersensitivity pneumonitis, industrial bronchitis), cardiovascular events (sudden death associated with particulate air pollution), and neuropsychiatric conditions (due to odor as well as delayed effects of toxic inhalations).⁹ Other problems include increased headaches, sore throats, excessive coughing, diarrhea, burning eyes, and reduced quality of life for nearby residents.¹⁰ CAFO air pollution tends to be especially

⁸ In the swine industry, for example, large confinement operations dominate hog production. Hog CAFOs typically confine approximately 5,000 hogs at any given time in totally closed buildings. Such large CAFOs are highly specialized operations which do not resemble traditional farming, and are more akin to manufacturing processes, in which the operator closely regulates the animals' environment, food source, and water supply.

⁹ Iowa State University and The University of Iowa Study Group, Iowa Concentrated Animal Feeding Operations, Air Quality Study, Final Report (2002) ("Iowa Air Quality Study"), <http://www.public-health.uiowa.edu/ehsrc/CAFOstudy.htm> at 122; *see also* Minnesota Planning Agency Environmental Quality Board, Final Animal Agriculture Generic Environmental Impact Statement (2002), ("Minnesota EIS for Animal Agriculture"), www.eqb.state.mn.us/geis/ for information concerning health impacts of particular CAFO air pollutants.

¹⁰ S. Wing & S. Wolf, Intensive Livestock Operations, Health, and Quality of Life Among Eastern North Carolina Residents, 108 *Envtl. Health Persp.* 223-38 (2000); *see also* K. Thu et al.,

problematic from a public health perspective because neighboring communities are exposed on a near constant basis.¹¹

Exposure to moderate concentrations of ammonia (50-150 ppm) can lead to severe cough and mucous production. Exposure to higher concentrations (>150 ppm) may cause scarring of the upper and lower airways, a consequence of which, in some cases, is reactive airway dysfunction syndrome and associated persistent airway hyperresponsiveness. At higher concentrations, sufficient ammonia may bypass the upper airways to cause lower lung inflammation and pulmonary edema. In addition to pulmonary disease, ammonia causes irritation of the eyes, nose, and throat.

Concerns over air pollution from CAFOs have been voiced for over a decade, and have grown increasingly alarming over time.¹² In 2004, the U.S. Environmental Protection Agency reported that a single CAFO in Ohio emitted over 700 tons per year of particulate matter and 375 tons per year of ammonia without receiving any permit authorizing these emissions.¹³

Furthermore, as conceded when it passed the 100 lb/day RQ, ammonia emissions cause or contribute to water quality problems as well. Once released to the atmosphere, ammonia is readily deposited back to the earth in one of two forms. Ammonia rapidly adheres to particles in the air due to its cohesive properties. Ammonia also can be converted to ammonium sulfate or ammonium nitrate, each of which contributes to fine particulate concentrations (PM 2.5). When deposited back to the earth, these aerosols contribute to nutrient over-enrichment in aquatic systems and acidification of the environment.¹⁴

A Control Study of the Physical and Mental Health of Residents Living Near a Large-Scale Swine Operation, 3 J. Agric. Safety & Health 1, 13-26 (1997).

¹¹ Iowa Air Quality Study at 122.

¹² See Takai, Concentrations and Emissions of Airborne Dust in Livestock Buildings in Northern Europe, 70 J. Agric. Res. at 59-77 (1998).

¹³ EPA, Ohio's Largest Egg Producer Agrees to Dramatic Air Pollution Reductions from Three Giant Facilities, http://www.usdoj.gov/opa/pr/2004/February/04_enrd_105.htm.

¹⁴ "NH₃ [ammonia] may cause several ecological problems in the environment. First, the inputs of nitrogen may lead to considerable changes in plant communities with the result that plants which prefer low nitrogen soils disappear and there is an increase in nitrogen indicator plants. Second, acidification of soil with low buffer capacity may occur after nitrification of the nitrogen added. A falling pH leads to the dissolution of toxic soil constituents such as aluminum ions, and to the leaching of nutrients and aluminum into the groundwater. Third, the natural capability of forest soil to take up methane (CH₄) decreases by NH₃ deposition, thus increasing the concentration of the greenhouse gas in the atmosphere. Fourth, surface waters may be affected by eutrophication and acidification. Finally, NH₃ depositions on buildings will promote bacterial growth, which contributes substantially to weathering and corrosion damage of the buildings." Quotation from Generic Environmental Impact Statement on Animal Agriculture,

Nitrogen compounds, primarily ammonia, are routinely detected in surface waters around big dairies from air deposition, stormwater and irrigation runoff from manure land application areas, and from spills and direct discharges resulting from overapplication of manure. Nitrates, another component of the nitrogen cycle that often comes from ammonia, are frequently found in groundwater in quantities that present serious public health threats to rural residents, often of low-income, whose sole source of drinking water is groundwater. Widespread contamination of nitrates above the 10 part per million federal maximum contaminant level has been documented in and around industrial dairies in multiple states such as California, Washington, Idaho, New Mexico, and Wisconsin, to name some of the most industrialized dairy states. Ammonia has also been found in many wells with nitrate problems and from direct leakage to groundwater. See, e.g., “Quality of Ground Water in Private Wells in the Lower Yakima Valley, 2001-02,” at pp.13-15, authored by Ron Sell and L. Knutson, Valley Institute for Research and Education. Copy attached as Exhibit A.

Many studies have shown, for example, that high nutrient concentrations (e.g., ammonia from swine CAFOs, or ammonia oxidized to nitrate, or phosphorus from poultry (CAFOs) commonly move off-site to contaminate the overlying air and/or adjacent surface and subsurface waters (Aneja et al. 2003; Evans et al. 1984; Sharpe and Harper 1997; Sharpley and Moyer 2000; Stone et al. 1995; U.S. EPA 1998; Webb and Archer 1994; Westerman et al. 1995; Zahn et al. 1997). Inorganic N forms are added to the atmosphere during spray practices, and both ammonia and phosphate can also adsorb to fine particles (dust) that can be airborne. The atmospheric depositions are noteworthy, considering that a significant proportion of the total ammonium from uncovered swine effluent lagoons and effluent spraying (an accepted practice in many states) re-enters surface waters as local precipitation or through dry fallout (Aneja et al. 2003; U.S. EPA 1998, 2000).

It is incumbent on EPA to require systematic compliance not wholesale exemption. For EPA to suggest exempting CAFOs from EPCRA and CERCLA reporting is not only without basis in the law, but does a grave disservice to the statutes Congress passed, each of which are designed not only to provide the public the right to know what they are being exposed to, but also to provide baseline information to public health and environmental protection agencies to encourage and allow the agencies to assess the full impacts of these releases and take steps to protect public health and the environment.¹⁵ Instead of living up to the intentions of the statutes,

University of Minnesota, College of Agriculture, Food, and Environmental Sciences (1999)(citations omitted).

¹⁵ See, e.g., *Sierra Club v. Tyson Foods*, 299 F. Supp.2d at 704 (“[t]he Supreme Court in discussing the purpose of EPCRA has stated as follows: “EPCRA establishes a framework of state, regional and local agencies designed to inform the public about the presence of hazardous and toxic chemicals, and to provide for emergency response in the event of health-threatening releases.” *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 86 (1998)); *id.* at 705 (“The purpose of CERCLA notice requirement is to provide the EPA and other regulatory agencies with the information they need to assess hazards and mitigate potential injury from releases. Similarly, EPCRA establishes a framework of agencies designed to inform the public about the presence of hazardous and toxic chemicals, and to provide emergency response in the event of health-threatening releases. Without the required notices of alleged releases, regulatory

EPA proposes to continue to bury its head in the sand so it can continue to ignore the urgent health threats created by CAFOs. Instead of ignoring the issue, EPA should be moving to require the CAFO industry to comply with EPCRA and CERCLA reporting requirements. Public health and regulatory agencies would then be better able to see the enormity of the problem and takes steps to protect human health and the environment.

Some examples of known human health problems include high nitrate levels in water used in mixing infant formula that have been associated with risk for methemoglobinemia (blue-baby syndrome) in infants under six months of age, although other health factors like diarrhea and respiratory disease have also been implicated (Ward et al. 2005). The U.S. EPA drinking water standard of 10 mg/L NO₃-N (nitrate-nitrogen) and the World Health Organization guideline of 11 mg/L NO₃-N were set due to concerns about methemoglobinemia. Epidemiological studies of non-cancer health outcomes and high nitrate levels in drinking water have reported an increased risk of hyperthyroidism (Seffner 1995) from long-term exposure to levels between 11–61 mg/L (Tajtakova et al. 2006). Drinking water nitrate at levels below the 10 mg/L has been associated with insulin-dependent diabetes (Kostraba et al. 1992), while other studies have shown an association with insulin-dependent diabetes at nitrate levels >15 mg/L (Parslow et al. 1997) and >25 mg/L (van Maanen et al., 2000). Increased risks for adverse reproductive outcomes including central nervous system malformations (Arbuckle et al. 1988) and neural tube defects (Brender et al. 2004; Croen et al. 2001) have been reported for drinking water nitrate levels <10 mg/L. Other reports of reproductive effects of nitrate in drinking water include a case study of spontaneous abortions in women consuming high nitrate water (19-26 mg/L) from private wells.¹⁶

Because ammonia, as part of the nitrogen cycle, can transform to nitrates under certain conditions, it is important to know both how and where ammonia is being emitted from CAFOs as well as how much is being emitted. EPCRA and CERCLA provide for that opportunity. It is telling indeed that EPA has created a process through the Air Compliance Agreement that has delayed for many years emissions reporting from CAFOs when the information already exists to require such reporting. While the exact pounds of ammonia emitted, for example, may vary depending upon the type of operation involved, the general amounts can be presently ascertained. It has been citizens, through the EPCRA and CERCLA citizen suit provisions, that have brought about at least some industry reporting. *See, e.g., DeRuyter Brothers Dairy, Outlook, Washington* (2007 Ammonia reporting of 344,000-688,000 pounds/year from 6,300

agencies are without knowledge of the releases; and are consequently impeded from adequately mitigating the releases. As a result, Plaintiffs who use the affected environment are therefore injured by potential exposure to the hazardous releases.”); *id.* at 710 (“The purpose of Section 103 has been described by the EPA 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).”).

¹⁶ “Spontaneous Abortions Possibly Related to Ingestion of Nitrate-Contaminated Well Water-LaGrange County, Indiana 1991-1994,” *Morbidity and Mortality Weekly*, Report 26, Centers for Disease Control (July 5, 1996) pp. 569-71.

cows after receiving notice of intent to sue from Community Association for Restoration of the Environment (CARE)).¹⁷ DeRuyter Brothers even reported that it is within a mile of an elementary school. The elementary school was recently found to have nitrate contamination in its drinking well above 10 mg/l.¹⁸ DeRuyter's EPCRA reporting now makes it more readily accessible to agencies to connect this information.

What health impacts are the ammonia emissions having on the children? Again, for example, there are numerous other dairy operations within a 10 mile radius of the DeRuyter operation, perhaps as many as another 75,000 head. Extrapolating from the DeRuyter Brothers ammonia emissions estimate, that would mean the people in the Outlook-Sunnyside area are consistently exposed to anywhere from about 12,000-24,000 pounds per day of ammonia. EPCRA and CERCLA reporting would confirm a more accurate picture of exposure. Similar, even more voluminous, problems are experienced in the San Joaquin Valley¹⁹ and the Magic Valley in Idaho.²⁰

Instead of requiring reporting, EPA rationalizes that the exemptions proposed are reasonable because "[t]he Agency believes that federal response to such notifications is impractical and unlikely." This statement tells the public that EPA is failing woefully to do its

¹⁷ DeRuyter Brothers Dairy 2007 EPCRA/CERCLA reports, attached as Exhibit B.

¹⁸ "What's in the water in Outlook? Too much nitrate." Leah Beth Ward, Yakima Herald-Republic, January 3, 2008, attached as Exhibit C.

¹⁹ The California Air Resources Board "Staff Report: Initial Statement of Reasons for Rulemaking-Public Hearing to Consider the Large Confined Animal Facility Definition" (May 6, 2005)(pp. 10-13) (attached as Exhibit D) shows that the San Joaquin Valley has over 1,000,000 milking cows. Thus, conservatively estimated, daily emissions of ammonia are well over 170,000 lbs/day. *Id.* at p. 28. In Tulare County alone there are over 400,000 milking cows, and over 800,000 total head of dairy livestock, approximately 95% of which are at facilities with greater than 500 head. According to the San Joaquin Valley Air Pollution Control District, one facility, South Lakes (Schakel) Dairy emits hundreds of thousands of pounds of ammonia per year. No health assessments have been done at the federal level to determine the health impacts from these enormous ammonia emissions. California has done some preliminary work that implicates ammonia emissions with health impacts. More needs to be done.

²⁰ The National Agricultural Statistics Service (NASS) reports that at the end of 2007 Idaho had 533,000 milk cows. According to recent reports from the Idaho Dairyman's Association (IDA), the Magic Valley accounted for 72% (over 380,000) of Idaho's milk cow population. There are at least 70 dairies in Idaho with over 2,000 milk cows. (IDA)

Several large dairy operators, including Big Sky Dairy, Southfield Dairy and Louis Bettencourt have held themselves out as "industrial" by requesting, and qualifying for, millions of dollars in low interest financing to construct wastewater lagoons through "Industrial Development Corporations" set up by at least two counties in the Magic Valley. Interest rates the borrowers pay on these bonds are very low. Smaller dairy operators are put at a competitive disadvantage when the larger operators get cheap loans this way.

job of protecting human health and the environment in the face of known acute and chronic threats from large CAFOs. EPA's position basically says that no matter how much pollution you are suffering, we're not going to anything about it anyway, so why don't we just ignore the problem. EPA cannot ignore the problem because Congress mandated that it collect the information and respond to it. If the agencies fail to do their job, the right-to-know aspect of the statute allows citizens access to the information so they can at least petition their government to respond to these ongoing health threats.

EPA also incorrectly states that because many of the releases from animal waste are continuous, that they need not be reported. The court in *Sierra Club v. Tyson* specifically rejected this argument when made by Tyson, citing EPA's own guidance documents on the subject. *See Sierra Club v. Tyson Foods*, 299 F. Supp.2d at 711-12. The court went on to say that the statute requires only reduced reporting requirements when releases are continuous, but to qualify for reduced reporting there must be reporting in the first place. *Id.* In this rule, EPA ignores this part of EPCRA and CERCLA entirely. *See also* 40 C.F.R. § 355.40(a)(2)(iii)(A). Many facilities may be releasing ammonia on both a continuous and intermittent basis. It is the polluting facility's responsibility to make this initial determination and back it up with facts.

These are not farms that we are talking about, but industrial-scale animal processing facilities. The concentration of the animals has created dangerous conditions for the environment, community health, worker health and animal health. In the chicken and hog industries, the ammonia that accumulates in the confinement pens has to be ventilated to the outside or else the animals will die!²¹ If the animals are experiencing health problems from these exposures, surely the people that live in the communities surrounding these facilities also experience health problems. In fact, many people should probably be relocated due to the injuries they continuously suffer from the ammonia emissions alone. Yet no governmental health agencies are collecting the data and taking a hard look at the steps necessary to protect workers and other residents exposed to these toxins.

Section III.D of the Proposed Rule asks for comments on what an appropriate response would be to releases of ammonia, among other things, from animal waste as it is defined in the proposed rule. Without being too flippant, some response would be nice! EPA needs to take a comprehensive look at health impacts from industrial-sized CAFOs. Or perhaps better yet, provide funding to a credible institution to conduct exposure assessments. Reporting by facilities, not exempting them, would help assemble the emissions data to make real assessments about the dangers of exposure. Right now the emissions and their impacts are being entirely ignored. EPA's statement that they are not likely to respond is based on an institutional position of "don't look, don't find." Such an approach to public health and environmental protection greatly undermines the public's confidence in what is supposed to be the nation's premier environmental protection agency.

²¹ *See Sierra Club v. Tyson Foods*, 299 F. Supp.2d at 700 ("Ventilation in the poultry houses is necessary to protect the health of the chickens and is accomplished by a combination of exhaust fans and vents).

The economic analysis in section III.E. of the proposed rule is fatally flawed because it assumes that CAFOs are actually complying with the law. Nothing could be further from the truth. Before cost savings can occur there have to be cost expenditures and far more than 95% of CAFOs have not complied with the existing statutory requirements. Having this information would create emissions information that would require not just a recordkeeping response from local, state and federal agencies, but a real public health response based upon the cumulative exposures from CAFOs. Large CAFOs have the resources to comply with the law.

Now that citizens have sought to enforce the law, the CAFO industry, through an industry-friendly administration, has sought to take away access to the information to prevent accountability, embarrassment and further regulatory controls necessary to protect public health and the environment. It is shameful that EPA is seeking to provide further protections for the CAFO industry rather than taking steps to protect human health and the environment.

In addition, EPA is jumping the gun on the Air Compliance Agreement and findings that will come from this multiple year process. EPA is seeking to exempt facilities from reporting requirements before it “knows” what these facilities release.²² This rule provides further evidence that the EPA Air Compliance Agreement process is nothing more than a sop to the public and provides further evidence that EPA intends to do nothing about CAFO pollution.

EPA must comply with a number of other statutory and Executive Order reviews when it promulgates a rule, none of which appear evident to any significant extent in this rulemaking. The relevant reviews may include, but are not limited to:

- Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks—EPA must evaluate the environmental health or safety effects on children for rules that are “economically significant” and that may have a disproportionate effect on children. At the very least, EPA’s rationale for not acting under this executive order is arbitrary, capricious and not in accordance with law. EPA provides nothing but conclusory assertions in section IV.G
- Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations—EPA must assess how the rule affects the quality of the human environment.
- Executive Order 12866: Regulatory Planning and Review—EPA must determine whether a regulatory action is “significant” and therefore subject to OMB review.
- Executive Order 13132: Federalism—EPA must develop a process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.
- Executive Order 13175: Consultation and Coordination with Indian Tribal Governments--EPA must develop a process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.
- Paperwork Reduction Act—OMB must approve information collection requirements

²² The industry already has generally reliable formulas for determining emissions, but EPA has provided yet further delay in reporting requirements using the Air Compliance Agreement omnibus consent decree.

of a rule.

- Regulatory Flexibility Act—EPA must prepare a regulatory flexibility analysis.
- Unfunded Mandates Reform Act—EPA must assess the effects of the regulatory analysis on State, Tribal and Local Governments and the private sector.
- National Technology Transfer and Advancement Act—EPA must use voluntary consensus standards unless inconsistent with law or impractical.

A number of these Executive Orders and Acts are particularly relevant to EPA’s proposed rule. For example, Executive Order 13045 is important in light of the ever-growing body of science that links asthma to children exposed to CAFO pollution. Similarly, Executive Order 12898 is implicated, because CAFO air emissions often have disproportionate impacts on rural, low-income communities.

Trying to redefine CAFOs, EPA seeks to exclude animal waste as a source of reportable pollution. This is contrary to statute. CERCLA defines “facility” as “(A) any building, structure, ... lagoon, impoundment [or other listed structures], or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located...”²³ Similarly, EPCRA defines “facility” as “all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person...”²⁴ Courts interpreting the meaning of the CERCLA definition of “facility” as applied to CAFOs have held that it “encompasses the [hog farm] site as a whole.”²⁵ EPA is acting beyond its authority by excluding sources from reporting that fit within these statutory definitions.

In conclusion, there is nothing in the proposed rule that comports with the law or furthers public policy. Removing the CAFO industry from EPCRA and CERCLA reporting will only provide further opportunities for large CAFOs to avoid accountability to the public, continue to fly under the radar of public health agencies whose job is to protect public health, and avoid stricter regulatory controls. Instead of exempting these facilities, EPA should require industry-wide reporting. Please throw out the proposed rule and work toward achieving 100% compliance with the statutory reporting requirements. Thank you.

Sincerely,

/s/ Charles M. Tebbutt _____

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²² 42 U.S.C. § 9601(9).

²³ 42 U.S.C. § 11049(4).

²⁴ Sierra Club v. Seaboard Farms, Inc., 387 F.3d 1167, 1176 (10th Cir. 2004).

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Socially Responsible Agricultural Project
32672 115th Street
Unionville, MO 63565

Western Environmental Law Center
1216 Lincoln St.
Eugene, OR 97401

Wood County Citizens Opposed to Factory
Farms
P.O. Box 924
Bowling Green, OH 43402

and the following organizations:

Western Organization of Resource Councils
220 S. 27th Street, Suite B
Billings, Montana 59101

Clean Water Action Alliance of Minnesota
308 East Hennepin Avenue
Minneapolis, Minnesota 55414

Association of Irrigated Residents
30100 Orange St
Shafter, CA 93263