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United States Environmental Protection Agency
Division Directors for EPCRA §304 / CERCLA §103
via email: CERCLA103.guidance@epa.gov

November 24, 2017

Re: CERCLA and EPCRA Reporting Requirements for Air Releases of Hazardous Substances from Animal Waste at Farms

To Whom It May Concern:

Waterkeepers Chesapeake [and other signatories] respectfully submits the following comments on the United States Environmental Protection Agency's (EPA) Guidance regarding the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) §103 and Emergency Planning and Community Right to Know Act (EPCRA) §304 reporting requirements for Concentrated Animal Feeding Operations (CAFOs) and Animal Feeding Operations (AFOs).[1] As a 501 (c)(3) non-profit organization, Waterkeepers Chesapeake is a coalition of 19 Riverkeepers, Shorekeepers, and Coastkeepers from Pennsylvania to Virginia working to make the waters of the Chesapeake and Coastal Bays swimmable, drinkable and fishable once again.

On April 11th 2017, the United States D.C. Circuit Court of Appeals found that EPA had unlawfully exempted CAFOs and AFOs from the reporting requirements outlined in CERCLA §103 and EPRCA §304.[2] While the decision was meant to close an EPA loophole that has long exempted CAFOs and AFOs from reporting the same hazardous substances – like ammonia and hydrogen sulfide – as other industries, EPA's Guidance largely circumvents the Court's impetus for requiring CAFOs and AFOs to report hazardous emissions in the first place – to protect communities and provide much needed information for local, state and federal authorities and emergency responders.

In addition to human health impacts, we are generally concerned with the impacts that these hazardous emissions have on regional and local waterways. For instance, ammonia is highly soluble and will deposit in surrounding water bodies and degrade water quality.[3] Ammonia, in its gaseous form, can deposit close to the source of emissions - causing local water quality issues in addition to downstream impacts (for example, in the Chesapeake Bay). According to the EPA, "[w]hen ammonia is present in water at high enough levels, it is difficult for aquatic organisms to sufficiently excrete the toxicant, leading to toxic buildup in internal tissues and blood, and potentially death." Ammonia may also produce secondary particles due to its ability to chemically react with atmospheric pollutants, such as NO_x and SO_2; these particles can travel long distances and cause

[1] U.S. EPA: CERCLA and EPCRA Reporting Requirements for Air Releases of Hazardous Substances from Animal Waste at Farms, *available at* <https://www.epa.gov/epcra/cercla-and-epcra-reporting-requirements-air-releases-hazardous-substances-animal-waste-farms>

[2] See *Waterkeeper Alliance, Et. Al., v. EPA (April 11, 2017)*

[3] Gates, et al. Methods for Measuring Ammonia Emissions from Poultry Houses. Poultry Science Association (2005).

regional and national problems downwind.[4] More specifically, Waterkeepers Chesapeake would like to point out the following issues in regards to EPA's Guidance:

1. **More than ninety percent of the largest AFOs across the United States are exempted from the reporting requirements under both CERCLA & EPCRA.**

According to the Guidance, EPA is not requiring any CAFO or AFO that signed onto the 2005 Animal Feeding Operation Air Compliance Agreements "to report air releases of hazardous substances from animal wastes under CERCLA and EPCRA." According to a recent report from the EPA's Inspector General, these agreements cover about 13,900 AFOs in 42 states; these 13,900 AFOs comprise more than ninety percent of the largest AFOs in the United States. While these compliance agreements were set up so EPA could develop a reliable way to estimate emissions from CAFOs and to determine whether they comply with Clean Air Act (CAA) standards, a recent EPA Inspector General report noted that the agency has not been able to complete the task for almost twelve years now.[5] We applaud the EPA for attempting to develop a more reliable way to estimate emissions from CAFOs and AFOs and ensure that these facilities are complying with the CAA, but twelve years is far too long. EPA must complete the process. And regardless of whether the EPA is enforcing these laws, they are in force and must be complied with. Suggesting otherwise runs counter to the D.C. Circuit determination that the exemption was unlawful

The largest AFOs and CAFOs are the facilities emitting the most ammonia and hydrogen sulfide – meaning these are the facilities where the CERCLA and EPCRA reporting requirements would most likely apply. The EPA estimates that nearly three-quarters[6] of the country's ammonia emissions come from these large operations. The manure ends up emitting high quantities of ammonia, hydrogen sulfide, volatile methane and particulate matter after it's stored or applied to cropland, where it either decomposes or undergoes nitrification and de-nitrification. The ventilation systems in CAFOs also release harmful levels of ammonia emissions. For instance, a study conducted by Iowa State University found that two chicken houses in Kentucky emitted over 10 tons of ammonia in one year. Ammonia air pollution is associated with serious health effects, including throat irritation; chemical burns to the respiratory tract, skin and eyes; chronic lung disease; and increased mortality rates.

Despite these serious health consequences, EPA's Guidance exempts more than ninety percent of the largest CAFOs and AFOs across the United States from reporting. Creating yet another exemption goes directly against the D.C. Circuit Court's Opinion that the EPA has no "discretion to fashion other exemptions" from the reporting requirements. The Court states,

> Had Congress done nothing more than place certain exemptions in these statutes we might have reasonably concluded that the EPA had discretion to fashion other exemptions consistent with the statutory purposes… But here Congress paired those specific exemptions with a sweeping reporting mandate. It made clear that the statutes

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[4] *Id.*

[5] U.S. EPA Inspector General: Eleven Years After Agreement, EPA Has Not Developed Reliable Emission Estimation Methods to Determine Whether Animal Feeding Operations Comply With Clean Air Act and Other Statutes, *accessible at <https://www.epa.gov/sites/production/files/2017-09/documents/_epaoig_20170919-17-p-0396.pdf>*

[6] U.S. EPA: AMMONIA EMISSION FACTORS FROM SWINE FINISHING OPERATIONS, D. Bruce Harris, Et. Al. *available at* <https://www3.epa.gov/ttnchie1/conference/ei10/ammonia/harris.pdf>

> require notification of "*any* release . . . of a hazardous substance . . . in quantities equal to or greater than" the reportable quantities authorized… 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." [7]

EPA's Guidance should be amended to reflect the Court's decision that all CAFOs and AFOs that emit hazardous substances above the reportable quantity (i.e. 100 pounds of ammonia or hydrogen sulfide/day) must report to the appropriate authorities under CERCLA and EPCRA.

2. All CAFOs and AFOs are virtually excluded from the reporting requirements under EPRCA §304, circumventing the D.C. Circuit's goal of informing state and local authorities about dangerous releases from these facilities.

According to the EPA guidance, any CAFO or AFO that uses manure as part of its "routine agricultural operations" is exempted from the reporting requirements under EPCRA – the statute that requires reports of hazardous substances to local and state authorities. All CAFOs and AFOs produce or use manure as part of their routine agricultural operations, so EPA's new interpretation of EPCRA would exempt all facilities from reporting to state and local authorities. EPA stated that it "believes Congress did not intend to impose EPCRA reporting requirements on farms engaged in routine agricultural operations," despite the D.C. Circuit's finding that state and local authorities need this information to adequately respond to emergencies. As stated earlier, the Court made clear that EPA does not have "discretion to fashion other exemptions," yet here we have another exemption created by the EPA.

This unlawful exemption also has some serious implications. The Court explained that exempting CAFOs and AFOs from reporting under EPRCA and CERCLA "prevent[s] local, state and federal emergency responders from having critical information about potentially dangerous releases" and limits the ability of federal or state authorities to take action through "investigations or clean-up[s]" or "issuing abatement orders."[8] The Court referenced a comment from the National Association of SARA Title III Program Officials that discussed the need for these reports from CAFOs and AFOs when responding to genuine emergencies,

> The 911 call that comes in from a member of the public in the dark of night reporting a foul or chemical odor rarely contains information on the source. The responders are forced to guess at that source as they ga[u]ge their response. *"Immediate" release reporting by facilities under EPCRA provides crucial information to those responders. Without such information responders are forced to blindly drive through an area not knowing what they are looking for—is it a vehicle accident, a facility release or something worse will be the question in their minds.* (Emphasis added).[9]

The EPCRA reports from CAFOs and AFOs are clearly necessary for state and local authorities to adequately respond to large releases of hazardous substances from these operations. The Court

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[7] Op. 12.
[8] Op. 15-16.
[9] Op. 16.

explained that commenters "put before the EPA a good deal of information, not refuted by the EPA, suggesting scenarios where the reports could be quite helpful in fulfilling the statutes' goals." The Court went on to say,

> Specifically, commenters explained that "when [manure] pits are agitated for pumping," hydrogen sulfide, methane, and ammonia "are rapidly released from the manure and may reach toxic levels or displace oxygen, increasing the risk to humans and livestock…That risk isn't just theoretical; people have become seriously ill and even died as a result of pit agitation.[10]

Like other industries that emit hazardous substances, there are serious public health consequences when a large amount of ammonia or hydrogen sulfide is emitted by a CAFO or AFO. It's not clear why EPA is continuing to place the interests of these operations over the health of surrounding communities and waterways.

Given the EPA's previous stance that animal waste "reports are unnecessary because, *in most cases*, a federal response is impractical and unlikely,"[11] along with their new, purported reporting exemptions to state and local authorities under EPCRA – it's clear that the EPA desires to continue disregarding the need for authorities and emergency responders to access crucial information so that communities can adequately respond to public health threats.

Lastly, EPA's decision to exempt CAFOs and AFOs from reporting under EPCRA evades the statutory interplay between CERCLA and EPCRA. As the Court explains, "In drafting the EPCRA reporting requirements, Congress expressly tied them to CERCLA's. Thus all of EPCRA's reporting mandates are piggybacked on the CERCLA mandates in one form or another. And once EPCRA reporting is required, EPCRA goes on to mandate that the information from those reports be disclosed to the general public."[12]

EPA's Guidance should be amended to reflect the Court's decision that all CAFOs and AFOs that emit hazardous substances above the reportable quantity are required to report to state and local authorities under EPRCA.

3. **EPA's Guidance allows for rough estimations of hazardous substances, and possibly even incorrect ones; the "continuous release" reports required under CERCLA §103 allow for too much uncertainty.**

Under the EPA's Guidance, the remaining CAFOs and AFOs that are required to report under CERCLA §103 can file a continuous release notification with the National Response Center (NRC) and EPA regional offices if they plan to continuously exceed the reportable quantity (i.e. more than 100 pounds of ammonia emitted in a 24-hour period). The guidance states: "EPA recognizes that it will be challenging for farmers to report releases from animal wastes because there is no generally accepted methodology for estimating emission quantities at this time…EPA understands that farmers may need to report their releases in *broad ranges that reflect the high degree of uncertainty and*

[10] Op. 14-15.
[11] 73 Fed. Reg. at 76.956/1
[12] Op. 10.

variability of these releases." The Guidance also requires farms to review and estimate their emissions only once a year and even states that "[m]onitoring data is not required."

This language in the EPA Guidance could potentially prevent emergency responders and federal authorities from accessing much needed data about hazardous substance releases from CAFOs and AFOs. For instance, the Guidance requires farms to report Statistically Significant Increases (SSIs) or "an episodic release of a hazardous substance that exceeds the release quantity described in the upper bound of the normal range of the facility's continuous release report." While this information would be very relevant in responding to an emergency release of hazardous substances, the requirement that CAFOs and AFOs review their emissions only once a year prevents these operations from firmly determining whether there is a SSI. Further, no monitoring data is required – so it's unclear how they would estimate whether there is an SSI to begin with. The Guidance offers that owners and operators of these facilities may use their "best professional judgment" to make these estimations, but this leaves a lot of room for leeway and error, given the admitted difficulty of making these estimations in the first place. Instead of allowing for loose estimations, and possibly even incorrect ones, we would hope that the agency charged with protecting our air and water would ensure concrete estimations and reports from the very facilities jeopardizing them.

EPA's Guidance should be amended to include more concrete ways for facilities to estimate their emissions of hazardous substances. Without a standardized way to estimate these emissions, CAFOs and AFOs will continue to run afoul of the requirements under CERCLA and EPRCA (i.e. a facility that underestimates its emissions will not report, even though it is required to do so) and communities will continue to suffer from these threats without any information to act on.

Waterkeepers Chesapeake appreciates the opportunity to submit these comments, and would be happy to further discuss them with you or your colleagues at EPA.

Respectfully submitted,

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