

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 302 and 355

[EPA-HQ-OLEM-2018-0518-; FRL_XXXX-XX-OLEM]

RIN 2050-AG66

Vacatur Response - CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms; FARM Act Amendments to CERCLA Release Notification Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is revising regulations promulgated under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980, as amended, and under the Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986. Specifically, EPA is removing regulatory provisions associated with the administrative reporting exemption that applied to releases of hazardous substances into the air from animal waste at farms. These revisions implement the vacatur of the CERCLA and EPCRA administrative reporting exemption regulations ordered by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) on April 11, 2017 with a final mandate issued on May 2, 2018. This rule also incorporates CERCLA revisions enacted by the Fair Agricultural Reporting Method (FARM) Act, signed into law on March 23, 2018, which exempts reporting of air emissions from animal waste under CERCLA. Finally, EPA is removing 2008 definitions of “farm” and “animal waste” from the CERCLA and EPCRA regulations and adding revised definitions of “farm” and “animal waste” to the CERCLA regulations consistent with the FARM Act.

DATES: This final rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-HQ-OLEM-2018-0518. All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the EPA Docket Center, EPA/DC, WJC West Building, Room 3334, 1301 Constitution Ave., N.W., Washington DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m. Monday through Friday, excluding Federal holidays. The telephone number for the Public Reading Room is (202) 566-1744. For more information on EPA's Docket Center Reading Room, see <https://www.epa.gov/dockets/epa-docket-center-reading-room>.

FOR FURTHER INFORMATION CONTACT: Office of Emergency Management, mail code 5104A, Environmental Protection Agency, 1200 Pennsylvania Ave., N.W., Washington DC 20460, Alison Kent (202) 564-7645, kent.alison@epa.gov or Sicy Jacob (202) 564-8019, jacob.sicy@epa.gov; or contact the EPCRA, RMP & Oil Information Center toll free at 1-800-424-9346 or (703) 348-5070 in the Washington DC area. The call center operates from 10:00 a.m. to 5:00 p.m. EST Monday through Friday, excluding Federal holidays.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

A list of entities that could be affected by this final rule include, but are not necessarily limited to:

NAICS Description	NAICS Code	Examples of Potentially Affected Entities
Crop Production	111	Facilities that manage crop production
Animal Production and Aquaculture	112	Facilities that manage animal production and aquaculture

This table is not intended to be exhaustive, but rather provide a guide for readers regarding the types of entities that EPA is aware could be involved in the activities affected by this action. However, other types of entities not listed in this table could be affected by this final rule. To determine whether your entity is affected by this action, you should carefully examine the applicability criteria found in Title 40 of the Code of Federal Regulations (CFR) parts 302 and 355. If you have questions regarding the applicability of this action to a particular entity, consult the persons listed in the FOR FURTHER INFORMATION CONTACT section.

B. Why is EPA issuing this action?

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause to issue this final rule without prior proposal and opportunity for comment because these revisions undertake the ministerial tasks of removing CERCLA and EPCRA regulatory provisions vacated by the D.C. Circuit and adding provisions to the CERCLA regulations consistent with the FARM Act's legislative amendments to CERCLA section 103.

As a matter of law, the orders issued by the D.C. Circuit on April 11, 2017 and May 2, 2018 vacated the final rule titled "CERCLA/EPCRA Administrative Reporting Exemption for

Air Releases of Hazardous Substances From Animal Waste at Farms” (73 FR 76948, December 18, 2008), herein referred to as the “2008 final rule,” which was issued by EPA under CERCLA, 42 U.S.C. 9601 *et seq.* and EPCRA, 42 U.S.C. 11001 *et seq.* It is, therefore, unnecessary to provide notice and an opportunity for comment on this action, which merely carries out the court’s orders by removing the administrative reporting exemption and related definitions of “farm” and “animal waste” from the CERCLA regulations at 40 CFR part 302 and the EPCRA regulations at 40 CFR part 355.

Prior to the court mandate vacating the 2008 final rule, Congress passed the FARM Act, which was signed into law by the President on March 23, 2018. The FARM Act amended CERCLA section 103 (42 U.S.C. 9603) to exempt reporting of air emissions from animal waste (including decomposing animal waste) at farms. This final rule revises the CERCLA regulations at 40 CFR part 302 to be consistent with the FARM Act’s amendments to CERCLA section 103 by adding the reporting exemption for air emissions from animal waste at farms and adding definitions of “farm” and “animal waste” from the FARM Act. EPA finds that it is unnecessary to provide notice and an opportunity to comment on these revisions because this final rule merely codifies the FARM Act’s legislative amendments to CERCLA.

In addition, EPA finds that it has good cause to make these revisions immediately effective under section 553(d) of the Administrative Procedure Act, 5 U.S.C. 553(d). EPA has determined that there is good cause for making this final rule effective immediately because this action merely implements court orders vacating certain regulatory provisions and codifies statutory amendments to CERCLA. Delaying the effectiveness of this rulemaking would prolong the period of time between the change in the law (i.e., the court’s mandate and the FARM Act’s

amendments to CERCLA) and the corresponding update to the regulations. Minimizing that time period would reduce the possibility of confusion for the regulated community and the public.

C. What is the Agency's authority for taking this action?

These regulations are promulgated under the authority of section 102(a), 103, 104, and 115 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, as amended by the Superfund Amendments and Reauthorization Act (SARA) of 1986. The Agency also relies on section 304 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. 11001 *et seq.*, as authority to issue regulations governing EPCRA section 304 notification requirements, and EPCRA section 328 for general rulemaking authority. Finally, the Agency relies on the Consolidated Appropriations Act (Omnibus Bill), which was signed into law on March 23, 2018. Title XI of Division S of the Omnibus Bill, known as the Fair Agricultural Reporting Method (FARM) Act exempts the reporting of air emissions from animal waste (including decomposing animal waste) at a farm under CERCLA section 103(e).

II. Background of the Final Rule

A. Overview

Section 103 of CERCLA requires the person in charge of a vessel or facility to immediately notify the National Response Center (NRC) when there is a release of a hazardous substance, as defined under CERCLA section 101(14), in an amount equal to or greater than the reportable quantity for that substance within a 24-hour period. In addition to these CERCLA reporting requirements, EPCRA section 304 requires owners or operators of certain facilities to immediately notify state and local authorities when there is a release of an extremely hazardous substance, as defined under EPCRA section 302, or of a CERCLA hazardous substance in an

amount equal to or greater than the reportable quantity for that substance within a 24-hour period.

B. December 2008 administrative reporting exemption for farms

On December 18, 2008 (73 FR 76948), EPA issued an administrative reporting exemption for air releases from animal waste at farms. Specifically, the rule exempted all farms from CERCLA's reporting requirements for air releases of any hazardous substance from animal waste. Under EPCRA, the 2008 final rule exempted reporting of such releases if the farm had fewer animals than a large concentrated animal feeding operation, as defined by the Clean Water Act. Documents related to this rulemaking are located at www.regulations.gov, docket number EPA-HQ-SFUND-2007-0469.

The 2008 administrative reporting exemption was ultimately struck down, or vacated, by the U.S. Court of Appeals for the District of Columbia Circuit in *Waterkeeper Alliance v. EPA*, 853 F.3d 527 (D.C. Cir. 2017). In vacating the rule, the court found that the Agency could not rely on general rulemaking authority or a *de minimis* exception to issue an administrative reporting exemption for this category of releases, particularly where the Agency had failed to identify any statutory ambiguity as the basis for its interpretation of the reporting requirements. The court issued a mandate effectuating the vacatur on May 2, 2018.

C. FARM Act and legislative amendments to CERCLA

On March 23, 2018 the Consolidated Appropriations Act (Omnibus Bill) was signed into law. Title XI of Division S of the Omnibus Bill, known as the FARM Act, exempts the reporting of air emissions from animal waste at a farm under CERCLA section 103(e). *See* Fair Agricultural Reporting Method Act, Pub. L. No. 115-141, Sections 1101–1103 (2018).

III. Vacatur and Court Mandate: Revisions to CERCLA and EPCRA Regulations

Due to the D.C. Circuit's issuance of its mandate vacating the 2008 final rule, EPA is amending the CERCLA and EPCRA regulations to remove any provisions added in the 2008 final rule. These regulations are amended by removing the administrative reporting exemption for air releases of a hazardous substance from animal waste at farms at 40 CFR 302.6(e)(3) and 355.31(g) and (h). EPA is also removing the definitions of "*animal waste*" and "*farm*" from 40 CFR 302.3 and 355.61.

IV. FARM Act: Revisions to CERCLA Regulations

The FARM Act amended CERCLA section 103 by providing an exemption from reporting air emissions from animal waste (including decomposing animal waste) at a farm. In this final rule, EPA is adding this exemption to the CERCLA release reporting regulation in 40 CFR 302.6 as well as the definitions of "*animal waste*" and "*farm*" to 40 CFR 302.3. Due to the FARM Act, farms remain exempt from CERCLA release reporting requirements despite the D.C. Circuit's vacatur of the 2008 final rule.

V. Effective Date

This final rule will become effective immediately upon publication in this Federal Register.

VI. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993) and Executive Order 13563 (76 FR 3821, January 21, 2011), this action is not a "significant regulatory action" and therefore was not submitted to the Office of Management and Budget (OMB) for review. In addition, this action is not considered an Executive Order 13771 (82 FR 9339, February 3, 2017) regulatory action, because this action is not significant under Executive Order 12866. This action is not subject to notice and comment requirements under the Administrative Procedure Act or

any other statute, therefore, it is not subject to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) or sections 202 and 205 of the Unfunded Mandates Reform Act of 1999 (Pub. L. 104-4). This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA), 5 U.S.C. 553, or any other statute. This rule is not subject to notice and comment requirements because the Agency has invoked the APA “good cause” exemption under 5 U.S.C. 553(b). In addition, this action does not significantly or uniquely affect small governments. This action does not create new binding legal requirements that substantially and directly affect Tribes under Executive Order 13175 (65 FR 67249, November 9, 2000). This action does not have significant Federalism implications under Executive Order 13132 (64 FR 43255, August 10, 1999). It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Because this final rule is not subject to review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994). This action does not involve technical standards; thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

Congressional Review Act

This action is subject to the Congressional Review Act (CRA), and the EPA will submit a rule report to each House of Congress and to the Comptroller General of the United States. The CRA allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and comment rulemaking procedures are impracticable, unnecessary or contrary to the public interest (5 U.S.C. 808(2)). The EPA has made a good cause finding for this rule as discussed in Section I.B of the preamble, including the basis for that finding. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects

40 CFR part 302

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

40 CFR part 355

Environmental protection, Chemicals, Disaster assistance, Hazardous substances, Hazardous waste, Natural resources, Penalties, Reporting and recordkeeping requirements, Superfund.

Dated: Jul 23 2018



Andrew R. Wheeler,
Acting Administrator.

For the reasons stated in the preamble, EPA is amending 40 CFR parts 302 and 355 as follows:

PART 302— DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

1. The authority citation for part 302 is revised to read as follows:

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

2. Section 302.3 is amended by revising the definitions for “*animal waste*” and “*farm*” to read as follows:

Animal waste means feces, urine, or other excrement, digestive emission, urea, or similar substances emitted by animals (including any form of livestock, poultry, or fish). The term “animal waste” includes animal waste that is mixed or commingled with bedding, compost, feed, soil, or any other material typically found with such waste.

Farm means a site or area (including associated structures) that-

(i) is used for-

(I) the production of a crop; or

(II) the raising or selling of animals (including any form of livestock, poultry, or fish); and

(ii) under normal conditions, produces during a farm year any agricultural products with a total value equal to not less than \$1,000.

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

(e)

(3) Air emissions from animal waste (including decomposing animal waste) at a farm.

PART 355— EMERGENCY PLANNING AND NOTIFICATION

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

Authority: Sections 302, 303, 304, 325, 327, 328, and 329 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) (42 U.S.C. 11002, 11003, 11004, 11045, 11047, 11048, and 11049).

5. Section 355.31 is amended by removing paragraphs (g) and (h).

6. Section 355.61 is amended by removing the definitions for “*animal waste*” and “*farm*”.