

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 355

[EPA-HQ-OLEM-2018-0318; FRL-XXXX-XX-OLEM]

RIN 2050-AH00

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is proposing to amend the release notification regulations under the Emergency Planning and Community Right-to-Know Act (EPCRA) to add the reporting exemption for air emissions from animal waste at farms provided in section 103(e) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). In addition, EPA is proposing to add definitions of “farm” and “animal waste” to the EPCRA regulations to delineate the scope of this reporting exemption. This proposed rule maintains consistency between the emergency release notification requirements of EPCRA and CERCLA in accordance with the statutory text, framework and legislative history of EPCRA, and is consistent with the Agency’s prior regulatory actions.

DATES: Comments must be received on or before [30 days after publication in the Federal Register].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OLEM-2018-0318, at <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Sicy Jacob, United States Environmental Protection Agency, Office of Land and Emergency Management, 1200 Pennsylvania Ave., NW (Mail Code 5104A), Washington, DC, 20460; telephone number: (202) 564-8019; email address: jacob.sicy@epa.gov.

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:

Type of Entity	Examples of Affected Entities
Industry	NAICS code 111 – Crop production NAICS code 112 – Animal production
States and/or Local Governments	NAICS code 999200 – State Government, excluding schools and hospitals NAICS code 999300 – Local Government, excluding schools and hospitals State Emergency Response Commissions, Tribal

	Emergency Response Commissions, Tribal Emergency Planning Committees and Local Emergency Planning Committees
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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 proposed rule. To determine whether your entity is affected by this action, you should carefully examine the applicability criteria found in § 355.30 of title 40 of the Code of Federal Regulations (CFR). If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the FOR FURTHER INFORMATION CONTACT section.

B. What action is the Agency taking?

The EPA is proposing to amend the EPCRA emergency release notification regulations to include the reporting exemption for air emissions from animal waste at farms provided in CERCLA section 103(e). In addition, EPA is proposing to add definitions of “farm” and “animal waste” to the EPCRA regulations to delineate the scope of this reporting exemption.

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

This proposed rule is being issued under EPCRA, which was enacted as Title III of the Superfund Amendments and Reauthorization Act (SARA) of 1986 (Pub. L. 99-499). EPA proposes this rule under the authority of EPCRA section 304 (42 U.S.C. 11004) and the Agency’s general rulemaking authority under EPCRA section 328 (42 U.S.C. 11048).

II. Background of the Proposed 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 (EHS), 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.

EPCRA and CERCLA are two separate but interrelated environmental laws that work together to provide emergency release notifications to Federal, state and local officials. Notice given to the NRC under CERCLA serves to inform the Federal government of a release so that Federal personnel can evaluate the need for a response in accordance with the National Oil and Hazardous Substances Contingency Plan (NCP),¹ the Federal government's framework for responding to both oil discharges and hazardous substance releases. Relatedly, notice under EPCRA is given to the State Emergency Response Commission (SERC) for any state likely to be affected by the release and to the community emergency coordinator for the Local Emergency Planning Committee (LEPC) for any area likely to be affected by the release so that state and local authorities have information to help protect the community.

Release reporting under EPCRA depends, in part, on whether reporting is required under CERCLA.² Specifically, EPCRA section 304(a) provides for reporting under the following three release scenarios:

- EPCRA section 304(a)(1) requires notification if a release of an EPCRA EHS occurs from a facility at which a hazardous chemical is produced, used or stored, and such

¹ 40 CFR part 300.

² In this notice, emergency release notification and release reporting are used interchangeably.

release requires a notification under CERCLA section 103(a).

- EPCRA section 304(a)(2) requires notification if a release of an EPCRA EHS occurs from a facility at which a hazardous chemical is produced, used or stored, and such release is not subject to the notification requirements under CERCLA section 103(a), but only if the release:
 - is not a federally permitted release as defined in CERCLA section 101(10),
 - is in an amount in excess of the reportable quantity as determined by EPA, and
 - occurs in a manner that would require notification under CERCLA section 103(a).
- EPCRA section 304(a)(3) requires notification if a release of a substance not designated as an EPCRA EHS occurs from a facility at which a hazardous chemical is produced, used or stored, and such release requires a notification under CERCLA section 103(a).

B. Fair Agricultural Reporting Method Act and legislative amendments to CERCLA

On March 23, 2018, the President signed into law the Consolidated Appropriations Act, 2018 (“Omnibus Bill”). Title XI of the Omnibus Bill is entitled the “Fair Agricultural Reporting Method Act” or the “FARM Act.” See Fair Agricultural Reporting Method Act, Pub. L. No. 115-141, sections 1101–1103 (2018). The FARM Act expressly exempts reporting of air emissions from animal waste (including decomposing animal waste) at a farm from CERCLA section 103. The FARM Act also provides definitions for the terms “animal waste” and “farm.” On August 1, 2018, the Agency published a final rule to amend the CERCLA regulations at 40 CFR part 302 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.

C. Proposed revisions to EPCRA section 304 release notification regulations

Based on the criteria for EPCRA section 304 release reporting, EPA is proposing to

amend the EPCRA release notification regulations in 40 CFR 355.31 to include the reporting exemption for air emissions from animal waste at farms. EPA is also proposing to add definitions of “farm” and “animal waste” to the definition section of the EPCRA regulations in 40 CFR 355.61 to delineate the scope of this reporting exemption. EPA believes these proposed changes appropriately reflect the relationship between CERCLA and EPCRA release reporting requirements and are consistent with the statutory text, framework and legislative history of EPCRA, as well as the Agency’s prior regulatory actions.

III. Legal Rationale for the Proposed Rule

This proposed rule maintains consistency between the emergency release notification requirements of EPCRA and CERCLA in accordance with the statutory text, framework and legislative history of EPCRA, and is consistent with the Agency’s prior regulatory actions. Specifically, this proposed rule is based on the relationship of the EPCRA section 304 reporting requirements to the CERCLA section 103 reporting requirements, as recently amended. As previously noted, EPCRA section 304 reporting depends, in part, on whether reporting is required under CERCLA section 103. EPCRA’s legislative history further indicates that the EPCRA section 304 reporting requirements are designed to be consistent with the reporting requirements of CERCLA section 103. EPA has thus revised the EPCRA emergency release notification regulations from time to time, as appropriate, to maintain consistency with the CERCLA reporting requirements.

Consistent with the Agency’s interpretation of EPCRA section 304 and the Agency’s prior regulatory actions, EPA now proposes to amend the EPCRA release notification regulations to explicitly exempt air emissions from animal waste at farms from reporting under EPCRA section 304.

A. Statutory text and framework

EPCRA section 304 provides for release reporting under three scenarios, each of which depends in some way on whether the release requires notice under CERCLA. If a release requires notice under CERCLA section 103(a), the release may be subject to reporting under EPCRA if the release meets the requirements of EPCRA section 304(a)(1) or 304(a)(3). If 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). Because the FARM Act exempted air emissions from animal waste at farms from CERCLA reporting, these types of releases no longer require notice under CERCLA section 103(a) and thus do not fall within the EPCRA section 304(a)(1) or (a)(3) reporting scenarios. Instead, these releases fall within the EPCRA section 304(a)(2) reporting scenario. Pursuant to EPCRA section 304(a)(2), a release of an EPCRA EHS that is not subject to notification under section 103(a) of CERCLA need only be reported under EPCRA if the release:

- is not a federally permitted release as defined in section 101(10) of CERCLA,
- is in an amount in excess of the reportable quantity as determined by EPA, and
- occurs in a manner that would require notification under section 103(a) of CERCLA.

A release that is not subject to CERCLA section 103(a) reporting must meet all three criteria in EPCRA section 304(a)(2) to be subject to EPCRA reporting. Here, air emissions from animal waste at farms could meet the first two criteria because such releases are generally not federally permitted and may exceed the applicable reportable quantity. Yet these types of releases do not “occur[] in a manner” that would require notification under CERCLA section 103(a) and thus do not meet the third criterion of EPCRA section 304(a)(2). Because air

emissions from animal waste at farms do not meet all three criteria under EPCRA section 304(a)(2), and do not fall within the EPCRA section 304(a)(1) or (a)(3) reporting scenarios, these types of releases are not subject to EPCRA reporting. As such, EPA is proposing to amend EPCRA's emergency release notification regulations to clarify reporting exemptions for certain types of releases under EPCRA section 304.

Air emissions from animal waste at farms no longer “occur[] in a manner” that would require notification under CERCLA section 103(a) because the recent amendment exempted these types of releases from CERCLA reporting. Importantly, the CERCLA reporting exemption is specifically tied to the nature or manner of these releases rather than to a specific substance. For example, the recent amendment does not exempt specific substances typically associated with animal waste (such as ammonia and hydrogen sulfide) from reporting; rather, it exempts from reporting releases of any substance from animal waste at a farm into the air. Because air emissions from animal waste do not “occur[] in a manner” that would require notification under CERCLA section 103(a), these types of releases do not meet the third criterion of EPCRA section 304(a)(2) and are thus not subject to EPCRA reporting.

EPCRA section 304(a)(2) promotes consistency between the reporting requirements of EPCRA and CERCLA by ensuring that only releases that “occur[] in a manner” that would require CERCLA notification be reported under EPCRA. Yet, the provision also contemplates scenarios where releases not subject to reporting under CERCLA may still need to be reported under EPCRA, such as releases of substances designated as EHSs under EPCRA but not as hazardous substances under CERCLA. For example, trimethylchlorosilane (Chemical Abstract Service No. 75-77-4) is designated as an EPCRA EHS but not as a CERCLA hazardous substance. Since trimethylchlorosilane is not a CERCLA hazardous substance, its releases are

not subject to notification under CERCLA section 103(a) and need only be reported under EPCRA if such releases meet the criteria of EPCRA section 304(a)(2). A trimethylchlorosilane release that (1) is not a federally permitted release as defined in CERCLA section 101(10); (2) exceeds the applicable reportable quantity; and (3) “occurs in a manner” that would require notification under CERCLA section 103(a) would still be subject to EPCRA reporting. In this example, a release of trimethylchlorosilane “occurs in a manner” that would require notification under CERCLA section 103(a) where, for example, the release is “into the environment” as defined in CERCLA section 101(22), and is not one of the excluded or exempted types of releases described in CERCLA sections 101(22), 103(e), or 103(f). (See section C, below, for further explanation of these exemptions.) Therefore, the release of trimethylchlorosilane would be similar to other releases that require notification under CERCLA section 103(a).³

As another example, petroleum (including crude oil or any fraction thereof) is expressly excluded from the definition of “hazardous substance” in CERCLA section 101(14). Because of this “petroleum exclusion,” releases of petroleum are not subject to notification under CERCLA section 103(a) and so need to be reported under EPCRA only if such releases meet the criteria of EPCRA section 304(a)(2). Where a petroleum release meets the first two criteria of EPCRA section 304(a)(2), the question becomes whether the release “occurs in a manner” that would require notification under CERCLA section 103(a). Notably, unlike air emissions from animal waste at farms, Congress did not exempt petroleum releases from CERCLA reporting based on the manner or nature of these releases. Instead, Congress exempted these types of releases from CERCLA reporting by excluding petroleum (including crude oil or any fraction thereof) from the

³ See, e.g., 48 FR 23552, 23555 (May 25, 1983) (describing the nature of releases subject to CERCLA notification requirements); 52 FR 13378, 13383 (Apr. 22, 1987) (explaining that the method used to determine whether a release meets or exceeds the applicable RQ under CERCLA “should be equally applicable to releases under [EPCRA] section 304 due to similarity to section 103 of CERCLA”).

definition of “hazardous substance.” *See* 42 U.S.C. 9601(14). As such, these types of releases still “occur[] in a manner” that would require notification under CERCLA section 103(a) and could thus be subject to reporting under EPCRA section 304(a)(2) where the petroleum release contains an EHS. *See* 52 FR 13378, 13385 (April 22, 1987). In sum, where a CERCLA reporting exemption or the reason a release is not subject to CERCLA reporting is unrelated to the manner in which such releases occur, EPCRA section 304(a)(2) may compel reporting of such releases.

In addition to the statutory text of EPCRA section 304(a)(2), the statutory framework of EPCRA’s reporting requirements indicates a desire to maintain consistency between the EPCRA and CERCLA reporting requirements. Indeed, “[i]n drafting the EPCRA reporting requirements, Congress expressly tied them to CERCLA’s” such that “all of EPCRA’s reporting mandates are piggybacked on the CERCLA mandates in one form or another.” *Waterkeeper Alliance v. EPA*, 853 F.3d 527, 532 (D.C. Cir. 2017). Under EPCRA sections 304(a)(1) and (a)(3), EPCRA reporting depends on whether a release requires notification under CERCLA section 103(a), and under EPCRA section 304(a)(2), EPCRA reporting depends on whether a release “occurs in a manner” that would require notification under CERCLA section 103(a). Therefore, EPCRA requires reporting only for releases that require notification under CERCLA or occur in a manner that would require notification under CERCLA. Under CERCLA section 103 as amended, air emissions from animal waste at farms do not require notification under CERCLA section 103(a) and do not occur in a manner that would require such notification. As a result, these types of releases are not subject to reporting under EPCRA section 304(a)(1), (a)(2) or (a)(3). Thus, to clarify that these types of releases are not subject to reporting under EPCRA section 304, EPA is proposing to amend the EPCRA release notification regulations to exempt air emissions from animal waste at farms from reporting under section 304. In doing so, EPA seeks to avoid

inconsistent regulation of these types of releases under EPCRA and CERCLA, in furtherance of the underlying purpose of this statutory framework.

B. Legislative history

EPA's understanding of EPCRA section 304(a)(2) is informed by the legislative history of EPCRA itself. In 1986, Congress passed EPCRA pursuant to Title III of the Superfund Amendments and Reauthorization Act (SARA). In the committee conference report addressing EPCRA, Congress discussed the three scenarios requiring release reporting under EPCRA section 304. With respect to EPCRA section 304(a)(2), the report states: "This requires notification where there is a release of an extremely hazardous substance that would require notice under section 103(a) of CERCLA but for the fact that the substance is not specifically listed under CERCLA as requiring such notice." *See* 99 Cong. Conf. Report H. Rep. 962, October 3, 1986; SARA Leg. Hist. 38 (Section 304 Emergency Notification).

Congress thus expressed its intent that state and local authorities be notified of a qualifying release under EPCRA, even if the substance released is not identified as a hazardous substance under CERCLA, when the release occurs in a manner as the types of releases that require notification under CERCLA section 103(a). Conversely, if the release occurs in a manner that Congress determines does not require notification under CERCLA section 103(a)—such as air emissions from animal waste at farms—then no reporting is required under EPCRA section 304(a)(2) (i.e., the third criterion of EPCRA section 304(a)(2) has not been met).

The legislative history also reveals that Congress intended EPCRA section 304(a)(2) to operate to exclude continuous releases from EPCRA's immediate notification requirements because such releases do not occur in a manner that requires reporting under CERCLA section

103(a).⁴ The committee conference report explains: “[R]eleases which are continuous or frequently recurring and do not require reporting under CERCLA are not required to be reported under [EPCRA section 304].” Rather, continuous releases are subject to reduced reporting requirements pursuant to CERCLA section 103(f). As explained in section C.3 below, EPA incorporated an alternative for continuous releases into EPCRA and promulgated regulations that allow continuous releases to be reported in a manner consistent with CERCLA’s continuous release reporting requirements.

Congress’s intent in adopting the three scenarios in EPCRA section 304(a)(1)-(3) was to ensure that when Federal authorities receive notice of a release under CERCLA section 103(a), state and local authorities receive similar notice under EPCRA. Note that CERCLA notification applies to the list of hazardous substances (located in 40 CFR 302.4), while EPCRA notification applies to the lists of both CERCLA hazardous substances and EPCRA EHSs (located in 40 CFR part 355 Apps. A and B). When a substance is not a listed CERCLA hazardous substance, but is on the EPCRA EHSs list, EPCRA section 304(a)(2) provides for notification only if the release of such substance occurs in a manner as the types of releases that require notification under CERCLA section 103(a). On the other hand, if Congress determines that a release occurs in a manner that does not require notification under CERCLA section 103(a), EPCRA section 304(a)(2) works to logically exclude that release from EPCRA reporting.

C. Prior regulatory actions

⁴ CERCLA section 103(a) requires the person in charge of a vessel or facility to “immediately notify” the NRC when there is a release of a hazardous substance in an amount equal to or greater than the reportable quantity for that substance within a 24-hour period. In contrast, releases that are continuous and stable in quantity and rate may qualify for reduced, “continuous release” reporting under CERCLA section 103(f)(2). Similarly, EPCRA section 304 requires owners or operators of certain facilities to “immediately” notify state and local authorities of qualifying releases, and EPA has promulgated regulations that allow continuous releases to be reported under EPCRA in a manner consistent with CERCLA’s continuous release reporting requirements.

As noted, CERCLA release notification was established to alert Federal authorities to a release so that the need for a response can be evaluated and any necessary response undertaken in a timely fashion. EPCRA release notification supplements CERCLA release notification by similarly preparing the community at the state and local level. Based on the criteria for EPCRA section 304 release reporting, and to promote consistency between CERCLA and EPCRA release notification requirements, the Agency has incorporated many of CERCLA's release notification exemptions into the EPCRA release notification regulations through prior rulemakings. Each of these prior regulatory actions are summarized below.

1. Exemptions from the definition of "release" under CERCLA and EPCRA

Both CERCLA and EPCRA define the term "release." Under CERCLA section 101(22), the term "release" generally means "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)," but also includes specific exclusions for workplace releases, vehicle emissions, nuclear material releases and fertilizer application. Similar to the CERCLA workplace exposure exclusion, EPCRA section 304(a)(4) exempts from reporting any release which results in exposure to persons solely within the site or sites on which a facility is located. Though the definition of "release" under EPCRA section 329 mirrors the CERCLA definition, it does not contain three exclusions provided in the CERCLA section 101(22) definition of "release": (1) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel or pipeline pumping station engine; (2) releases of source, byproduct or special nuclear material from a nuclear incident; and (3) the normal application of fertilizer. However, because the types of releases excluded from CERCLA's definition of

“release” do not occur in a manner that would be reportable under CERCLA section 103(a), these types of releases do not meet the reporting requirements under EPCRA section 304. *See* 52 FR 13381, 13384–85 (April 22, 1987) and related Response to Comments document, April 1987, Docket Number 300PQ. Thus, EPA adopted these statutory CERCLA exclusions into the EPCRA regulations codified at 40 CFR 355.31.⁵

2. Exemptions from immediate notification requirements

There are four types of statutory exemptions from the immediate notification requirements for releases of hazardous substances provided in CERCLA sections 101(10) and 103(e) and (f). Specifically, these statutory exemptions include: (1) federally permitted releases, as defined in section 101(10); (2) releases from the application of a pesticide product registered under the Federal Insecticide, Fungicide and Rodenticide Act or from the handling and storage of such a pesticide product by an agricultural producer (section 103(e)); (3) certain releases of hazardous wastes that are required to be reported under the provisions of the Resource Conservation and Recovery Act and that are reported to the NRC (section 103(f)(1)); and (4) certain releases that are determined to be continuous under the provisions of section 103(f)(2).

In the final rulemaking on April 22, 1987 (52 FR 13378) for emergency planning and release notification requirements under EPCRA, the Agency adopted exemptions from CERCLA section 103(a) reporting “based on the language in EPCRA section 304(a) which requires that releases reportable under that Section occur in a manner which would require notification under section 103(a) of CERCLA.” 52 FR 13378, 13381 (April 22, 1987).

Although EPA stated in the April 1987 rulemaking that it was incorporating CERCLA reporting exemptions into the EPCRA regulations based on the criteria for EPCRA section 304

⁵ The 1987 rule codified these exemptions at 40 CFR 355.40(a)(2), which was later reorganized into 40 CFR 355.31. *See* 73 FR 65451 (November 3, 2008).

release reporting, the Agency inadvertently omitted the exclusion for the “application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act or to the handling and storage of such a pesticide product by an agricultural producer” from the EPCRA section 304 regulations at that time. Thus, in a technical amendment published on May 24, 1989 (54 FR 22543), EPA added a provision to the EPCRA regulations in 40 CFR 355.40(a)(2)(iv) (currently codified at 40 CFR 355.31(c)) providing that releases exempted from CERCLA section 103(a) reporting by CERCLA section 103(e) are also exempt from reporting under EPCRA section 304. In addition, the May 1989 technical amendment clarified the language in paragraph (a)(2)(v) of 40 CFR 355.40 (currently codified at 40 CFR 355.31(d)), explaining that this section exempts from EPCRA section 304 reporting “any occurrence not meeting the definition of release under section 101(22) of CERCLA,” as “[s]uch occurrences are also exempt from reporting under CERCLA section 103(a).” *See* 54 FR 22543, 22543 (May 24, 1989).

3. Continuous release reporting

CERCLA section 103(f) provides relief from the immediate notification requirements of CERCLA section 103(a) for a release of a hazardous substance that is continuous and stable in quantity and rate. Instead, continuous releases are subject to a significantly reduced reporting requirement under regulations promulgated pursuant to CERCLA section 103(f). In adopting the implementing regulations for EPCRA in 40 CFR part 355, EPA relied on EPCRA section 304(a)(2) to likewise exclude continuous releases from the immediate notification requirement of EPCRA section 304, reasoning: “Because such releases do not ‘occur in a manner’ which requires immediate release reporting under section 103(a) of CERCLA, they are also not reportable under section 304 of [EPCRA].” *See* 52 FR 13381, 13384 (April 22, 1987). EPA later

promulgated continuous release reporting regulations for EPCRA that cross-reference and follow the CERCLA continuous release reporting regulations, finding that EPCRA release reporting is “closely tied” and “parallel” to CERCLA release reporting. *See* 55 FR 30169, 30179 (July 24, 1990). At that time, the Agency also reiterated that “[t]o the extent that releases are continuous and stable in quantity and rate as defined by CERCLA section 103(f)(2) . . . , they do not occur in a manner that requires notification under CERCLA section 103(a)” and are thus not subject to the EPCRA section 304 immediate notification requirements. *Id.* (emphasis added).

IV. Scope of Proposed Rule

The scope of this proposed rule is limited to air emissions from animal waste (including decomposing animal waste) at a farm. The Agency proposes to add this reporting exemption to the EPCRA section 304 emergency release notification regulations as implemented in 40 CFR part 355, subpart C, entitled “Emergency Release Notification.” The scope of the proposed rule stems from existing requirements under EPCRA section 304(a)(2) and under CERCLA section 103(e), as amended, and is tied to the nature or manner of these releases rather than to a specific substance. In other words, the Agency is not proposing to exempt substances typically associated with animal waste (such as ammonia or hydrogen sulfide) from reporting. Rather, this proposal codifies EPA’s interpretation that air emissions from animal waste at farms are not subject to EPCRA section 304 release reporting by explicitly exempting releases from animal waste into the air at farms from reporting. Thus, the Agency is proposing to exclude all releases to the air from animal waste at a farm from reporting under EPCRA section 304.

The proposed rule does not apply to releases of substances from animal waste into non-air environmental media, nor to releases into the air from sources other than animal waste or decomposing animal waste at a farm. For example, a release from animal waste into water (*e.g.*,

a lagoon breach) or a release from an anhydrous ammonia storage tank into the air might trigger reporting requirements if the release exceeds the applicable reportable quantities.

This proposed exemption would be added to those currently listed in the EPCRA regulations codified at 40 CFR 355.31, entitled “What types of releases are exempt from the emergency release notification requirements of this subpart?” To delineate the scope of this proposed exemption, EPA is also proposing to amend the definition section of the EPCRA regulations at 40 CFR 355.61 to add definitions of “farm” and “animal waste” that are consistent with CERCLA section 103(e). By proposing to add a reporting exemption for air releases from animal waste at farms to the EPCRA emergency release notification regulations, EPA is not reopening or proposing revisions to the existing reporting exemptions codified in 40 CFR 355.31, nor will EPA consider or respond to comments related to the existing reporting exemptions. Comments received on the existing reporting exemptions will be outside the scope of this proposed action.

V. Relationship of *Waterkeeper Alliance v. EPA* to this Proposed Rule

In 2008, EPA issued an administrative reporting exemption for air releases from animal waste at farms (73 FR 76948, December 18, 2008). 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 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. The 2008 administrative reporting exemption was ultimately 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.

This proposal to amend the EPCRA section 304 release notification regulations to exempt air emissions from animal waste at farms is not constrained by the D.C. Circuit's decision in *Waterkeeper*. In contrast to the 2008 rule, this proposed rule is not an administrative reporting exemption stemming from EPA's general rulemaking authority. This proposal is instead rooted in EPCRA section 304 and its relationship with CERCLA section 103 and as informed by EPCRA section 304's statutory text, framework and legislative history.

VI. Proposed Revisions to 40 CFR part 355

A. Exemption for air emissions from animal waste at farms

For the reasons stated throughout this preamble, EPA is proposing to amend the EPCRA section 304 release notification regulations to exempt air emissions from animal waste (including decomposing animal waste) at a farm from reporting. Currently, the regulations at 40 CFR 355.31 list the releases that are exempt from reporting under EPCRA section 304, including the exemptions adopted from CERCLA through prior rulemakings. The Agency is proposing to amend 40 CFR 355.31 by adding a reporting exemption for air emissions from animal waste at farms. EPA seeks comment on this proposed revision.

B. Definitions

EPA is proposing to add the definitions of "animal waste" and "farm" applicable to CERCLA section 103(e) to the definition section of the EPCRA regulations codified at 40 CFR 355.61. EPA requests comment on adding these definitions to 40 CFR 355.61.

VII. Statutory and Executive Orders Reviews

Additional information about these statutes and Executive Orders can be found at <http://www.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 regulatory action because the proposed rule would not result in additional costs.

C. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. The Agency is proposing to codify a provision exempting farms from reporting air releases from animal waste under EPCRA section 304 release notification regulations.

D. Regulatory Flexibility Act (RFA)

I certify that this action would not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. Consistent with the Agency's interpretation that air emissions from animal waste at farms are not subject to EPCRA section 304 release reporting, the proposed rule explicitly exempts these types of releases from EPCRA reporting and would not result in

additional costs.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector. The Agency is proposing to amend the EPCRA section 304 release notification regulations to add the reporting exemption for air emissions from animal waste at farms provided in CERCLA section 103(e), as amended.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It would 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.

G. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. The EPA is proposing to amend the EPCRA section 304 release notification regulations to add the reporting exemption for air emissions from animal waste at farms provided in CERCLA section 103(e), as amended. Thus, Executive Order 13175 does not apply to this action.

H. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of *covered regulatory action* in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does

not pose an environmental health risk or safety risk. This proposed rule is intended to maintain consistency between EPCRA section 304 and CERCLA section 103(a) emergency release notification requirements by exempting reporting of air emissions from animal waste at farms.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. The EPA is proposing to amend the EPCRA section 304 release notification regulations to add the reporting exemption for air emissions from animal waste at farms provided in CERCLA section 103(e), as amended.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

K. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard. This proposed rule is intended to maintain consistency between EPCRA section 304 and CERCLA section 103(a) emergency release notification requirements by exempting reporting of air emissions from animal waste at farms under EPCRA.

List of Subjects

40 CFR Part 355

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

Dated: 10-30-2018



Andrew R. Wheeler,
Acting Administrator.

For the reasons set forth in the preamble, EPA proposes to amend 40 CFR part 355 as follows:

PART 355—EMERGENCY PLANNING AND NOTIFICATION

1. 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).

2. Section 355.31 is amended by adding paragraph (g):

§ 355.31 What types of releases are exempt from the emergency release notification requirements of this subpart?

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

3. Section 355.61 is amended by adding in alphabetical order the definitions for *animal waste* and *farm* to read as follows:

§ 355.61 How are key words in this part defined?

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-

(1) 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

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