

American Bar Association  
Section of Environment, Energy, and Resources

**CAFOs & More: Agricultural Policy Meets Environmental Law**

**Emerging Legal Issues in the Regulation and Operation of CAFOs**

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## Introduction

Environmental activists, encroaching urban neighbors, and state and federal regulators have targeted rural livestock operations for increased regulatory scrutiny, and seek to treat agricultural operations in the same manner as industrial facilities. One goal of the activists is certainly to paint agricultural operations as industrial operations and attempt to subject livestock operations to burdensome statutes and regulations which were not originally crafted to apply to agriculture and are typically ill suited to address the unique issues of rural operations.

Additionally, the increasing size of livestock operations is the source of further criticism by agricultural opponents. But, as livestock production operations have grown bigger and more sophisticated, the operators are better able to collect, manage and beneficially reuse animal wastes. At larger operations, confinement areas, barns, and waste management operations are engineered and tightly regulated using new technologies. Further, by moving livestock from open air lots to enclosed buildings, operators are able to protect livestock from predators and adverse weather conditions and to more carefully regulate the feeding of animals so as to reduce the amount waste generated per animal fed.

This paper will briefly review some of the recent legal and regulatory issues impacting operators of CAFOs, including the 2003 amendments to federal CAFO rules, legal challenges to CAFO operations brought under the Clean Water Act and CERCLA, including the surprising claim that manure should be considered a CERCLA “hazardous substance”. The paper will conclude by touching on recent nuisance cases which involve right-to-farm statutes. Although all species have been targeted in lawsuits, a notable portion of the recent legal attacks have focused on large dairy operations claimed to be polluting waterways and on swine operations which have been alleged to adversely impact air quality.

## Federal CAFO Rules and General Permits

The federal Clean Water Act includes concentrated animal feeding operations within the definition of “point source” thereby requiring an NPDES permit to authorize any discharge of pollutants into waters of the United States.<sup>1</sup> Federal rules defining the applicability of the Clean Water Act to animal feeding operations were first adopted in 1983. However, prior to the latest amendment of the federal rules, and consistent with the clear statutory language, animal feeding operations irrespective of size or head count were not deemed to be “CAFOs” subject to NPDES permitting requirements, unless the operation discharged into waters of the United States during a storm other than a 25-year, 24-hour rainfall event.<sup>2</sup> Nevertheless, many CAFO operators chose to gain NPDES permit coverage, either because such coverage was obtained in conjunction with a state permit in federally delegated states or to protect themselves from enforcement, or minimize penalties, in the event that a discharge occurred.

### 2003 Amendments to Federal CAFO Rules

On February 12, 2003, the Environmental Protection Agency (“EPA”) published its final amendments to federal NPDES and effluent limitation rules applicable to CAFOs, promulgated under the Clean Water Act.<sup>3</sup> The amended federal regulations became effective on April 14,

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<sup>1</sup> 33 U.S.C §§1362(14) and 1311(a).

<sup>2</sup> 40 CFR §122, App. B.

<sup>3</sup> 68 Fed. Reg. 7176.

2003, although certain permitting obligations and operational requirements are delayed to dates in 2006. The amended CAFO rules, include the following changes:

— Imposing a new affirmative “duty to apply,” irrespective of actual discharges, on CAFOs and strictly narrowing the circumstances under which a CAFO had previously been able to claim an exemption to NPDES permitting due to the operation’s ability to retain rainfall events and established history of no actual discharge to waters of the United States;<sup>4</sup>

— Imposing a 100-year, 24-hour rainfall design requirement on newly constructed CAFOs that house animals such as swine, poultry and veal (rather than the previous 25-year, 24-hour requirement);

— Establishing different design requirements on housed animal operations, such as swine, poultry and veal, as compared to open lot operations such as dairy cattle and beef cattle (which continue to have the 25-year, 24-hour design requirement);

— Defining dry litter poultry operations with greater than 125,000 chickens or 82,000 laying hens, to be CAFOs, and requiring existing operations to apply for water quality permits not later than February 13, 2006 and new operations to obtain authorization prior to commencing operation;

— Requiring the development of nutrient management plans to ensure the proper management of manure, litter, and process wastewater and the appropriate agricultural application and utilization of such materials;

— Narrowing the scope of the agricultural stormwater discharge exemption to instances where land application of manure, litter or process wastewater conforms to site specific nutrient management practices; and

— Establishing new recordkeeping and reporting requirements, including annual reporting of such information as the number and type of animals confined, amount of manure, litter and process wastewater generated, and the number of acres of land covered by the nutrient management plan.

The Clean Water Act excludes from the definition of “point source” “agricultural stormwater discharges and return flows from irrigated agriculture.”<sup>5</sup> However, as to land application from CAFOs, the amended CAFO rules make such land application subject to NPDES requirements and also narrow the terms of the agricultural stormwater discharge exemption. Specifically, 40 CFR §122.23(e) states, in part, as follows:

Land application discharges from a CAFO are subject to NPDES requirements. The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process

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<sup>4</sup> The prior EPA Regulations exempted animal feeding operations from NPDES permit requirements if the operation discharged pollutants only in the event of a 25-year 24-hour storm. Specifically the regulations provided that for purposes of permitting “no animal feeding operation is a concentrated animal feeding operation . . . if [it] discharges only in the event of a 25-year, 24-hour storm event.” 40 C.F.R. §122, App. B.

<sup>5</sup> 33 U.S.C. §1362(14).

wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. 1362(14).

The rules require land application of wastes to be made in accordance with a NMP, and only then allow precipitation related discharges to be exempt agricultural discharges. Specifically, 40 CFR §122.23(e) goes on to state:

For purposes of this paragraph, where the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in Sec. 122.42(e)(1)(vi)-(ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.

In the preamble to the rules, EPA recognized that a CAFO may have “no potential to discharge” if the CAFO is located at a great distance from any water of the United States and has been designed to retain rainfall events. Therefore, the federal rules set forth a new, and cumbersome, process for a CAFO operator to obtain an affirmative “no potential to discharge” determination, and consequently an exception from NPDES permitting.<sup>6</sup>

#### Promulgation of CAFO General Permits

In a 2002 press release, issued in conjunction with the proposed federal CAFO rule amendments, EPA estimated that 4,500 animal feeding operations were covered by NPDES permits, but that another 11,000 operations would need to secure permits under the terms of the proposed rule. To facilitate the permitting of large number of CAFOs, EPA regions and states have worked on, or adopted, new general permits.

Unfortunately, in some EPA regions the general permitting process has moved quite slowly. EPA Region VI first adopted a CAFO general permit on March 10, 1993, which permit expired on March 10, 1998.<sup>7</sup> While Region VI subsequently published a new draft general permit in June 1998, the region has not yet, more than six years later, finalized that general permit. While operations which gained coverage under the 1993 general permit, prior to its expiration, have had their coverage extended administratively, no other operation, new or existing, can obtain such coverage. Such operations must either seek coverage under a difficult to obtain individual NPDES permit or await until EPA finally adopts the new general permit.

However, those facilities located in delegated states (which in Region VI are Texas, Arkansas and Louisiana) may be able to take advantage of a CAFO general permit adopted by the

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<sup>6</sup> However, for purposes of permitting in those delegated states which have permit thresholds more stringent than federal rules, such as Texas, the “no potential to discharge” exception is largely academic. For example, in Texas the state has long required permitting of animal feeding operations based upon animal head count thresholds, not proximity to surface waters or potential to discharge.

<sup>7</sup> 58 Fed. Reg. 7610.

state. For example, the Texas Commission on Environmental Quality adopted a CAFO general permit on July 20, 2004.<sup>8</sup>

### Federal Rules Litigation

Following EPA's adoption of the amended CAFO rules, environmental groups and livestock trade associations filed challenges to the rules. The challenges were filed in different circuits, but were ultimately consolidated before the Second Circuit Court of Appeals. See, *Waterkeeper Alliance, Inc. et. al., v. U.S. Environmental Protection Agency, et. al.*, No. 03-4470 (L), in the United States Court of Appeals for the Second Circuit.

The Environmental Petitioners<sup>9</sup> challenged the rules as insufficiently stringent for failing to include Nutrient Management Plans (NMPs) as part of NPDES permits, for treating land application discharges as exempt agricultural stormwater, for exempting CAFO land application discharges from complying with water quality standards, and for failing to impose sufficiently stringent pollution control requirements.<sup>10</sup> Relying upon *Southview Farms*, which is discussed later in this paper, the Environmental Petitioners have argued that a CAFO should include all land application areas, not just animal confinement areas, and that all discharges from the "operation" are point source discharges and therefore cannot be exempt agricultural stormwater discharges.

In contrast, the Farm Petitioners argue that EPA exceeded its authority under the Clean Water Act in promulgating the amended CAFO rules.<sup>11</sup> First, Farm Petitioners argue that EPA does not have statutory authority to impose upon all CAFOs a new "duty to apply" for NPDES permits.<sup>12</sup> The amended CAFO rule regulates CAFO *operations*, rather than CAFO *discharges*. The Farm Petitioners note that the Clean Water Act, in Section 301 regulates the discharge of pollutants and in Section 402 provides for NPDES permits to be issued for "the discharge of any pollutant."<sup>13</sup> EPA's NPDES permit rules support Farm Petitioners arguments, which rules provide that "the NPDES program requires permits for the discharge of 'pollutants' from any 'point source' into waters of the United States."<sup>14</sup> Prior to the 2003 rule amendments, the federal CAFO rules clearly excluded from NPDES permitting requirements those CAFOs which discharged only in the event of a 25-year, 24-hour storm event.<sup>15</sup>

Second, Farm Petitioners argue that the amended CAFO rule exceeds EPA's authority by regulating non-point source stormwater runoff from land application areas where CAFO-generated manure, litter or process wastewaters have been applied.<sup>16</sup> Specifically, the amended CAFO rule states that the "discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process

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<sup>8</sup> General Permit No. TXG920000.

<sup>9</sup> The Environmental Petitioners were comprised of the Waterkeeper Alliance, Inc., American Littoral Society, Sierra Club, Inc. and Natural Resources Defense Council, Inc.

<sup>10</sup> Brief for the Environmental Petitioners.

<sup>11</sup> The Farm Petitioners are comprised of the American Farm Bureau Federation, National Chicken Council and National Pork Producers Council.

<sup>12</sup> Brief of Petitioners American Farm Bureau Federation, National Chicken Council, and National Pork Producers Council.

<sup>13</sup> 33 U.S.C. §1311(a); 33 U.S.C. §1342(a)(1).

<sup>14</sup> 40 CFR §122.1(b).

<sup>15</sup> 40 C.F.R. §122, App. B.

<sup>16</sup> Brief of Farm Petitioners at 64.

wastewater by the CAFO to land . . . is a discharge from the CAFO subject to NPDES permit requirements.”<sup>17</sup> While the Clean Water Act includes CAFOs in the definition of a “point source”, stormwater runoff from agricultural lands, including land application areas, is not “point source” pollution. EPA’s attempt to regulate runoff from land application areas runs afoul of the agricultural stormwater discharge exemption found in the statute. Specifically, the statutory definition of “point source” provides that “this term does not include agricultural stormwater discharges and return flows from irrigated agriculture.”<sup>18</sup>

In the rule, EPA sought to justify regulating land application areas on the theory that they receive wastewater and manure for beneficial use of CAFOs. However, land application areas are not part of a CAFO, even under EPA’s CAFO definition, which provides that a CAFO is “a lot or facility in which animals are stabled or confined and maintained.”<sup>19</sup> Farm Petitioners point to the plain meaning of the statutory language “concentrated animal feeding operation”, as precluding bringing land application fields into the CAFO, as no animals are “concentrated” in the fields, and animal feeding ordinarily does not take place there.

Third, the Farm Petitioners argue that the amended CAFO rules exceed EPA authority by purporting to expand EPA’s jurisdiction to all “surface waters” rather than respecting the statutory limitation of the Clean Water Act to “navigable waters”.<sup>20</sup> The term “navigable waters” is defined as “the waters of the United States, including territorial seas.”<sup>21</sup> The Farm Petitioners argue that the amended CAFO rules use of the term “surface waters” to specify set backs and vegetated buffers exceeds the agency’s authority.

At the date of this writing, the Court has made no substantive ruling on the various challenges to the amended CAFO rules.

### **Clean Water Act Litigation**

As described earlier, the Clean Water Act regulates the discharge of pollutants into navigable waters from point sources. Specifically, the Act provides that, absent a permit and subject to certain limitations, “the discharge of any pollutant by any persons shall be unlawful.”<sup>22</sup> The term pollutant is defined to include “solid waste, . . . sewage, . . . biological materials, . . . and agricultural waste discharged into water”<sup>23</sup> A “discharge” is “any addition of any pollutant to navigable waters from any *point source*.”<sup>24</sup> The term “point source” includes “any discernible, confined and discrete conveyance, including but not limited to any . . . concentrated animal feeding operation . . . This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.”<sup>25</sup>

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<sup>17</sup> 68 *Fed. Reg.* at 7267.

<sup>18</sup> 33 U.S.C. §1362(14); *see also* CFR §122.2.

<sup>19</sup> 68 *Fed. Reg.* at 7197.

<sup>20</sup> 33 U.S.C. §1311.

<sup>21</sup> 33 U.S.C. §1362(7).

<sup>22</sup> 33 U.S.C. §1311(a).

<sup>23</sup> 33 U.S.C. §1362(6).

<sup>24</sup> 33 U.S.C. §1362(12).

<sup>25</sup> 33 U.S.C. §1362(14); *see generally*, *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114, 123 (2nd Cir. 1994).

Two CAFO cases brought by citizens and involving operators who appear to have had poor waste management practices, resulted troubling case precedent about what parts of a CAFO operation are to be considered “point sources”.

In *Southview Farm*, the Court found that manure spreading vehicles, used to spread liquid dairy wastes onto fields, were “point sources” because the wastes were then discharged directly into navigable waters.<sup>26</sup> At the trial court, the jury found that in specific instances the operator’s application of wastes resulted in discharges, which discharges did not occur due to precipitation. Though blurring the distinction between the animal confinement areas and land application areas, the Court held that because the dairy was a CAFO and the discharges were not caused by precipitation, the discharges were not exempt agricultural stormwater discharges.

Building on the holding in *Southview Farm*, the Court in *Community Association for Restoration of the Environment v. Henry Bosma Dairy*<sup>27</sup>, affirmed the trial court’s finding of Clean Water Act violations against two dairy operations. The case originated as a citizen suit under the Clean Water Act against the dairies, both located in Washington State. Each dairy reportedly had a chronic history of wastewater discharges and over-application of wastewater and manure onto crop land. In its interpretation of the term “point source,” the Court found that a field where manure was stored and related ditches were “point sources” given they were part of a concentrated animal feeding operation. The finding appears to be based upon clear evidence that there was over-application of manure containing wastewater onto the fields, causing the saturated fields to discharge into a canal which emptied into the Yakima River. The Court explained its reasoning as follows:

Bosma admits that a portion of the dairies are point sources but argues that the district court erred in finding that Bosma’s fields where manure is stored and ditches therein are part of the CAFO and thus, point sources. We disagree. We note that the “definition of a point sources is to be broadly interpreted.” *Dague v. City of Burlington*, 935 F.2d 1343, 1354 (2nd Cir. 1991).<sup>28</sup>

The Court went on and favorably cited the *Southview Farm* case holding that liquid manure spreading operations are a “point source” within the meaning of CWA §1362(14) because the farm itself falls within the definition of CAFO.

Defining a CAFO to include any manure spreading vehicles, as well as manure storing fields, and ditches used to store or transfer the waste serves the purpose of the CWA to control the disposal of pollutants in order to restore and maintain the waters of the United States. 33 U.S.C.A. §125(a) (West 1986 & supp. 1995); *CARE v. Southview Farm*, 34 F.3d 114, 123 (2d Cir. 1994).<sup>29</sup>

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<sup>26</sup> *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114, 123 (2d Cir. 1994).

<sup>27</sup> 305 F.3d 943 (9th Cir. 2002).

<sup>28</sup> *Community Association for Restoration of the Environment v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002).

<sup>29</sup> *Community Association for Restoration of the Environment v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002).

## CERCLA Claims for Water Quality Impairment

Recent litigation brought by downstream water rights holders have alleged that owners or operators of CAFOs, are responsible under the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”), better known as the federal “Superfund” statute, for discharges of animal manure allegedly containing hazardous substances. The “manure as hazardous substance” theory first came to attention in litigation brought by the City of Tulsa against six poultry operators and the City of Decatur, Arkansas.<sup>30</sup> The case addressed two critical issues of interest to livestock producers: 1) whether manure containing a phosphorus compound is a “hazardous substance” under CERCLA, and 2) the applicability of the exclusion from CERCLA for the normal application of fertilizer. Unfortunately, the court’s decision, later vacated, did nothing to clarify these two important issues. In fact, by confusing the issues, the case has encouraged other litigation using similar theories, including a pending lawsuit filed by the City of Waco, Texas against nearly 50 defendants who are alleged to be owners or operators of dairy operations in the North Bosque River watershed, located upstream of the City of Waco.<sup>31</sup>

### The City of Tulsa Lawsuit

In the lawsuit, the City of Tulsa and its water utility sought compensation under CERCLA for phosphorous pollution found in lakes from which the City drew its water supply.<sup>32</sup> In its CERCLA claim the City alleged that the defendant CAFOs had “arranged” for disposal of hazardous substances (poultry litter and manure) and that the watershed was a polluted “facility.” The City further sought cost recovery and contribution from defendants, as responsible parties, under CERCLA for costs expended by the City for water treatment, including costs to address alleged “taste and odor problems” with the water. Prior to trial of the case, the City settled with all defendants and pursuant to the settlement the court’s questionable order, which held that poultry litter and manure was a hazardous substance, was vacated.

To establish a *prima facie case* of liability under either section 107 or 113 of CERCLA, a plaintiff must prove the following elements:

- (1) the defendants are in one of four categories of responsible persons (including the owner or operator of any facility at which a hazardous substances was disposed or any person who arranged for disposal of a hazardous substance);
- (2) there has been a release or threatened release of a hazardous substance from a site which is a covered facility;
- (3) the release or threatened release caused the plaintiffs to incur costs;

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<sup>30</sup> *The City of Tulsa v. Tyson Foods, Inc., et al.*, 258 F.Supp.2d 1263, 1285 (N.D. Oklahoma 2003), *vacated pursuant to settlement*.

<sup>31</sup> *See, e.g.*, Third Amended Complaint, *The City of Waco v. Dennis Schouten, et al.*, Civil Cause No. W-04-CA-118 (In the United States District Court for the Western District of Texas, Waco Division).

<sup>32</sup> In *The City of Tulsa* case, the City did not sue the City of Decatur in its CERCLA contribution claim, presumably because every municipal wastewater treatment plant discharges some amount of phosphorus into a receiving water body.

- (4) plaintiffs' costs are necessary response costs; and
- (5) plaintiffs' response action or cleanup was consistent with the NCP.

42 U.S.C. §9607(a).<sup>33</sup>

The City alleged the defendant CAFOs were liable as “arrangers” for their growers’ “disposal” of phosphorus in the poultry litter into the watershed. An “arranger” is defined under CERCLA as “any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person by any other party or entity, at any facility . . .”<sup>34</sup>

#### Allegations that Animal Manure is a “Hazardous Substance”

Most troubling to livestock producers, farmers and ranchers is the claim made by the plaintiff in the *City of Tulsa* that animal manure could be considered a “hazardous substance” under CERCLA because animal manure may contain compounds which include “phosphorus.”

As background, elemental phosphorus is a listed hazardous substance in 40 C.F.R. §116.4 (Table 116.4A-List of Hazardous Substances). Table 116.4A specifically lists: phosphoric acid, phosphorus, phosphorus oxychloride, phosphorus pentasulfide, and phosphorous trichloride. Likewise, these chemicals are listed in 40 C.F.R. Table 302.4 – List of Hazardous Substances in Reportable Quantities.

However, elemental phosphorus is a highly reactive substance and apparently manure does not actually contain *elemental phosphorus* in its pure, unreacted state. EPA regulations state, prior to the list designating hazardous substances, that “this designation includes any isomers and hydrates, as well as any solutions and mixtures containing these substances.”<sup>35</sup> Case law indicates that even miniscule or nominal amounts of a “hazardous substance” are sufficient to come within the CERCLA definition.<sup>36</sup> But reacted phosphorous may not be either a solution or mixture, it may be an entirely different chemical compound.

In *The City of Tulsa* case, the Court found that phosphorus contained in poultry litter in the form of phosphate *is* a hazardous substance under CERCLA.<sup>37</sup> The Court acknowledged a

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<sup>33</sup> In *The City of Tulsa*, the plaintiffs sought to have the court find that the superfund site or “facility” to include the entire 415 square mile watershed and the poultry land application sites. The Court stated that the statutory definition of “facility” was expansive enough to include the entire watershed, however, the Court concluded that the evidentiary record before it did not support making findings as to the boundaries of the “facility.” “Facility” is defined under CERCLA as: (A) Any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) *any site or area where a hazardous substance has been deposited, stored, deposited of, or placed, or otherwise come to be located*; but does not include any consumer product in consumer use or any vessel. 42 U.S.C. §9601(9) (emphasis added).

<sup>34</sup> 42 U.S.C. §9607(a)(3).

<sup>35</sup> 40 C.F.R. § 116.4.

<sup>36</sup> *B.F. Goodrich v. Detkoski*, 99 F.3d 505 (2<sup>nd</sup> Cir. 1996), as clarified, 112 F.3d 88, *cert. denied*, 118 S.Ct. 2318; *see also U.S. v. Alcan Aluminum Corp.*, 990 F.2d 771 (2<sup>nd</sup> Cir. 1993).

<sup>37</sup> *The City of Tulsa*, 258 F.Supp.2d at 1285.

clear distinction between phosphorus, and phosphate, the specific substance found in the poultry litter at issue, as follows:

It is undisputed that elemental phosphorus is highly combustible, poisonous and so reactive it does not occur free in nature, and that phosphate is found in all living cells, is safe and vital to life processes.<sup>38</sup>

Yet, despite its understanding of the clear distinction between the two chemicals, the Court went on and concluded that “EPA intended to include phosphorus compounds such as phosphates in listing phosphorus in Table 302.4 whether expressed as PO<sub>4</sub> or another chemical combination of phosphorus and oxygen, phosphates contained phosphorus,” *citing B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2<sup>nd</sup> Cir. 1992) and the remedial nature of CERCLA.

Given that the Court’s decision was subsequently vacated, the Court’s analysis of the legal status of phosphates and manure carries no weight as precedent. Nevertheless, the opinion appears quite ill advised as, if followed, it would render “virtually everything in the universe” a hazardous substance.<sup>39</sup>

#### Scope of the “Normal Application of Fertilizer” Exclusion

CERCLA specifically excludes from the definition of “release” the *normal application of fertilizer*. Given that fertilizer would routinely contain one or more constituents listed as hazardous substances, this exclusion from the definition of “release” is obviously necessary to prevent virtually the entirety of the nation’s cultivated crop land from falling within the scope of CERCLA.

The exclusion is found within the CERCLA definition of “release” as follows:

The term “release” means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . but excludes . . . (D) the normal application of fertilizer.<sup>40</sup>

In *The City of Tulsa* case, the CAFO defendants sought summary judgment on the basis that the land application of poultry litter constituted a “normal application of fertilizer.” While the plaintiffs conceded that animal waste may be used as fertilizer under proper circumstances, they argued that the land application of poultry litter by the defendants exceeded the “normal” application of fertilizer.

The fertilizer exclusion is discussed in a Senate Report that attempted to define some of its terms:

Certain feedstocks used to produce fertilizer (nitric acid, sulfuric acid, phosphoric acid, anhydrous ammonia) are hazardous substances as defined by the bill, and certain fertilizer products may be listed as hazardous substances as well . . . Under this

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<sup>38</sup> *The City of Tulsa*, 258 F.Supp.2d at 1283.

<sup>39</sup> *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 259 (3d Cir. 1992).

<sup>40</sup> 42 U.S.C. §9601(22).

exclusion, however, the “normal field application” of fertilizer is not a “release” as defined in the bill . . . . The term “normal field application” means the act of putting fertilizer on crops or cropland, and does not mean any dumping, spilling, or emitting, whether accidental or intentional, in any other place or of significantly greater concentrations or amounts that are beneficial to crops.

S. Rep. No. 96-848, at 46 (1980), as cited in *The City of Tulsa*. In struggling with what constitutes a “normal” application of fertilizer the Court in *The City of Tulsa* noted that it was unaware of any decision interpreting the fertilizer exclusion and found that neither plaintiffs nor defendants supported their interpretation of the exclusion by any competent evidence. Consequently, the Court declined to decide whether land application of poultry manure at issue in the case fell within the exclusion. Therefore the Court, citing CERCLA’s goals of environmental protection and remediation, fell back on the argument that exceptions from liability are narrowly construed.

### **Air Emission Release Reporting**

Concerns over the constituents in, and quantity of, air emissions from large animal feeding operations led to the funding (by EPA and USDA) of a study of such air emissions, which was conducted by the National Research Council. The study, *Air Emissions from Animal Feeding Operations: Current Knowledge, Future Needs*, was released in December 2002 and documented the difficulty in making credible scientific estimates of air emissions from animal feeding operations, given the wide ranging variations in farm design, operations, and species of livestock raised.<sup>41</sup> More recently, the current efforts of seven major livestock producing states to regulate air emissions from animal feeding operations was examined in a law review article.<sup>42</sup> The article noted that animal feeding operations had largely escaped regulation under the federal Clean Air Act, but opined that once EPA funded research develops accurate methods for measuring air emissions, animal feeding operations can expect further state and federal regulation of their emissions.

Another new line of cases addresses the emission release reporting requirements of CERCLA, specifically as relate to ammonia emissions from hog farms. In the latest case, *Sierra Club v. Seaboard Farms, Inc.*,<sup>43</sup> the Court found that Seaboard’s Dorman Farm in Beaver County, Oklahoma was obligated to report ammonia emissions which exceeded CERCLA’s “reportable quantity” of 100 pounds per day. The reporting obligation is found in Section 103 of CERCLA, which requires that:

Any person in charge of a vessel or an offshore or an onshore facility *shall*, as soon as he has knowledge of any release (other than a federally permitted release) *of a hazardous substance from such vessel or facility* in quantities equal to or greater than those determined pursuant to section 9602 of this title, *immediately notify the National Response Center established*

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<sup>41</sup> National Research Council, *Air Emissions from Animal Feeding Operations: Current Knowledge, Future Needs* (2003).

<sup>42</sup> Endres, Jody, et al, *Air Emissions from Animal Feeding Operations: Can State Rules Help?*, 13 Penn St. Envtl. L. Rev. 1 (2004).

<sup>43</sup> 387 F.3d 1167 (10<sup>th</sup> Cir. 2004).

*under the Clean Water Act* [33 U.S.C.A. §1251 et seq.] of such release. The National Response Center shall convey the notification expeditiously to all appropriate Government agencies, including the Governor of any affected State.

42 U.S.C. §9603(a) (emphasis supplied). Ammonia (NH<sub>4</sub>) is a hazardous substance under §102 of CERCLA.<sup>44</sup> The EPA-defined reportable quantity for ammonia is one hundred pounds per day.

Notably excluded from the reporting obligation is a release which is a “federally permitted release.” An example of a federally permitted release would be a release occurring under a federally enforceable air emissions permit. However, it is rare that livestock operations hold federally enforceable air emission permits, as such permits require the quantification of the amount of emissions and controls on the emissions.

The specific issue addressed in *Sierra Club v. Seaboard Farms* was whether the reporting obligation under §103 required the aggregation of emissions from each lagoon, barn or other emission source at the Dorman Farm for purposes of computing whether the emissions exceeded the 100 pound per day reporting threshold, or whether, as Seaboard argued, the reporting obligation only applied if the ammonia emissions for an individual lagoon, barn or other emission source, standing alone, exceeded the 100 pound per day threshold. The Court held that the term “facility” in Section 103 requires the aggregation of emissions from all sources at the entire Dorman Farm site for purposes of determining whether the release reporting threshold is met.

An earlier case raised similar issues. In *Sierra Club, Inc. v. Tyson Foods, Inc.*,<sup>45</sup> a federal district court held that a farm site as a whole should be considered for the CERCLA reporting threshold. The case also raised a reporting issue involving the Emergency Planning and Community Right to Know Act (EPCRA).<sup>46</sup> As to EPCRA, the defendants argued that the subject poultry production facilities came within a EPCRA reporting exemption for “routine agricultural operations”. The Court rejected defendant’s arguments, finding that defendants do not store gaseous ammonia for agricultural use, but rather defendants worked to rid the poultry barns of ammonia given that such gases were known to be harmful to poultry.

In an attempt to reconcile the confusion of these cases, on January 21, 2005 EPA released for public comment its consent agreement on animal feeding operation emissions. The consent agreement will allow operators of animal feeding operations to voluntarily resolve any past emission reporting obligations under the federal Clean Air Act, CERCLA, and EPCRA.<sup>47</sup> The consent agreement is to be published in the federal register for public comment, and thereafter qualifying operations will have 90 days to choose whether to sign the agreement. The consent agreement will provide each participating operation the benefit of a covenant not to sue and protection from EPA enforcement, subject to certain exclusions, but would require payments of a civil penalty of between \$200 to \$100,000 and \$2,500 per farm (subject to a cap) to fund a nationwide emissions monitoring program.

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<sup>44</sup> See 40 C.F.R. §302.4.

<sup>45</sup> 299 F.Supp 2<sup>nd</sup> 693 (Western District Kentucky 2003).

<sup>46</sup> 42 U.S.C. § 11001 – 11050.

<sup>47</sup> See, EPA Website at [www.epa.gov/compliance/resources/agreements/caa/cafo-fcsht-0501.html](http://www.epa.gov/compliance/resources/agreements/caa/cafo-fcsht-0501.html). Previously, a draft of the EPA Consent Agreement on Animal Feeding Operation Emissions (dated December 10, 2003) was published by *BNA Environment Reporter* January 30, 2004 (Vol. 35 No. 5).

## Right-To-Farm Litigation

In the late 1970s and early 1980s, state lawmakers across the country became concerned about the adverse effect nuisance suits were having on agricultural operations. As towns and cities expanded, farms that had been in the same location for years suddenly found themselves in close proximity to new urban neighborhoods. To protect agricultural operations, state legislatures adopted so called “right-to-farm” laws, which generally provide agricultural operations with some level of protection from nuisance litigation. The policy behind the right-to-farm laws is embodied in a statement made by the Texas Legislature, in enacting that state’s act:

It is the policy of this state to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. It is the purpose of this chapter to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be regulated or considered to be a nuisance.<sup>48</sup>

In Texas, the nuisance protection comes from a statute of repose written into the act which provides that “[n]o nuisance action may be brought against an agricultural operation that has lawfully been in operation for one year or more prior to the date on which the action is brought, if the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation.”<sup>49</sup> Moreover, in Texas, the agricultural operator can recover attorneys fees and expenses from a person who improperly brings a nuisance action.<sup>50</sup>

Right-to-farm laws can protect animal feeding operations and CAFOs from nuisance suits, depending upon the breadth of the agricultural operations brought within the protections of the statute. The Texas act’s definition of “agricultural operation” to include “raising or keeping livestock or poultry” is plainly intended to cover animal feeding operations within the act’s protections.<sup>51</sup> Further, recent court decisions have applied the act to animal feeding operations.

In *Houbec v. Brandenberger*, the Texas Supreme Court addressed the applicability of the Texas right-to-farm act’s affirmative defense against a claim that an agricultural operation was a nuisance.<sup>52</sup> The Court addressed the statute’s one-year bar to nuisance actions. The Court concluded that the one-year bar is essentially a statute of repose that was intended to bar any nuisance action from being brought against a lawful agricultural operation more than one year after the commencement of the conditions provided the basis for the action, and irrespective of when the complaining party discovered the offending conditions.<sup>53</sup> Due to errors at the trial court, the Court remanded the case back to the trial court for further proceedings.

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<sup>48</sup> TEX. AGRIC. CODE § 251.001.

<sup>49</sup> TEX. AGRIC. CODE § 251.004(a).

<sup>50</sup> TEX. AGRIC. CODE § 251.004(b).

<sup>51</sup> TEX. AGRIC. CODE § 251.002(1).

<sup>52</sup> *Houbec v. Brandenberger*, 111 S.W.3d 32 (Tex. 2003).

<sup>53</sup> *Id.* Due to errors at the trial court, the Court remanded the *Houbec* case back to the trial court for further proceedings.

In a second Texas case, *Barrera v. Hondo Creek Cattle Company*, the right-to-farm act formed the basis to dismiss plaintiffs' nuisance complaints against a 6000-head cattle operation located near Edroy, Texas.<sup>54</sup> The subject cattle feedlot, which plainly would be a CAFO under state law due to its head count, had operated for decades at the same location, although the operation had changed owners about two years prior to the plaintiffs' bringing suit. Relying on *Holubec*, the Court found the act to contain a statute of repose, held that the cattle feedlot was an "agricultural operation" within the act, and affirmed the trial court's take-nothing judgment against the plaintiffs.

In contrast to the Texas decisions, the Iowa Supreme Court in *Gacke v. Pork Extra, LLC*<sup>55</sup> recently struck down as unconstitutional a section of the Iowa Code which provided broad nuisance immunity to animal feeding operations. The Iowa Statute at issue provided in part:

An animal feeding operation, as defined in section 455B.161, shall not be found to be a public or private nuisance under this chapter or under principles of common law, and the animal feeding operation shall not be found to interfere with another person's life or property under any other cause of action.

Iowa Code §657.11(2). In this case, the Court held that the statutory immunity afforded to animal feeding operations was invalidated insofar as it purported to prevent property owners subjected to a nuisance from recovering damages for the diminution value of their property. The Court reasoned that the act in effect created an "easement" across the property affected by the nuisance, and that owner's property interest was protected by the "takings" protection afforded in the Iowa Constitution.

### Conclusion

Opponents to CAFOs and other livestock operations are growing more sophisticated in their legal and regulatory challenges. Further, new federal regulations impose additional regulatory obligations on animal feeding operations, including new obligations for permitting, new requirements for management of manure and land application, and increased reporting obligations. These increased burdens are likely to continue to cause a decline in the number of small livestock operations, as the need for facility investments and competent professional and engineering advice drives up the cost of operations. Likewise, careful site selection will be of even greater importance as operators seek new sites which are appropriately set back from neighbors, water ways and other sensitive areas.

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<sup>54</sup> *Barrera v. Hondo Creek Cattle Co.*, 2004 WL 396603 (Tex. App.—Corpus Christi 2004).

<sup>55</sup> 684 N.W.2d 168 (Iowa 2004).