



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 355

[EPA-HQ-OLEM-2018-0318; FRL-9995-03-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: Final rule.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is amending 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 adding definitions of “animal waste” and “farm” to the EPCRA regulations to delineate the scope of this reporting exemption. This amendment 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: This final rule is effective [insert date 30 days after date of publication in the Federal Register].

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-HQ-OLEM-2018-0318. All documents in the docket are listed on the

http://www.regulations.gov web site. Although listed in the index, some information is not publicly available, e.g., 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 electronically through <http://www.regulations.gov>.

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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

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 § 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 amending 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 adding definitions of “animal waste” and “farm” to the EPCRA regulations to delineate the scope of this reporting exemption.

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

This final 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 finalizes this action 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).

D. What is the background of this final rule?

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 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),

¹ 40 CFR part 300.

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

- 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).

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.”

The FARM Act amended CERCLA by providing an exemption from reporting air emissions from animal waste at farms. Because these types of releases are exempted under CERCLA, based on the release reporting criteria under EPCRA section 304, these types of releases are also exempt under EPCRA section 304.

Consequently, on November 14, 2018, EPA published a proposed rule to amend the release reporting regulations under EPCRA section 304. The comment period closed on December 14, 2018. EPA received 87,473 comments, of which 87,091 are mass mail campaigns opposing the proposed rule. The remaining were individual letters that either supported or opposed the proposed rule. EPA’s response to significant comments are generally addressed below in Section V of this preamble. EPA developed a response to comment document to

address all the comments received by the Agency on the proposed rule, which is in the docket EPA-HQ-OLEM-2018-0318 to this final rule. In addition, this rulemaking generally tracks the guidance document EPA had previously issued after enactment of the FARM Act. Thus, EPA formally withdraws the guidance document entitled, “How does the Fair Agricultural Reporting Method (FARM) Act impact reporting of air emissions from animal waste under CERCLA Section 103 and EPCRA Section 304?” dated April 27, 2018.

II. Summary of this Final Rule

This final rule amends the release reporting regulations under EPCRA section 304 by adding the reporting exemption in 40 CFR 355.31 for air emissions from animal waste at farms, as proposed. EPA is also adding definitions of “animal waste” and “farm” to the definition section of the EPCRA regulations in 40 CFR 355.61 to delineate the scope of this reporting exemption, as proposed. EPA believes this final rule appropriately reflects the relationship between CERCLA and EPCRA release reporting requirements and is consistent with the statutory text, framework and legislative history of EPCRA, as well as the Agency’s prior regulatory actions.

III. Legal Rationale for this Final Rule

This rulemaking 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 rulemaking 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 is amending 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). 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). 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).

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 amending the 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 FARM Act 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 FARM Act 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 it 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 of this preamble, for further explanation of these exemptions.) The reason the release is not subject to notification under CERCLA section 103(a) is because trimethylchlorosilane is not a CERCLA hazardous substance, not because there is anything particular about the release that renders it exempt.

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 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 amending 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).³ 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. of this preamble, 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 (or a federally permitted release and is above the applicable reportable quantity), 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

³ 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.

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

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 355.31.⁴

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) 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

⁴ 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).

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 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 the Final Rule

The scope of this rulemaking is limited to air emissions from animal waste (including decomposing animal waste) at a farm. The Agency is adding 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 this rulemaking 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 exempting substances typically associated with animal waste (such as ammonia or hydrogen sulfide) from reporting. Rather, this rulemaking 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 excluding all releases to the air from animal waste at a farm from reporting under EPCRA section 304.

This rulemaking 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 exemption is 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 exemption, EPA is finalizing, as proposed, the definitions of “animal waste” and “farm” to be consistent with CERCLA section 103(e). See 40 CFR 355.61 for the full text of these definitions.

V. Response to Comments

EPA received comments from various organizations, including the National Association of SARA Title III Program Officials (NASTTPO), agricultural trade associations, farm bureaus, a university research center and environmental groups. EPA also received individual comment letters. This section provides a summary of major comments received and EPA’s responses. A detailed summary of the comments and EPA’s responses are in the Response to Comments document, a copy of which is in the docket for this rulemaking.

A. General Comments Supporting the Proposed Rule

Several commenters, NASTTPO, agricultural trade associations, the Department of Agriculture from West Virginia and North Dakota, farm bureaus and a few private citizens, expressed general support for the proposed amendment to the EPCRA section 304 release reporting regulations to add the reporting exemption for air emissions from animal waste at

farms provided in CERCLA section 103(e). In support of the proposed amendment, commenters stated that the proposed rule lays out the proper reading of the law and is consistent with Congress' clear intent that EPCRA section 304 and CERCLA release reporting requirements should be applied consistently except in certain very limited circumstances. Some of the commenters stated that EPCRA was never intended to govern agricultural operations, where emissions from livestock are a part of everyday life and are certainly not emergency situations. The natural breakdown of livestock manure does not constitute an emergency release pursuant to the CERCLA and EPCRA laws. One commenter stated that EPCRA was created to protect citizens from disasters such as 1984 Bhopal tragedy, however, animal agriculture cannot be compared to or included in a similar category designed to address toxic chemicals, hazardous substances and chemical emergencies.

B. General Comments Opposing the Proposed Rule

EPA received numerous mass mail campaigns which include anonymous private citizens, citizen & environmental groups opposing the proposed amendment to add the reporting exemption to the EPCRA section 304 emergency release notification regulations for air emissions from animal waste at farms. Several commenters strongly urge the EPA to withdraw the proposed rule, which commenters said would exempt concentrated animal feeding operations (CAFOs) from EPCRA reporting requirements so that reports of hazardous substance releases will be available to the public. Certain members of the Senate Environment and Public Works (SEPW) Committee strongly urged EPA to withdraw the proposed rule and faithfully execute and enforce EPCRA and CERCLA reporting requirements consistent with the laws passed by Congress.

EPA also received individual comment letters opposing the proposed amendment. One

commenter stated that it is the job of the EPA to regulate sources of hazardous emissions and protect the population from known sources of these emissions. One commenter asked EPA not to ignore and vacate their right-to-know by exempting the CAFO's responsibility to control and report the toxic emissions they are required to control and report.

EPA's Response: While EPA recognizes commenters' concerns regarding animal waste emissions, this amendment is based on the statutory language in EPCRA section 304 and its relationship to CERCLA section 103 release reporting requirements. The basic purpose of emergency release notification requirements under EPCRA section 304 is for facilities to inform state and local agencies of accidental releases so that these agencies can exercise the local emergency response plan if necessary. This may include, but is not limited to, providing shelter or evacuating the community to prevent acute exposure from accidental releases of chemicals. EPCRA section 304 serves as a notification requirement for chemical accidental releases, it is not intended to regulate emissions.

In their letter to EPA dated June 1, 2017, the members of NASTTPO indicated that the release reports for air emissions from animal waste at farms provide little value to local agencies and first responders, and are generally ignored. NASTTPO states that open dialogue and coordination among farms and local agencies can be more effective than release reporting to address animal waste management at farms. NASTTPO reiterated this principle in its comment to this rulemaking, dated December 14, 2018. In addition, regardless of reporting, EPA can still enforce applicable laws and regulations to address threats to human health and the environment. This rulemaking does not limit the Agency's authority under CERCLA sections 104 (response authorities), 106 (abatement actions), 107 (liability), or any other provisions of CERCLA to address releases of hazardous substances at farms.

C. Comments on the proposal to add definitions of “animal waste” and “farm”

EPA requested comments on adding the definitions of “animal waste” and “farm” to the definition section of EPCRA regulations in 40 CFR part 355.

1. Support

A few commenters supported adding the definitions of “animal waste” and “farm” to EPCRA regulations in 40 CFR part 355. These commenters expressed that the incorporation of the FARM Act’s definitions of “animal waste” and “farm” into the ECPRA regulations provides important regulatory clarity to agricultural producers. In their comments, NASTTPO expressed that EPA has crafted a narrow and specific exemption from the reporting of releases from animal waste from farms.

2. Oppose

Many commenters as part of mass mail campaigns as well as few individual commenters opposed adding the definitions of “animal waste” and “farm” to the EPCRA regulations in 40 CFR part 355. One of the commenters specifically stated that limiting definitions of what constitutes a farm, or animal waste merely hides problems and that we should be striving for more transparency on issues concerning emissions that affect climate and public health, not trying to limit transparency. Another commenter stated that it is only the large CAFOs that can release sufficient volumes of toxic pollutants, as ammonia and hydrogen sulfide into the air which obviously will then end up in our soil and water.

EPA’s Response: On March 23, 2018, the Fair Agricultural Reporting Method (FARM) Act of 2018 amended CERCLA section 103 to exempt the reporting of air emissions from animal waste at a farm. *See* Fair Agricultural Reporting Method Act, Pub. L. 115-141 §§ 1101-1103 (2018). The FARM Act includes definitions for “animal waste” and “farm.” On August 1,

2018, EPA promulgated a final rule to incorporate the FARM Act legislation into the CERCLA reporting regulations at 40 CFR part 302 (see 83 FR 37446), including definitions for “animal waste” and “farm.” This amendment is based on EPA’s interpretation of EPCRA section 304(a)(2) and its relationship to CERCLA section 103 as amended by the FARM Act. Thus, the Agency believes it is reasonable to promulgate the same definitions for “animal waste” and “farm” into the EPCRA release reporting regulations to maintain consistency between the statutes and to effectuate the exemption under EPCRA.

D. Comments on the Legal Rationale for the Proposed Rule

EPA received comments supporting and opposing the legal rationale for the proposed rule. Below is a summary of the significant comments received and EPA’s responses. Details of these comments and the Agency’s responses are addressed in the Response to Comments document which can be found in the docket for this rulemaking.

1. Support

A few commenters state that Congress intended for EPCRA reporting requirements to be consistent with or “linked to” CERCLA reporting requirements, which is evinced by the statutory language in EPCRA section 304(a)(2). Commenters stated that EPA has the authority 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). Commenters also note that an analysis prepared by the Congressional Research Service (CRS) at the request of the Senate Committee on Environment and Public Works (EPW) supports EPA’s interpretation as presented in the proposed rule. In sum, commenters state the proposed rule is a sound and lawful codification based on the statutory language in EPCRA and CERCLA.

2. Oppose

EPA received comments with a wide range of arguments opposing the Agency's legal rationale for the proposed rule. The following is a brief summary of comments on each topic presented in the preamble to the proposed rule. Details of comments received and the Agency's response can be found in the Response to Comments document at the docket for this rulemaking.

i. Statutory Text

A few commenters argue the proposed rule is in direct contravention of the plain language of EPCRA and CERCLA and is therefore "fundamentally flawed" and "illegal." One commenter argues that the phrase "occurs in a manner" makes it clear that even if a release is not reported under CERCLA, EPCRA reporting would still be required if the "factual" circumstances of the release would otherwise require CERCLA reporting. The commenter also stated that EPA arbitrarily based its interpretation of "occurs in a manner" on the method or type of release (i.e., into the air) rather than on the substance emitted. Additionally, this commenter argues that the statute provides no support for such an interpretation. Another commenter expressed that the plain language of EPCRA is unambiguous in that it prohibits EPA from exempting animal feeding operations from EPCRA's reporting requirements; but even if there was some ambiguity in the statute, the proposed rule is arbitrary and capricious because EPA has not provided a reasoned explanation to justify its departure from the statute or supported that explanation with substantive record evidence.

EPA's Response: EPA's interpretation is lawful and based on the plain language of EPCRA and CERCLA. EPA reasonably interpreted the operative language in EPCRA section 304(a)(2) as requiring EPCRA reporting when the release "occurs in a manner" which would require notification under CERCLA section 103(a). Because air emissions from animal waste at farms do not "occur in a manner" that would require notification under CERCLA section 103(a), such

releases are not reportable under EPCRA section 304(a)(2).

EPA disagrees with commenters' analysis that reporting of these types of air emissions would still be required under EPCRA so long as they are factually releases under CERCLA. EPA understands these comments to propose that the "occurs in a manner" language in EPCRA section 304(a)(2) means that a release only has to satisfy the definition of a "release" under CERCLA to be eligible for EPCRA reporting. Such a reading is unnecessary as the definition of a "release" in EPCRA already mirrors the definition of a "release" in CERCLA. (see the definition of "release" under EPCRA section 329(8) and CERCLA section 101(22)). While the CERCLA definition may focus more on hazardous substances and the EPCRA definition focusses more on extremely hazardous substances and hazardous or toxic chemicals, both definitions list similar types, ways, or manners of a release.

EPA believes it is not a full and fair reading of EPCRA section 304(a)(2) to say that EPCRA reporting would still be necessary if a release to the environment qualifies as a release to the environment under CERCLA, regardless of whether reporting is legally required under CERCLA. An EPCRA release into the environment already follows the definition of a release into the environment under CERCLA. Applied to the present rulemaking, emissions into the air from animal waste at farms already qualify as releases into the environment under both statutes (i.e., they are "emitting" or "escaping" under the statutory definitions). Further analysis of what factually is a release to the environment does not shed light on the Congressional intent of EPCRA section 304(a)(2) and does not follow the plain language of the statute, which requires, in part, that a release occurs in a manner which would require notification under CERCLA section 103(a).

In enacting the FARM Act, the Senate EPW requested an analysis from the Congressional

Research Service (CRS) of the potential effects of the FARM Act's amendments to CERCLA and EPCRA release reporting. The CRS issued two memorandums, March 7, 2018 (an overview of CERCLA and EPCRA release reporting, statutory exemptions, the 2008 CERCLA/EPCRA rule and resulting litigation, etc.) and March 13, 2018 ("Supplemental Analysis: Fair Agricultural Reporting Method Act/FARM Act (S.2421)"). CRS agreed with this interpretation in its memorandum dated March 7, 2018, which states:

[T]he phrase "occurs in a manner" generally has been implemented over time to mean the nature of the release in terms of how the substance enters the environment. [CRS March 7, 2018 memorandum page 6].

The next question is whether the release would require notification under CERCLA section 103(a). As discussed earlier, the FARM Act exempted only releases of a certain kind or manner – air emissions from animal waste at farms – from notification under CERCLA section 103(a). Accordingly, these types of releases do not occur in a manner that would require notification under CERCLA section 103(a). Because the third criteria of EPCRA section 304(a)(2) is not met, no reporting under EPCRA is required.

EPA believes its interpretation follows the plain language of the statute and carries out the Congressional intent of EPCRA section 304(a)(2).

ii. Legislative History and Prior Agency Actions

Commenters opposing the proposal argue that the legislative history of the FARM Act makes it clear that Congress intended for EPCRA reporting to continue notwithstanding the FARM Act's CERCLA exemption. The letter from certain Senate EPW members cites to testimony by Senators and witnesses explaining that the FARM Act makes no changes to reporting requirements for releases of extremely hazardous substances under EPCRA. Commenters assert

that the proposed rule violates the legislative intent of the FARM Act. One commenter argues that EPCRA's legislative history does not support EPA's prior actions exempting certain releases from EPCRA reporting, such as the CERCLA continuous release provision.

EPA's Response: In enacting the FARM Act, Congress amended the CERCLA section 103 reporting requirements; it did not amend the EPCRA section 304 reporting requirements. While the FARM Act legislative history has relevance with respect to the statutory changes to reporting under CERCLA section 103, EPA considered the text of EPCRA section 304 and its legislative history in issuing this rule. As stated throughout the proposed rule, EPA has interpreted EPCRA section 304(a)(2) as carrying over CERCLA reporting exemptions related to the manner or nature of release. In this way, EPCRA section 304(a)(2) promotes consistency between EPCRA and CERCLA reporting. The legislative history of the FARM Act does not address the legislative history of EPCRA, and if Congress wished to ensure that the exemption in the FARM Act did not carry over into EPCRA reporting, it could have expressly enacted such statutory text, but it did not.

The legislative history of the FARM Act is correct to the extent that the amendment does not exempt all releases from animal waste at farms from reporting under EPCRA. Rather, the amendment only exempts certain types of releases, and this rule tracks the FARM Act to provide that a limited type of release, air emissions from animal waste at farms, are not subject to reporting under EPCRA. This 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 is because the releases occur in a manner that require reporting under CERCLA because they are releases into a non-air media or they are not emissions from animal waste.

The proposed rule also explains how, in the 1986 committee conference report addressing EPCRA, Congress expressed its intent that EPCRA release reporting be aligned with CERCLA reporting. As an example, the committee conference report explains how continuous releases which are not subject to immediate reporting requirements under CERCLA should likewise not be subject to EPCRA reporting. As result, EPA promulgated reduced reporting requirements that cross-reference and follow the CERCLA reduced reporting requirements for continuous releases. In this manner, EPA reasonably followed Congressional intent to state that numerous types of releases are not subject to reporting under EPCRA when reporting wasn't required under CERCLA, including vehicle emissions, the normal application of fertilizer, and the application of registered pesticide products (see the Federal Register notice for the proposed rule for a more detailed discussion).

The legislative history of the FARM Act's amendment to CERCLA did not nullify the statutory text in EPCRA section 304(a)(2). EPA reasonably interpreted that text and the proposed rule is supported by EPCRA's legislative history.

E. Other Comments

EPA also received adverse comments on the rulemaking and its impact on environment and public health. These commenters expressed that the proposed exemption will prevent local emergency responders from accessing information to protect the community. Some commenters assert that the proposed rule is arbitrary and capricious because the Agency failed to consider environmental justice, the National Environmental Policy Act, and the Endangered Species Act prior to issuing the proposed rule.

EPA's Response: Although these comments are outside the scope of this rulemaking, the Agency's response to these comments are provided in the Response to Comments document, which can be found in the docket to this rulemaking.

F. Request for Public Comment Period Extension & Public Hearings

Three commenters, a university research organization, mass mail campaign and community group, requested EPA to extend the public comment period for the proposed rule. These commenters stated that the proposed rule may have significant consequences on the ability of local governments and their residents to protect their health and wellbeing, none of which seems to have been considered by EPA during the preparation of the proposed rule. Additionally, these commenters expressed that they need an additional 60 days to collect information from studies on health and environmental impacts of CAFO air emissions on surrounding communities as rulemaking docket does not contain any scientific studies or other documents about toxic emissions from CAFOs and their impact on surrounding communities.

Two groups, mass mail campaigns and community organization, requested public hearings on the proposed rule stating that given the impact that the proposed rule will have on communities across the country, including a disproportionate number of low-income and minority communities, EPA should schedule at least three public hearings in various locations across the country to ensure adequate public participation in the rulemaking process. EPA should hold these hearings in locations near to communities affected by CAFOs, for example, communities in North Carolina, Maryland, Iowa, or Oklahoma, to name a few.

EPA's Response: EPA believes that the 30-day comment period was appropriate. The proposed rule is based on a reasonable interpretation of the statutory language in EPCRA section 304(a)(2) and its relationship with CERCLA section 103 as amended by the FARM Act. EPA's

rationale is set out in the Federal Register notice for the proposed rule and all the supporting documents the Agency relied on are available in the associated docket.

The proposed rule is not based on health or environmental risk, so no such associated studies are necessary. Because the proposed rule is based on a statutory interpretation, the record is not extensive, and therefore EPA did not believe such an extension should be granted. EPA also generally set out its statutory interpretation in the guidance document entitled “How does the Fair Agricultural Reporting Method (FARM) Act impact reporting of air emissions from animal waste under CERCLA Section 103 and EPCRA Section 304?” dated April 2018. That guidance document states: “EPA intends to conduct a rulemaking to address the impact of the FARM Act on the reporting of air emissions from animal waste at farms under EPCRA.” Accordingly, the commenters were provided a meaningful opportunity to comment and no extensions were necessary to comment on EPA’s statutory interpretation. Similarly, no public meetings or hearing were required or deemed necessary to allow for comment on EPA’s interpretation.

VI. Statutory and Executive Orders

Additional information about these statutes and Executive Orders can be found at <https://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 subject to Executive Order 13771 because this final rule does 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 codifying 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 will 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, this final 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 amending 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 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.

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 amending 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 final rule is not based on health or environmental effect, rather, it 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 amending 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. EPA has no authority under EPCRA to prevent or reduce emissions from certain facilities or their operations. The rule presents a statutory interpretation intended to maintain consistency between EPCRA section 304(a) and CERCLA section 103 release notification requirements and does not have any impact on human health or the environment.

L. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 355

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

Dated: June 4, 2019.

Andrew R. Wheeler,
Administrator.

For the reasons set forth in the preamble, EPA amends 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. Amend § 355.31 by adding paragraph (g) to read as follows:

§ 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. Amend § 355.61 by adding in alphabetical order 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). This term 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.

[FR Doc. 2019-12411 Filed: 6/12/2019 8:45 am; Publication Date: 6/13/2019]