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Concentrated Animal Feeding Operations/EPCRA Reporting Requirements: Environmental Organizations Challenge 2018 U.S. Environmental Protection Agency Guidance

10/02/2018

Waterkeeper Alliance and a number of other environmental organizations (collectively “Waterkeeper”) filed a September 28th Complaint for Declaratory and Injunctive Relief (“Complaint”) against the United States Environmental Agency (“EPA”) challenging what it describes as:

. . . guidance that the U.S. Environmental Protection Agency (“EPA”), first issued on October 26, 2017, and updated on April 30, 2018, exempting Concentrated Animal Feeding Operations (“CAFOs”) from requirements to inform state and local officials about releases of dangerous levels of pollutants as required by Section 304 of the Emergency Planning and Community Right-to-Know Act (“EPCRA”), 42 U.S.C. § 11004.

Citing EPA, CERCLA and EPCRA Reporting Requirements for Air Releases of Hazardous Substances from Animal Waste at Farms (Apr. 30, 2018).

Whether certain emissions from CAFOs are subject to EPCRA and CERCLA (Superfund) statutory reporting requirements has been the subject of significant debate and litigation for a number of years.

The Complaint describes the March 23, 2018, Congressional enactment of the Consolidated Appropriations Act, 2018 (“Omnibus Bill”). Title XI of the Omnibus Bill is denominated the Fair Agricultural Reporting Method Act (i.e., FARM Act) which expressly exempts air emissions from animal waste (including decomposing animal waste) at a farm from federal Comprehensive Environmental Response, Compensation, and Liability Act (Superfund) reporting requirements.

Waterkeeper argues that the Omnibus Bill did not exempt CAFOs from reporting under the EPCRA. The organization contends that the exemption is a legislative rule affecting legal rights and duties of CAFOs that would have to report certain releases but for the exemption.

Waterkeeper argues that the exemption was promulgated by EPA outside of the Administrative Procedure Act rulemaking process. It further argues that EPA has not:

a. published a notice of proposed rulemaking in the Federal Register for the EPCRA Exemption;

- b. referenced the legal authority under which EPA proposed the EPCRA Exemption;
- c. published a final rule with a concise general statement of its basis and purpose;
- d. published a response to the comments submitted by the public or otherwise made those comments publicly available; or
- e. set an effective date at least 30 days after publication of a final rule.

The organization requests that the Court hold the cited exemption to be arbitrary, capricious, abuse of discretion, and otherwise not in accordance with law, etc., and in violation of the Administrative Procedures Act. They seek an Order Vacating the Exemption and requiring CAFOs to comply with EPCRA reporting requirements by date certain, not to exceed 30 days after issuance of the Court's Order.

A copy of the [Complaint](#) can be found here.