

THIS WAITING GAME STINKS: THE LACK OF EPA PROGRESS IN REGULATING AIR EMISSIONS FROM ANIMAL AGRICULTURE

Introduction

There is an increasing consensus in both scientific circles and the general population that global warming is a real phenomenon and anthropomorphic.¹ Despite this fact, predictably, the path to building a legal and political consensus that allows for meaningful progress in addressing this problem continues to have many obstacles that impede progress. This is especially true if one examines recent political machinations from Congress and conflicting signals expressed by successive presidential administrations. Although the U.S. Supreme Court has reaffirmed the Environmental Protection Agency's (EPA) authority to regulate green house gases (GHGs), the EPA has not determined an appropriate scientific basis for curtailing some of the most potent GHGs threatening our society--GHGs produced in massive quantities by factory farms known as Animal Feeding Operations (AFOs) and Concentrated Animal Feeding Operations (CAFOs).² Examining some of the political and scientific issues facing the EPA lends a perspective to the dilemma but does not excuse its lack of progress over the last ten years.

Overview of CAFOs

AFOs are agricultural operations where animals are kept and raised in confined situations for forty-five days or more in any twelve-month period.³ AFOs generally congregate animals, feed, manure, dead animals, and production operations on a small area of land.⁴ Rather than the animals grazing in pastures, feed is brought to them.⁵ CAFOs are AFOs that, depending on the number and type of animals, are classified by the EPA as large, medium, or small.⁶ These industrial facilities emanate significant quantities of air emissions including methane and nitrous oxide--two GHGs--as well as ammonia, hydrogen sulfide, particulate matter, and volatile organic compounds from animal housing structures and areas used to store and treat manure.⁷ Methane is over twenty times more effective in trapping heat in the atmosphere than carbon dioxide and these pollutants have scientifically been shown to have negative effects on human health and welfare and adverse effects on climate change and the environment.⁸

CAFOs represent a dominant and ever-increasing percentage of the nation's animal agriculture.⁹ It is estimated there are more than 20,000 CAFOs and 450,000 AFOs in the United States.¹⁰ Along with the growing affluence of CAFOs, the global demand for meat has multiplied in recent years and approximately ten billion animals are slaughtered for food each year in the United States. Unsurprisingly, global meat consumption is expected to double again by 2050.¹¹ One might think these increasingly ominous numbers would convince Congress and the EPA of the urgency to address CAFO air emissions for the purpose of securing the health and well-being of U.S. citizens and the environment; however, progress over the last ten years

has been lacking.

EPA Fails To Reach Consensus on Proper Methodology

In 2001, the EPA and the United States Department of Agriculture recognized the need for scientific methodologies for estimating air emissions from AFOs because a number of the pollutants emitted by AFOs were regulated by the Clean Air Act (CAA), the Comprehensive Environmental Response, Compensation and Liability Act (EPCRA), and the Emergency Planning and Community Right-to-Know Act (CERCLA).¹² The lack of a credible method for measuring AFO emissions hampered the EPA's ability to enforce the aforementioned requirements.¹³ The EPA began discussions with agricultural industry representatives, state and local government officials, environmental organizations, and citizen groups to facilitate an agreement that would develop these methodologies.¹⁴ After three years of discussions, the EPA announced the AFO Air Compliance Agreement ("Agreement") on January 21, 2005.¹⁵ The Agreement consisted of certain AFO's voluntarily taking part in a two-year nationwide monitoring study to evaluate their air emissions.¹⁶ A total of 2,568 agreements were approved representing 1,856 swine, 468 dairy, 204 egg laying, and 40 broiler chicken operations.¹⁷ As an incentive for AFOs to participate, the EPA agreed not to sue any AFOs participating in the study.¹⁸

An EPA press release dated August 22, 2006 confirmed that eighteen months following the study's conclusion, the EPA "will evaluate all data and publish emission-estimating methods for AFOs."¹⁹ The press release went further to state "[t]his approach will achieve compliance with environmental laws much faster than any other enforcement mechanism."²⁰

It seemed the EPA was on a clear path to developing methodologies that would lead to the regulation of GHG emissions from CAFOs. However, the EPA abruptly changed course on December 18, 2008, in the wake of the Bush administration's "midnight regulations" that promulgated a rule exempting all CAFOs from all CERCLA and EPCRA reporting requirements for the "releases of hazardous substances to the air from animal waste at farms."²¹ This rule was finalized despite Congress's unambiguous intent to provide the public with emissions information and to regulate CAFOs, as demonstrated by the plain language of the Acts and case law such as *Sierra Club, Inc. v. Tyson Foods, Inc.*, which held that chicken farms were not exempt from reporting requirements of CERCLA and EPCRA.²²

The unsurprising outrage from environmentalists over the 2008 exemption rule fueled over the years and was ignited once again on January 13, 2011, when the EPA released the data from the two-year study of AFO air emissions.²³ The EPA did not release an analysis of this data and did not establish any methodologies.²⁴ Instead, the EPA issued a Call for Information seeking data from other monitoring studies of AFO emissions at the request of the agriculture industry.²⁵ This press release also claimed that the "EPA will make draft methodologies available for public review and comment on a rolling basis, beginning in the spring of 2011."²⁶ No draft methodologies have been released to date.

The Environmental Integrity Project (EIP), a nonpartisan, nonprofit organization established by former EPA enforcement attorneys to advocate for more effective enforcement of environmental laws, analyzed the EPA's study results and found pollution levels at some AFOs exceed Clean Air Act standards, worker health recommendations, and emissions reporting thresholds.²⁷ The EIP findings reported: measured levels of particle pollution well above CAA health-based standards; eleven of fourteen CAFOs emitted more than 100 pounds (some produced thousands) of ammonia per day that can cause damage to the respiratory system and is life-threatening at high concentrations; and CAFOs released a comparable amount of hydrogen sulfide to oil refineries who are required to report such emissions.²⁸ The EIP report urges the EPA to rescind the 2008 rule that "arbitrarily exempted CAFOs" from reporting emissions.²⁹

Congressional Roadblocks

Even though the EPA study indicates CAFOs pollute on the same level and sometimes above large-scale industrial industries, the Republican-led House of Representatives has focused on the need to cut spending from President Obama's so-called "job killing" regulatory agenda that directly impacts the EPA's ability to regulate in the coming years.³⁰ This is evidenced by several amendments to H.R.1, Fiscal Year 2001 Appropriations Bill including: House Amendment 47 that reduces financing for the EPA by \$8.5 million; House Amendment 101 that would eliminate EPA funding to regulate GHG emissions from power plants and factories; and House Amendment 88 that would prohibit EPA financing of a law limiting pollution from cement plants.³¹ Additionally, Rep. Billy Long (R-MO) recently introduced a bill in the House that will ensure manure and

other animal emissions cannot be regulated under the CERCLA and deny use of CERCLA money to clean up animal emissions, preventing farmers from becoming liable for the cleanup of entire watersheds.³²

Against the political backdrop, a coalition of environmental groups has asked the EPA to regulate CAFO ammonia emissions by listing it as “criteria pollutant” and establish National Ambient Air Quality Standards (NAAQS) under the CAA.³³ If the EPA grants the petition, CAFOs emitting ammonia would be subject to construction-permitting requirements under the CAA’s Prevention of Significant Deterioration rules.³⁴

Ten Years and Counting

If the EPA’s uncertain commitment to regulating CAFO air emissions is any indication of its future conduct, it may be incumbent upon citizens to take matters into their own hands. As family farms shrink in numbers, unregulated CAFOs continue to pollute on-scale with other industrial polluters, and meat consumption continues to increase, what can everyone do while we sit around and play the waiting game? The answer is simple. Eat less meat. The official handbook for Live Earth states, “refusing meat” is “the single most effective thing you can do to reduce your carbon footprint.”³⁵ For the sake of the environment, we can no longer ignore what is on our plate.

Footnotes

^{a1} Michelle Buckley is a second-year student of the James E. Rogers College of Law and holds a bachelor’s degree in music performance from Arizona State University. She is an Associate Editor of the *Arizona Journal of Environmental Law & Policy*, Co-Director of the law school’s Student Animal Legal Defense Fund, and volunteer intern for Compassion Over Killing, a nonprofit animal advocacy organization.

¹ Joe Romm, *Exclusive: Berkeley Temperature Study Results “Confirm the Reality of Global Warming and Support in all Essential Respects the Historical Temperature Analysis of the NOAA, NASA, and Had CRU”*, *Climate Progress* (Mar. 20, 2011, 12:05 PM), <http://thinkprogress.org/romm/2011/03/20/207726/berkeley-temperature-study-results-global-warming/>.

² *See* *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011)(the United States Supreme Court reaffirmed the EPA’s authority to regulate GHGs; however, it also raised the specter of widening preemption doctrines to possibly preclude tort actions based on state tort common law theories); *Animal Feeding Operations Air Quality Compliance Agreement Information Sheet*, U.S. Environmental Protection Agency (Mar. 11, 2009), <http://www.epa.gov/compliance/resources/agreements/caa/cafo-infosht-0309.html>; *Livestock’s Long Shadow: Environmental Issues and Options*, Food and Agriculture Organization of the United Nations, 272 (2006)(report concluded worldwide livestock farms generate more GHG emissions than all the world’s cars, trains, planes, and boats combined).

³ *What is a CAFO*, U.S. Environmental Protection Agency (Apr. 15, 2011), <http://www.epa.gov/region7/water/cafo/index.htm>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Animal Feeding Operations Consent Agreement and Final Order*, 70 Fed. Reg. 4958-01 (Jan. 31, 2005).

⁸ *Methane*, U.S. Environmental Protection Agency (Apr. 1, 2011), <http://www.epa.gov/methane/>; *Coalition Asks EPA to Regulate Greenhouse Gases and Other Toxic Air Pollutants from Factory Farms*, Friends of the Earth (Sept. 21, 2009), <http://www.foe.org/coalition-asks-epa-regulate-greenhouse-gases-and-other-toxic-air-pollutants-factory-farms>.

- ⁹ Robbin Marks, *Cesspools of Shame: How Factory Farm Lagoons and Spray fields Threaten Environmental and Public Health*, Natural Resources Def. Council and The Clean Water Network (Jul. 2001), <http://www.nrdc.org/water/pollution/cesspools/cesspools.pdf>.
- ¹⁰ *CWA National Enforcement Initiatives*, U.S. Environmental Protection Agency (May 18, 2010), <http://www.epa.gov/oecaerth/civil/cwa/cwaenfpriority.html>; *Animal Feeding Operations*, U.S. Environmental Protection Agency (Jun. 30, 2011), <http://www.epa.gov/agriculture/anafoidx.html>.
- ¹¹ *Id.*
- ¹² *Animal Feeding Operations*, *supra* note 2.
- ¹³ *See Assn. of Irrigated Residents v. E.P.A.*, 494 F.3d 1027, 1029 (D.C. Cir. 2007).
- ¹⁴ *Animal Feeding Operations*, *supra* note 2.
- ¹⁵ *Id.*
- ¹⁶ *Id.*
- ¹⁷ *EPA Takes Important Step in Controlling Air Pollution from Farm Country Animal Feeding Operations*, U.S. Environmental Protection Agency (Aug. 22, 2006), <http://yosemite.epa.gov/opa/admpress.nsf/a8f952395381d3968525701c005e65b5/a3b628e23af32f68852571d200618474!OpenDocument>.
- ¹⁸ *Id.*
- ¹⁹ *Id.*
- ²⁰ *Id.*
- ²¹ CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms, 73 Fed. Reg. 76,948, 76,951 (Dec. 18, 2008).
- ²² *See Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F. Supp. 2d 693, 714 (W.D. Ky. 2003).
- ²³ *Emissions Data from Animal Feeding Operations Study Now Available/EPA Also Solicits Additional Information to Further Understand Emissions*, U.S. Environmental Protection Agency (Jan. 13, 2011), <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/dc13b657ff6203ce85257817005ed001!OpenDocument>.
- ²⁴ *Unregulated Factory Farm Air Pollution at Some Sites Now Dirtier than America's Most Polluted Cities*, Environmental Integrity Project (Mar. 9, 2011), http://www.environmentalintegrity.org/03_09_2011.php.

- 25 *Emissions Data*, *supra* note 23.
- 26 *Id.*
- 27 *Environmental Integrity Project*, The National Clean Water Network (Mar. 9, 2011), <http://www.cleanwaternetnetwork.org/members/orgs/environmental-integrity-project>.
- 28 *Id.*
- 29 *Id.*
- 30 Derek Willis and Elisabeth Goodridge, *Key Amendments to H.R.1, Fiscal Year 2011 Appropriations Bill*, The New York Times (Oct. 28, 2011), <http://politics.nytimes.com/congress/bills/112/hr1/amendments>.
- 31 *Id.*
- 32 Kevin Richert, *Simpson to EPA: Don't Meddle with Manure*, voices.idahostatesman.com (Sep. 29, 2011), http://voices.idahostatesman.com/2011/09/29/krichert/simpson_epa_dont_meddle_with_manure.
- 33 Dustin Till, *Regulation of Air Emissions from Animal Feeding Operations*, Marten Law (Apr. 27, 2011), <http://www.martenlaw.com/newsletter/20110427-af-air-emissions-regulations>.
- 34 *Id.*
- 35 David de Rothschild, *The Live Earth Global Warming Survival Handbook: 77 Essential Skills to Stop Climate Change* 66 (Rodale Books, 2007).