**To:** Michael Formica[formicam@nppc.org]
**From:** Jackson, Ryan
**Sent:** Sun 5/7/2017 9:23:29 PM
**Subject:** RE: CAFO Air Emissions Court Decision

What can we do to help?

**From:** Michael Formica [mailto:formicam@nppc.org]
**Sent:** Tuesday, May 2, 2017 11:03 PM
**To:** Jackson, Ryan <jackson.ryan@epa.gov>
**Subject:** CAFO Air Emissions Court Decision
**Importance:** High

Ryan

Any time this week to chat about the recent DC Circuit decision on reporting air emissions from CAFOs?

(see the story below, the courts opinion is attached)

Thanks

***Michael C. Formica***

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## AGRICULTURE

# Court rejects Bush rule exempting CAFOs from reporting

Amanda Reilly, E&E News reporter

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A federal court tossed out a 2008 U.S. EPA rule exempting animal feeding operations from reporting pollution discharges. Photo by United States Geological Survey, courtesy of Wikipedia.

In a win for environmentalists, a federal court today tossed a George W. Bush-era rule exempting animal feeding operations from certain pollution reporting requirements.

A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit agreed with green groups that lawmakers never intended to give U.S. EPA the authority to exclude those operations.

Congress didn't "give the agency carte blanche to ignore the statute whenever it decides the reporting requirements aren't worth the trouble," Judge Stephen Williams, a Reagan appointee, wrote for the court.

The court also found that manure storage at livestock operations poses more than a "theoretical" risk to public health.

At issue is a rule that EPA adopted in December 2008 exempting all animal feeding operations from reporting releases of hazardous air pollution from animal waste under the Comprehensive Environmental Response, Compensation and Liability Act.



Typically, facilities covered by CERCLA have to report discharges of pollutants above certain thresholds to a National Response Center.

EPA's rule also exempted all but large concentrated animal feeding operations, or CAFOs, from reporting emissions to local and state emergency officials under the Emergency Planning and Community Right-to-Know Act.

The Waterkeeper Alliance, the Humane Society of the United States and other environmental groups filed the lawsuit, arguing that the rule put citizens at risk of breathing harmful ammonia and hydrogen sulfide.

EPA, though, said that requiring producers to report under CERCLA would be burdensome and fruitless because "local response agencies are very unlikely to respond" to reports of pollution. The government also argued that EPA lacked information on how to go about measuring emissions.

EPA noted that the statutes contained unrelated reporting exceptions, including one for releases of engine exhaust. The agency argued that it should be afforded deference under the *Chevron* legal doctrine because there was ambiguity over whether it could carve out new exemptions that weren't specifically written into the statute.

But Williams rejected those arguments, writing that Congress didn't mean for EPA to fashion new exemptions.

"Read together the statutory provisions set forth a straightforward reporting requirement for any non-exempt release," Williams wrote.

"Conspicuously missing," he added, "is any language of delegation, such as that reports be 'as appropriate,' 'effective,' 'economical,' or made 'under circumstances to be determined by the EPA.'"

Williams also rejected EPA's arguments that the environmentalists didn't have legal standing to sue because they couldn't show a concrete harm tied to EPA's reporting exemption. He agreed with the environmental groups that they have been harmed because they have been deprived of information about livestock operations (*E&E News PM*, Dec. 12, 2016).

The judge also slammed EPA's arguments about the fruitless nature of reporting: "We find that those reports aren't nearly as useless as the EPA makes them out to be," he wrote.

While acknowledging that it's difficult to measure releases from animal operations because emissions don't come out of a smokestack, Williams wrote that releases can pose a serious risk.

"Anyone with a pet knows firsthand that raising animals means dealing with animal waste," he wrote. "But many of us may not realize that as the waste breaks down, it emits serious pollutants — most notably ammonia and hydrogen sulfide."

When manure that's sitting in storage is agitated for pumping, it can stir up emissions of the hazardous air pollutants, Williams said.

The risk from manure storage "isn't theoretical," Williams wrote. "People have become seriously ill and even died as a result of pit agitation."

Along with vacating the 2008 rule, the court also dismissed as moot a lawsuit by the National Pork Producers Council challenging EPA's decision to require large CAFOs to report under the right-to-know law.

## *Chevron* skepticism

Judges Janice Rogers Brown, a Republican appointee, and Sri Srinivasan, an Obama appointee, heard the case with Williams.

In a concurring opinion, Brown said she agreed with the court's finding but said she was skeptical about some of the recent debate in legal circles about the two-step analysis that courts typically undertake under the *Chevron* doctrine.

Under the first step, courts look to whether Congress has been silent or ambiguous on an issue. The second step requires an analysis of whether an agency has acted reasonably.

While she agreed that the D.C. Circuit did the proper *Chevron* analysis in the case at hand, Brown said she worried that some scholars advocate leaving out the first step and simply looking at whether a federal agency action is reasonable.

"Congress is out of the picture altogether," she wrote. "Agencies are free to experiment with various interpretations, and courts are free to avoid determining the meaning of statutes."

"It isn't fair. It isn't nice," Brown wrote, quoting the Frank Sinatra song "Luck Be A Lady."

Leaving out the first step, she said, would implicate the separation of powers concerns that Justice Neil Gorsuch — then a judge on the 10th U.S. Circuit Court of Appeals — raised in an August 2016 concurring opinion. Gorsuch, who was sworn in for a seat on the Supreme Court yesterday, has questioned whether *Chevron* is still a valid legal doctrine.

Collapsing the two-step analysis, Brown said, was "yet another reason to question Chevron's consistency" with judges' duty to "say what the law is."

Click here to read the court's opinion