

## Agriculture, Manure and Superfund: Getting the Facts Straight

**Legislation has been proposed to exempt livestock manure from the definition of “hazardous substance” under Superfund. In arguing for this special liability loophole, proponents have raised the specter of draconian action against family farmers and, in many cases, have confused the debate with erroneous assertions and misleading implications. This information addresses some of the many myths that have emerged.**

***Myth: Courts and attorneys have misread the Federal Superfund law and are now arguing that manure is a hazardous waste, contrary to the law’s original intentions.***

**Fact:** Congress did consider the use of fertilizers when it first debated Superfund.

While Congress did not exclude manure from the definition of “hazardous substance,” it did exclude the “normal application of fertilizer” from the law’s definition of “release.” The term “normal field application,” according to the legislative history, 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 concentration or amounts that are beneficial to crops.”

In addition, Congress specifically provided that releases covered by and in compliance with a “federally issued permit,” such as a Clean Water Act permit, would have a defense to Superfund liability.

No one has argued that manure itself is “hazardous.” The argument has been made that phosphorus – which can reach polluting levels due to over-application or improper handling of manure – meets the Superfund definition of “hazardous substance.”

This terminology is important because it allows EPA, the states, local and tribal governments and other federal agencies to respond to major pollution problems involving these “hazardous substances” as well as other “pollutants or contaminants,” taking action to stop the polluting activity or seeking recovery of cleanup costs. (The terminology is not the same as “hazardous waste,” which has a specific meaning under the federal Resource Conservation and Recovery Act. See below.)

***Myth: A rash of Superfund lawsuits threatens agricultural operations of all types and sizes.***

**Fact:** In the 25-year history of Superfund, there have been only 3 Superfund lawsuits against animal feeding operations to address manure-related contamination.

- City of Tulsa v Tyson Foods targeted several large chicken operations and attempted to recover costs for water treatment incurred by the City and the Tulsa water utility. The case was settled in 2003.
- In 2004, the City of Waco sued 14 dairy operations for water quality problems with Lake Waco, the City’s drinking water supply. Settlements were reached with all 14 defendants.

- In 2005, the State of Oklahoma sued large-scale poultry producers for redress of water quality problems in the Illinois River watershed. This case is still pending.

These lawsuits involved large-scale animal operations or operations that had a history of problems with manure management. In each case, the lawsuit followed long controversy and attempted negotiations regarding waste management practices. Lawsuits were filed after previous negotiations failed and water quality conditions worsened. Settlements involved plans for improved manure management, not penalties.

**Myth: The result of lawsuits in Texas and Oklahoma could be the virtual outlawing of manure-based fertilizer in the United States.**

**Fact:** There is no move to ban manure-based fertilizers. The lawsuits considered not whether the use of manure as fertilizer was acceptable, but whether the methods of managing manure in those particular cases were outside of the realm of “normal fertilizer application.” Farm operations that use manure as fertilizer and do so in a responsible fashion, with application at rates that are beneficial to crops, are already excluded from Superfund cleanup liabilities.

**Myth: Any farm field where livestock are put out to pasture could become a Superfund hazardous waste site. Virtually every farm operation in the United States could be affected.**

**Fact:** No farm has ever been named to EPA’s National Priority List (NPL) – the worst contamination cases in the Nation – due to problems with manure-associated pollution. And none is likely to be nominated or listed. For a site to be named to the NPL, it must be assessed and assigned a hazard score, and only sites with scores above a certain level are eligible for the listing. In addition, for over 10 years, EPA has followed a practice of listing only those sites which the affected Governor agrees should be made federal priorities. A decision to list or not list a site on the National Priorities List is a discretionary authority of the President’s, and the President cannot be compelled, by lawsuit, to list a particular site.<sup>1</sup>

**Myth: Farmers could be forced to follow “hazardous waste” tracking requirements for manure. They could be forced to landfill or incinerate manure wastes.**

**Fact:** Hazardous waste management is governed by the Resource Conservation and Recovery Act (RCRA), not Superfund, and the term “hazardous waste” has specific, legal meaning under that law. It is not synonymous with the Superfund term “hazardous substance.” Manure is not considered a hazardous waste under RCRA. No hazardous waste requirements for labeling, tracking, storage, treatment or disposal would apply to manure, regardless of any ruling on cleanup under Superfund.<sup>2</sup>

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<sup>1</sup> About 30 farms have been named to the NPL over the years, and all of those listings were due to disposal or storage of industrial and municipal solid wastes or hazardous chemicals. None involved application or management of manure.

<sup>2</sup> While many materials – disposed of or managed improperly – would meet the Superfund definition of “hazardous substance” or “pollutant or contaminant,” a much smaller universe of material meets the RCRA definition of “hazardous waste.” To be considered a hazardous waste under RCRA, a material must be ignitable, corrosive, reactive or toxic based on specific tests for high concentrations of toxic chemicals. A material may also be a “hazardous waste” under RCRA, if EPA has studied a particular industrial process and declared the wastes created by that process, such as electroplating sludge as “listed” hazardous waste. RCRA specifies certain management standards for storage and disposal of these wastes, and requires labeling and tracking of these wastes as they are transported.

**Myth: Farmers may be required to follow strict cleanup rules spelled out in the Superfund law.**

**Fact:** Even if Superfund authorities were used to address serious pollution problems at specific agricultural operations, the law does not dictate specific cleanup actions. In fact, the settlements in the Tulsa and Waco lawsuits did not involve agriculture operations in cleanup of past pollution. The settlements required a range of prospective controls on future manure handling, including restrictions on application in certain sensitive areas, requirements for soil testing and appropriate application rates. Incineration, landfilling and hazardous waste labeling were not involved.

**Myth: Farmers could be potentially exposed to Superfund penalties.**

**Fact:** Superfund cleanup addresses restoration or payment for damages. No penalties are imposed in cost recoveries. (Penalties can be imposed for failure to report certain toxic releases. See discussion below.)

**Myth: Manure will be subject to a Superfund tax.**

**Fact:** Today, there are no Superfund taxes whatsoever. The initial Superfund trust fund was created with fees on certain chemical feedstocks and petroleum; the funds were used for emergency response and cleanup at highly polluted sites. The law includes a specific list of feedstock chemicals for taxation; only those chemicals specified were taxed. Manure is not on the list and has never been proposed for that list. The Superfund taxes expired in 1995, and the taxing authorities have not been renewed.

**Myth: Opponents of animal agriculture could use Superfund to shut down operations.**

**Fact:** The only parties that can bring cost-recovery suits under Superfund are EPA, affected state and tribal governments and other public trustees of natural resources or those directly affected by pollution damage, such as the affected water utilities in Texas and Oklahoma, who themselves take major action to clean up the problem. Citizen suits are not authorized for emergency action, for Superfund priority listings or for cost recoveries.

**Myth: American agriculture is effectively regulated by tough federal and state environmental laws, regulations and permitting.**

**Fact:** Neither the Clean Air Act nor the Clean Water Act contain provisions authorizing government agencies to seek recovery of damages for injury to, or destruction of, natural resources. Superfund is the only federal statute that allows for State and local governments to recover cleanup costs from parties responsible for contamination of local drinking water supplies.

In addition, though the federal Clean Water Act theoretically covers agriculture-related water quality problems as well as other industrial pollution, the law's provisions have not been vigorously enforced with respect to confined feeding operations. The Act has long required large animal feeding operations to obtain and abide by discharge permits that control the quality and volume of pollutant discharges, but as EPA has itself recognized, only a small percentage of operations have actually obtained required permits.

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A similar situation occurs with respect to air. Large feeding operations can release a range of air pollutants, and a 2003 study by the National Academy of Sciences found that animal feeding operations are the primary source of ammonia emissions across the country. Ammonia is not a regulated pollutant under the Clean Air Act, however, and there are no specific federal regulations under the Clean Air Act that limit or control emissions of hydrogen sulfide, particulate matter, greenhouse gases, volatile organic compounds, or nitrogen oxides from these sources.

***Myth: Superfund imposes burdensome reporting obligations on small farms and animal operations.***

**Fact:** Reporting obligations are not unduly burdensome, and in many cases, will involve only three phone calls, submission of one report and a one-time only confirmation of the required information.

Superfund and the Emergency Planning and Community Right-To-Know Act (EPCRA) include reporting requirements for facilities that release certain toxic chemicals in volumes over a set limit. The reporting requirements are not directed to any particular type of business or activity, but focus on specific toxic chemicals. Two chemicals covered under these reporting requirements that may be released from Concentrated Animal Feeding Operations are ammonia ( $\text{NH}_3$ ) and hydrogen sulfide ( $\text{H}_2\text{S}$ ). The amount of release that may trigger a reporting requirement is 100 lbs/day.<sup>3</sup>

***Myth: It is ludicrous to apply reporting requirements meant to address toxic wastes and releases, such as those of Love Canal or Bhopal, India, to farm operations.***

**Fact:** Releases from large manure-handling operations can be dangerous, and there is substantial data linking these releases to occupational hazards. Peer-reviewed studies also indicate possible links to community public health problems.

The two key gases associated with confined agricultural feeding operations that must be reported under CERCLA and EPCRA are ammonia and hydrogen sulfide. Ammonia can cause severe damage to eyes, throat and lungs, and hydrogen sulfide is a highly toxic gas associated with numerous fatal accidents related to manure storage.

Human deaths associated with manure pit accidents have frequently involved more than one fatality, because would-be rescuers enter manure storage areas without adequate ventilation or proper safety equipment. Safety precautions for potential emergency responders as well as investigations into possible linkages of such emissions with health impacts for neighboring communities, dictate continued emissions reporting.

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<sup>3</sup> Superfund or CERCLA reports are made to the US Coast Guard National Response Center by calling an established 800 number. The Coast Guard then provides an identification number that allows the reporter to mail, fax or file reports online. EPCRA requires reports to the State Emergency Response Centers (SERC) and Local Emergency Response Centers (LERC). Again, the reporting process is initiated with a phone call. For releases that are continuous or routine and anticipated, as ammonia and hydrogen sulfide emissions may be from an agricultural operation, the rules allow for “continuous release” reporting. After the first yearly report, additional reports need not be submitted, but records of emissions should be kept by the agricultural operation.