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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Don't Waste Arizona Incorporated,

No. CV-16-03319-PHX-GMS

10 Plaintiff,

ORDER

11 v.

12 Hickman's Egg Ranch Incorporated,

13 Defendant.
14

15 Pending before the Court are Plaintiff's Motion for Clarification, (Doc. 115), the
16 parties' briefs concerning the retroactive application of the FARM Act, (Docs. 119, 120),
17 and the supplemental briefing concerning the reporting of emissions from animal waste
18 under EPCRA, (Docs. 126, 127).

19 **BACKGROUND**

20 Defendant Hickman's Egg Ranch Inc. operates two large chicken egg facilities,
21 each emitting more than one thousand pounds of ammonia from chicken manure per day.
22 (Doc. 61, Exh. 4). Plaintiff Don't Waste Arizona Inc. ("DWA") is an environmental non-
23 profit with members who live in the vicinity of Hickman's facilities. (Doc. 1). DWA
24 brought this suit against Hickman's based on its failure to report ammonia emissions in
25 violation of the Emergency Planning and Community Right-to-Know Act. *Id.* In
26 preparation for a bench trial, the parties asked the Court to clarify various legal questions.
27 First, the Court addresses whether EPCRA requires reports of emissions from animal
28 waste. Second, the Court addresses relevant burdens of proof.

1 **DISCUSSION**

2 **I. Defendant’s Reporting Requirement Under EPCRA**

3 **A. EPCRA Background**

4 The Emergency Planning and Community Right-to-Know Act (“EPCRA”)
5 maintains “a framework of state, regional, and local agencies designed to inform the
6 public about the presence of hazardous and toxic chemicals, and provide for emergency
7 response in the event of health-threatening release[s].” *Steel Co. v. Citizens for a Better*
8 *Environment*, 523 U.S. 83, 86 (1998); 42 U.S.C. §§ 11001–11050. EPCRA requires
9 facilities which produce, use, or store a hazardous chemical to report any large-scale
10 release of certain hazardous chemicals to the state emergency response commission
11 (“SERC”) and the local emergency planning commission (“LEPC”). 42 U.S.C. § 11004.
12 Any person may commence a lawsuit against an owner or operator for failure to submit a
13 follow-up emergency notice. 42 U.S.C. § 11046(a)(1)(A)(i).

14 EPCRA requires facilities to report the release of a hazardous chemical under
15 three circumstances, listed in three separate subsections. 42 U.S.C. § 11004(a).¹ Under
16 the first and third subsections, a facility must report a release if “such release requires a
17 notification under section 103(a) of the Comprehensive Environmental Response,
18 Compensation and Liability Act.”² 42 U.S.C. § 11004(a)(1); *see also* 42 U.S.C. §
19 11004(a)(3). Under the second subsection, a facility may still be required to report a
20 release of an EPCRA hazardous chemical (even if notification under CERCLA is not
21 required) if the release is (A) not a federally permitted release, (B) exceeds a certain
22 amount determined by regulation, and (C) “occurs in a manner which would require

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24 ¹ This section of the United States Code is based on section 304 of the public law
enacting EPCRA, and many other publications refer to it as “EPCRA section 304.”

25 ² Six years prior to implementing EPCRA, Congress enacted the Comprehensive
26 Environmental Response, Compensation and Liability Act (“CERCLA”), which provides
27 for the liability, compensation, cleanup, and emergency response when hazardous
28 substances are released into the environment. *Chubb Customs Ins. Co. v. Space*
Systems/Loral, Inc., 710 F.3d 946, 956 (9th Cir. 2013) (citations omitted). Although
CERCLA and EPCRA have different purposes, both concern the release of toxic and
hazardous chemicals, and Congress explicitly based many EPCRA provisions on
CERCLA.

1 notification under section 103(a) of CERCLA.” 42 U.S.C. § 11004(a)(2).
2 Notwithstanding any of the three scenarios that might trigger the EPCRA reporting
3 requirement, the EPCRA statutory definition of “hazardous chemical” explicitly exempts
4 “[a]ny substance to the extent it is used in routine agricultural operations or is a fertilizer
5 held for sale by a retailer to the ultimate customer.” 42 U.S.C. § 11021(e)(5).

6 In 2008, the EPA updated federal regulations concerning the reporting obligation
7 in CERCLA section 103(a). The 2008 rule generally exempted farms from reporting
8 releases of hazardous chemicals from animal waste under CERCLA, but the regulation
9 carved out large, concentrated animal feeding operations, known as “CAFOs,” and
10 required them to report threshold releases of hazardous chemicals. 73 Fed. Reg. 76948,
11 76950–53 (Dec. 18, 2008).³ However, the 2008 Rule pertained only to the CERCLA
12 section 103(a) reporting requirements (and the associated EPCRA reporting requirements
13 based on CERCLA section 103(a)). The EPA explicitly did not define “routine
14 agricultural operations” in the 2008 rule. 73 Fed. Reg. 76948, 76951. The final rule did
15 not reference the EPCRA definition of hazardous chemical in 42 U.S.C. § 11021(e), and
16 it explicitly stated that the rule was not based on the EPCRA exception for routine
17 agricultural operations, explaining, “The Agency is not, in this rule, defining . . . routine
18 agricultural operations.” *Id.*

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21 ³ Public comment supported the EPA’s decision to treat CAFOs differently than
22 other farms.

23 [T]he Agency did receive comments from the public, as well as from
24 environmental groups, a coalition of family farmers and others expressing
25 the desire for information regarding emissions of hazardous substances to
26 the air from large animal feeding operations. Accordingly, the EPA decided
27 to bifurcate the administrative reporting exemption for EPCRA section 304
28 so as to retain certain emergency notifications for large CAFOs. In
addition, we sought comment on possible alternative definitions for farm,
indicating EPA might take factors such as size into account. Although not
specifically addressing the definition of a farm, we did receive many
comments asserting that very large farms are no different than other
industrial sources and should be regulated as such. We believe that our
threshold approach addresses those concerns.

73 Fed. Reg. 76948, 76952 (Dec. 18, 2008).

1 In 2017, the District of Columbia Circuit considered the validity of the 2008 rule.
2 *Waterkeeper Alliance v. Environmental Protection Agency*, 853 F.3d 527 (D.C. Cir.
3 2017). The D.C. Circuit vacated the 2008 final rule because it could not “be justified
4 either as a reasonable interpretation of any statutory ambiguity or implementation of a *de*
5 *minimis* exception.” *Id.* at 537–38. The *vacatur* of the 2008 final rule thus eliminated the
6 CERCLA section 103(a) reporting exemption for animal waste on farms, and it also
7 eliminated the regulations concerning the CAFO carve out. *Id.* at 538.

8 In March 2018, Congress addressed the D.C. Circuit’s *vacatur* of the 2008 Final
9 Rule and passed legislation to reinsert the exemption relieving farms from reporting
10 releases from animal waste under CERCLA section 103(a). Consolidated Appropriations
11 Act of 2018 Title XI, Pub. L. 115-141, 132 Stat. 348 (2018). Known as the “Fair
12 Agricultural Reporting Method Act” or “FARM Act,” it states, “Section 103 of
13 [CERCLA] is amended by . . . inserting the following: . . . In general.—This section shall
14 not apply to—. . . (B) air emissions from animal waste (including decomposing animal
15 waste) at a farm.” The FARM Act further defines animal waste as feces, urine, or other
16 excrement from any form of livestock, poultry, or fish, and it defines farm as a site or
17 area that is used for crop production or the raising or selling of animals.

18 On August 1, 2018, the EPA published a new rule in response to the FARM Act
19 and the D.C. Circuit’s *vacatur* of the 2008 rule. 83 Fed. Reg. 37444 (Aug. 1, 2018). The
20 new rule noted the removal of any provisions in the 2008 final rule. *Id.* at 37445. It then
21 reinserted the CERCLA section 103 exemption for reporting air emissions from animal
22 waste. *Id.* at 37445.

23 **B. Validity of 2008 Final Rule**

24 The court finds persuasive and adopts the D.C. Circuit’s reasoning in
25 *Waterkeeper Alliance v. Environmental Protection Agency*, 853 F.3d 527 (D.C. Cir.
26 2017) and acknowledges the invalidity of the 2008 Final Rule “[b]ecause the EPA’s
27 action . . . can’t be justified either as a reasonable interpretation of any statutory
28 ambiguity or implementation of a *de minimis* exception” *Waterkeeper Alliance v.*

1 *Environmental Protection Agency*, 853 F.3d 527 (D.C. Cir. 2017). In the suit, the
2 National Pork Producers Council “argue[d] that the *Final Rule’s* CAFO carve-out can’t
3 stand because it was based on a factor . . . which the Council argues is irrelevant to the
4 statutory purpose” *Id.* at 532. The D.C. Circuit explained that the *vacatur* of the
5 rule “necessarily moots the Pork Producers’ challenge to the CAFO carve-out” and it
6 dismissed their petition. *Id.* at 538. Although the FARM Act reinstated the portion of the
7 vacated rule pertaining to the CERCLA section 103 exemption for reporting air emissions
8 from animal waste, the FARM Act did not reinstate any parts of the 2008 final rule
9 pertaining to CAFOs and their reporting obligation under EPCRA. Therefore, regardless
10 of the retroactivity of the FARM Act, the regulation requiring CAFOs to report threshold
11 releases of hazardous emissions from animal waste is invalid and thus does not apply to
12 the present case.

13 **C. Retroactivity of the FARM Act**

14 Defendant Hickman’s argues that the amendment in the recent FARM Act should
15 retroactively apply to this lawsuit. (Doc. 120). Whether a new law should retroactively
16 apply to events that transpired prior to its passage requires analysis pursuant to *Landgraf*
17 *v. USI Film Prods.*, 511 U.S 244 (1994).

18 The first step in the *Landgraf* analysis considers whether the statute contains an
19 express statement on its retroactivity. *Id.* at 280. The FARM Act contains no language
20 about its temporal scope.

21 The second step examines whether the amendment’s application would have a
22 retroactive effect on the facts in the present case. *Id.* at 280. A statute has retroactive
23 effect if it would “impair rights a party possessed when he acted, increase a party’s
24 liability for past conduct, or impose new duties with respect to transactions already
25 completed.” *Id.* “If the statute would operate retroactively, our traditional presumption
26 teaches that it does not govern” *Id.* at 280. The Ninth Circuit has previously held
27 that an amendment that “extinguish[es] Defendants’ liability, . . . thus depriving Plaintiffs
28 of a pre-existing cause of action” would have retroactive effect. *Beaver v. Tarsadia*

1 *Hotels*, 816 F.3d 1170, 1187–88 (9th Cir. 2016). If the FARM Act applied to the facts in
2 this case, then Hickman’s would not be required to report releases under EPCRA as
3 codified in 42 U.S.C. § 11004(a). Hickman’s would be exempt under subsection one and
4 three because farms need not report emissions from animal waste under CERCLA section
5 103, and Hickman’s would not be required to report under subsection two because
6 CERCLA does not require reports for continuous releases (like those from animal waste),
7 42 U.S.C. § 9603(f), and thus the release would not “occur[] in a manner” which would
8 require notification under CERCLA. 42 U.S.C. § 11004(a)(2). Therefore, the FARM
9 Act would have retroactive effect because it would deprive DWA of a pre-existing cause
10 of action.

11 When a statute is determined to have retroactive effect, the final step of the
12 *Landgraf* analysis assesses whether “clear congressional intent” nonetheless favors
13 retroactive application. *See Landgraf*, 511 U.S. at 280. Courts employ a presumption
14 that Congress did not intend for legislation to operate retroactively. *Id.* Not only does
15 the FARM Act lack an express statement of retroactivity, nothing in the legislation
16 otherwise suggests an intent for it to apply retroactively. Therefore, the Court finds that
17 the FARM Act does not retroactively apply to this case.

18 **D. Exemption for “routine agricultural operations”**

19 Since its inception in 1986, EPCRA has exempted “[a]ny substance to the extent it
20 is used in routine agricultural operations” from its statutory definition of “hazardous
21 chemical.” 42 U.S.C. § 11021(e)(5). The parties present three instances where the EPA
22 has referenced the meaning of “routine agricultural operations” since 1986: first, in the
23 1987 final rule; second, in the 2008 final rule; and third, in recent guidance documents.

24 **1. Chevron Deference for 1987 Rule**

25 “When a court reviews an agency’s construction of the statute which it
26 administers,” it first asks “whether Congress has directly spoken to the precise question at
27 issue.” *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837,
28 842 (1984). Second, if the intent of Congress is not clear and the statute is silent or

1 ambiguous with respect to the specific issue, “the question for the court is whether the
2 agency’s answer is based on a permissible construction of the statute.” *Id.* at 843. Courts
3 should give considerable weight to an agency’s construction of a statutory scheme. *Id.* at
4 844.

5 In 1987, the EPA issued a final rule concerning EPCRA regulations and addressed
6 the “routine agricultural operations” definition in the statute. The statutory language in
7 EPCRA clearly exempts facilities from reporting releases from “routine agricultural
8 operations,” but the statute does not clearly identify which activities qualify as a routine
9 agricultural operation. An overarching purpose of EPCRA is to support emergency
10 planning efforts and to provide information concerning potential chemical hazards
11 present in the community. *See* Pub.L. 99-499, Title III, Oct. 17, 1986, 100 Stat. 1736; 52
12 Fed. Reg. 38344 (Oct. 15, 1987). In the 1987 final rule, the EPA stated that it believed
13 that the exemption was “designed to eliminate reporting of fertilizers, pesticides, and
14 other chemical substances when applied, administered, or otherwise used as part of
15 routine agricultural activities.” 52 Fed. Reg. 38344, 38349 (Oct. 15, 1987).
16 Additionally, the EPA stated that “[t]he exemption for substances used in routine
17 agricultural operations applies only to substances stored or used by the agricultural user.”
18 *Id.*⁴ This rule aligns with the exemption to relieve routine agricultural operations from
19 reporting while allowing the community to plan for emergency releases of hazardous
20 chemicals. Therefore, the Court gives considerable weight to the 1987 rule. However,
21 routine agricultural operations might also be read to include the necessary incidents of
22 farm animal maintenance and the 1987 rule did not reference animal waste and does not
23 conclusively indicate whether hazardous emissions from animal waste would qualify for

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25 ⁴ In *Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F.Supp.2d 693, 713–14 (W.D.
26 Kent. 2003), Tyson’s Chicken argued that they were exempt from reporting emissions
27 from their large chicken facilities because of the “routine agricultural operations” clause
28 in EPCRA. The Western District of Kentucky referenced EPA’s language in the 1987
Final Rule and concluded that the routine agricultural operations exemption did not apply
to Tyson Foods’ large feeding facilities. It stated, “Defendants do not store gaseous
ammonia in their chicken houses for agricultural use [and] do not use this ammonia in an
agricultural operation. Instead . . . the Defendants try to get rid of it because it is harmful
to the chickens.” *Id.*

1 the exemption.

2 **2. 2008 Final Rule**

3 The vacated 2008 final rule referenced reporting requirements from animal waste,
4 but the EPA explicitly did not define “routine agricultural operations” in the final rule.
5 73 Fed. Reg. 76948, 76951 (Dec. 18, 2008) (“The scope of this rule is intended to include
6 all hazardous substances that may be emitted to the air from animal waste at farms that
7 would otherwise be reportable under those sections. The Agency is not, in this rule,
8 defining facility, normal application of fertilizer, or routine agricultural operations.”).

9 **3. 2018 Guidance Document**

10 Soon after the passage of the FARM Act, the EPA published an interpretation of
11 “routine agricultural operations.” Env’tl. Prot. Agency, “How do the reporting
12 requirements in EPCRA Section 304 apply to farms engaged in ‘routine agricultural
13 operations’?” (Apr. 27, 2018), [https://www.epa.gov/sites/production/files/2017-](https://www.epa.gov/sites/production/files/2017-10/documents/web_document_placeholder.pdf)
14 [10/documents/web_document_placeholder.pdf](https://www.epa.gov/sites/production/files/2017-10/documents/web_document_placeholder.pdf). The publication explains that “the
15 feeding and breeding of animals, as well as the expected handling and storage of the
16 animals’ waste, would be considered a routine agricultural operation.” *Id.*⁵

17 Not all executive decisions warrant *Chevron* deference. The “overwhelming
18 number” of Supreme Court cases applying *Chevron* deference “have reviewed the fruits
19 of notice-and-comment rulemaking or formal adjudication.” *U.S. v. Mead Corp.*, 533
20 U.S. 218, 230 (2001). “Interpretations such as those in opinion letters—like
21 interpretations contained in policy statements, agency manuals, and enforcement
22 guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”
23 *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (citing *Reno v. Koray*, 515 U.S.

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25 ⁵ DWA argues that this 2018 guidance document should not apply retroactively to
26 Hickman’s alleged misconduct. (Doc. 128 at 4–5). Courts also follow *Landgraf* analysis
27 to determine if a regulation should apply retroactively. *Sacks v. S.E.C.*, 648 F.3d 945,
28 950–52 (9th Cir. 2011). However, no *Landgraf* analysis is required if the regulation
“merely serves to clarify rather than change the substance of existing law.” *Beaver v.*
Tarsadia Hotels, 816 F.3d 1170, 1186 (9th Cir. 2016). The EPA guidance document
clarifies the EPCRA exemption for routine agricultural operations and it does not change
the substance of the law. The Court therefore considers the EPA guidance in its decision.

1 50, 61 (1995) (internal agency guideline, which is not “subject to the rigors of the
2 Administrative Procedur[e] Act, including public notice and comment,” entitled only to
3 “some deference” (internal quotation marks omitted))). When executive guidance does
4 not warrant *Chevron* deference, as it appears not to in this case, courts should still give
5 some weight to agency interpretations depending on the thoroughness of its
6 consideration, validity of its reasoning, consistency with earlier and later
7 pronouncements, and its general power to persuade. *Mead*, 533 U.S. at 234–35 (citing
8 *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

9 Thus at trial the Court invites the parties to address both the validity of the
10 reasoning of the EPA’s interpretation that routine agricultural operation would include
11 the handling and storage of animal waste, and the meaning of that term under the statute.
12 To the extent that EPCRA’s statutory purpose is to respond to emergency emissions, the
13 routine ammonia emissions from animal waste from existing facilities may not typically
14 warrant an emergency response, or be the expected focus of state and local emergency
15 planning commissions. But the Court will allow the parties to address this issue before
16 ruling.

17 **II. Motion for Clarification**

18 DWA also filed a motion for clarification concerning the burden of proof for
19 statutory exceptions and the order of trial. (Doc. 115). A party seeking the benefit of an
20 exception bears the burden of proving that the exception applies. *E.E.O.C. v.*
21 *Kamehameha Schools/Bishop Estate*, 990 F.3d 458, 460 (9th Cir. 1993); *U.S. v. Freter*,
22 31 F.3d 783, 788 (9th Cir. 1994) (quoting *United States v. Green*, 962 F.2d 938, 941 (9th
23 Cir. 1992) (“The well-established rule . . . that a defendant who relies upon an exception
24 to a statute made by a proviso or distinct clause, whether in the same section of the statute
25 or elsewhere, has the burden of establishing and showing that he comes within the
26 exception.”)). An exception is an affirmative defense if the exception is “one that does
27 not serve to negative any facts of the crime.” *U.S. v. Freter*, 31 F.3d 783, 788 (9th Cir.
28 1994) (internal quotations omitted). Therefore, where “a statutory prohibition is broad

1 and an exception is narrow, it is more probable that the exception is an affirmative
2 defense.” *Id.* In *U.S. v. Freter*, the Court considered whether the “federally permitted
3 release” aspect of CERCLA was an affirmative defense. The applicable section stated,
4 “[a]ny person . . . in charge of a facility from which hazardous substance is released,
5 *other than a federally permitted release*, . . . who fails to notify immediately the
6 appropriate agency . . . shall, upon conviction, be fined . . . or imprisoned . . .” 42 U.S.C.
7 § 9603(b)(3) (emphasis added). The Ninth Circuit determined that the statutory
8 exception was an affirmative defense because “releases qualifying as ‘federally
9 permitted’ fall within both the broad definition of prohibited releases and the more
10 narrow exception of permitted releases. Proof that a release is federally permitted
11 therefore does not negate the government’s evidence that a release did occur.” *U.S. v.*
12 *Freter*, 31 F.3d at 788.

13 Hickman’s claims the benefit of two of EPCRA’s statutory provisions. First,
14 Hickman’s claims the benefit of 42 U.S.C. § 11004(a)(4), which states, “Exempted
15 releases: This section does not apply to any release which results in exposure to persons
16 solely within the site or sites on which a facility is located.” Although worded as an
17 exempted release, it is not an exception that would qualify as an affirmative defense. The
18 statute describes which releases require reporting under EPCRA, and which releases do
19 not. Therefore, a “release which results in exposure to persons solely within the site”
20 would not fall within the broader definition of a prohibited release under EPCRA, and
21 proof that a release was maintained onsite would negate contrary evidence that a release
22 occurred offsite.

23 Next, Hickman’s claims the benefit of 42 U.S.C. § 11021(e)(5), which states
24 “‘hazardous chemical’ has the meaning given such term by [federal regulations], except
25 that such term does not include . . . [a]ny substance to the extent it is used in routine
26 agricultural operations” This exception qualifies as an affirmative defense that
27 Hickman’s has the burden to prove. Ammonia emissions from animal waste could
28 generally qualify under the broad prohibition against chemical releases and the narrow

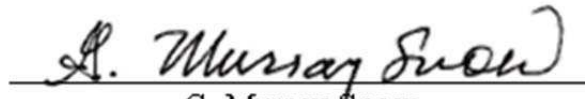
1 exception for routine agricultural operations, and evidence that a release came from
2 animal waste would not negate evidence that an otherwise prohibited release occurred.
3 Therefore, Hickman's bears the burden to prove whether the "routine agricultural
4 exception" applies. However, because DWA has the burden to prove that a qualifying
5 release occurred, it will present first at trial.

6 **CONCLUSION**

7 As described above, the Court concludes that the expected handling and storage of
8 animal waste would be considered a routine agricultural operation under 42 U.S.C.
9 § 11021(e)(5). Further, the Court grants Plaintiff's motion for clarification.

10 **IT IS HEREBY ORDERED** that Plaintiff's Motion for Clarification (Doc. 115)
11 is **GRANTED**. DWA has the burden to prove that a qualifying release occurred and it
12 will present first at trial. Hickman's bears the burden of proving whether the "routine
13 argument exception" applies.

14 Dated this 25th day of September, 2018.

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18 G. Murray Snow
19 Chief United States District Judge
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