The Agriculture Air Quality Task Force (AAQTF) has reviewed Clean Air Act issues impacting the diverse character of agriculture. The AAQTF believes there is a need for USDA and EPA to review, characterize and define how emissions sources from agriculture should be addressed. The following definitions constitute a starting point for discussions. These definitions have been drafted, amended and approved by the AAQTF Policy Committee. These definitions were also voted on and approved by the AAQTF on March 2, 2006.

DEFINITION 1

The term "farm/farming" operation means (1) A farming operation comprised of non-contiguous or non-adjacent agricultural lands shall not be considered a single "farm facility" notwithstanding such parcels of land are under common ownership or control; (2) Nonadjacent/noncontiguous fields are separate facilities, under the control of the farmer and constituting a cohesive management unit, where the farmer provides active personal management of the operation, are separate "facilities" and emissions shall not be aggregated. For a farming operation comprised of non-contiguous or non-adjacent lands, aggregate emissions shall be determined separately for each field or parcel of such agricultural lands; and (3) buildings and operations on agricultural land, that are separate, not connected, and distinct units are separate "facilities" and the emissions generated shall not be aggregated.

There is confusion over what constitutes a facility which is our first definition. EPA has never defined an agricultural operation for purposes of the Clean Air Act (CAA). Agriculture is not a "stationary source" like an industrial facility with specific point source emissions that can be characterized, sampled, controlled, and monitored -- agricultural emissions tend to be relatively small, disperse, and many times natural or biologic and fugitive. Is it one building, several buildings, one farm or several parcels of land which constitute a facility from which air emissions will be measured? Agricultural field operations/production agriculture may cover thousands of acres that involve different crops, cultural practices, soil types, meteorological conditions, and processes and emission characteristics. Confined animal operations typically involve distinct structures/areas with multiple emission points on one piece of property. Farming operations are not usually one fixed location but can be a collection of fields (each may have a separate USDA, FSA farm serial number or equivalent unit), whether contiguous or noncontiguous.

There are several courts which have issued rulings over what constitutes a facility or operation for the purpose of measuring air emissions. One case ruled a facility or farming operation under CERCLA defines facility to be limited to each individual farm building(s) and lagoon(s). This court ruled that the term facility did not apply to the entire hog operation and to all of the buildings as a whole. *Sierra Club v. Seaboard Farms Inc*, No. CIV-00-997-C (W.D. OK Feb. 5. 2002, July 18, 2002) A separate case, *Sierra Club v. Tysons Food, Inc.*, 299 F. Supp. 2d 693, 708 (W.D. KY. 2003) concluded just the opposite of the Seaboard Court. This court said an entire animal operation (all the buildings) came under the definition of a single facility under CERCLA. I also cited *Axel Johnson, Inc. v. Carroll Carolina Oil Company,* 191 F. 3d, 409, 417-19 (4th Cir. 1999). This Court declared that an entire property is a single facility under CERCLA when the property or properties (farms/farming operation) are controlled by single individuals and contamination is found throughout the property or properties. This ruling is one reason for defining farm and farming operations as we have in (1), (2), and (3) of the first definition.

I also cited a March 12, 2004, letter from a group of U.S. Senators to the Administrator of EPA. The letter declares there is confusion over what constitutes a facility on a farm. (copy attached) This letter cites an EPA regulation in 1985 that claims releases of emissions from separate buildings should not be aggregated to determine when the 100 lbs reportable quantity threshold has been reached. 50 Fed. Reg. 13, 456 (1985). Further this letter cites to EPA's Response to Comments and quotes "[r]eleases from separate facilities, however, need not be aggregated, e.g., releases from separate tanks scattered throughout a plant, separate piping systems, separate buildings, or separate ponds, or lagoons." Response to comments at 703-3 (Feb. 1985). This EPA material appears to provide strong support to the definition that there should be no aggregation of emissions from separate non-contiguous farm fields or buildings in order to reach the 100 lbs. of reportable quantity. The courts have nonetheless ruled to the contrary. EPA does not tell Congress about this history in its November 16th testimony regarding animal agriculture.

The Senate letter to the EPA Administrator also cites to a court case without citation which has ruled a farmer may have "constructive knowledge" of a reportable quantity of 100 lbs under CERCLA or EPCRA. If the farmer has "constructive knowledge" he could be in violation of nonreporting under CERCLA and EPCRA due to constructive knowledge.

Because of the regulatory and court history, the policy committee worked with Dr. Wakelyn and others in fashioning a definition for farm/farming operations to reflect the regulatory history as set forth.

DEFINITION 2

Ammonia is not carcinogenic, mutagenic, teratagenic or neurotoxic, in either low or high volumes of exposure, nor does it present any significant public health hazard or environmental hazard through chronic exposure to routine emissions from livestock or poultry manure.

The second definition involving ammonia was not developed by the committee but comes from a Congressional document. A Senate Committee in dealing with accidental release issues decided based on hearings, and experts that

> …the principle health concerns with ammonia is strictly sudden, accidental release in the atmosphere…ammonia is not carcinogenic, mutagenic, teratagenic or neurotoxic, in either low or high volumes of exposure, not does it present any significant public health hazard or environmental hazard through chronic exposure to routine emissions.…If air emissions of ammonia are hazardous at all, it is only in the case of substantial, sudden, and accidental release…

1990 Clean Air Legislative History at 8338, 8817 (compiled 1993) Congress. Research Service, 103rd Cong., Senate Comm. On Environmental and Public Works.

As result of the finding by the Senate Committee, EPA implemented regulations under Section 112 (r) of the Clean Air Act (CAA) that established threshold quantities for regulations of ammonia to be 10,000 lbs emitted and for ammonia in concentration of 20% or greater, 20,000 lbs. 40 C.F.R. Section 68.125. With this history in mind, the Committee recommended to the Task Force the definition that is set forth based on background documentation from the legislative history and EPA. Until the court cases were developed, it was assumed agriculture emissions of ammonia were not covered by CERCLA or EPCRA's 100 lbs reporting requirements because ammonia is not listed as a hazardous air pollutant under Section 112 of the Clean Air Act.

However, both CERCLA and EPCRA have as a reportable quantity (RQ) of sudden releases for ammonia of 100 lbs if it is emitted during a 24 hour period. 40 C.F.R. Section 302.4, Table 302.4 & 40 C.F.R. part 355, App. A. The 100 lb ammonia RQ was derived from the Clean Water Act. EPA stated in its 1985 Final Rule clarifying reportable quantities that under CERCLA reportable quantity of 100 lbs is applicable to emissions to and from the air and into water. 50 Fed. Reg. 13456 (April 4, 1985).

DEFINITION 3

Pollutant or contaminant shall not include any substances, including byproducts or constituent elements thereof, produced through natural biological processes of

agricultural operations, such as farms, ranches, and all livestock and other operations where animals are confined and/or maintained for use or profit.

The third definition is supported by legislative history. First, Congress passed CERCLA as a result of the Love Canal disaster. The purpose of that legislation was to deal with "the legacy of hazardous substances and waste which poses a serious threat to human health and the environment." S. Report No. 99-73 at 12 (1985). And "to clean the worst abandoned hazardous waste sites in the country". H.R. Rep. No. 99-253, Part 5 at 2 (1985). The legislation history contains extensive references to "synthetic", "man-made chemicals", "chemical contamination", and the results of "modern chemical technology." These are the problems CERCLA is intended to address and there is not one reference to an intention to regulate manure or biologically created materials from agricultural operations. S. Rep No. 96-848 at 2-6, 12 (1980); S. Rep. No. 99-11 at 1-2 (1985); S. Rep. No. 99-73, at 12 (1985); H.R. Rep No. 99-253, part 5, at 2 (1985).

In addition there is a taxation scheme in CERCLA covering feedstock chemicals manufactured on imported into the U.S. when they are sold or used. There is no tax put on ammonia or hydrogen sulfide generated from livestock or livestock waste.

There is more language which supports an argument that CERCLA and EPCRA are not to cover emissions from livestock or biological processes. In the Senate Committee Report discussing CERCLA and EPCRA release reporting requirements, the committee states that it wants "immediate direct notification of state and local emergency response officials for releases of highly toxic substances and particular those determined by regulation potentially to require response on an emergency basis." (S. Rep. No. 99-11, at page 8). Agricultural releases do not appear to demand the response described by the Senate Committee.

The Senate report also recognizes that there need not be the type of response just described when dealing with "naturally occurring substances." In fact, the language in the report is to exclude from response the release or threat of release "of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found" 44 U.S.C. Section 104 (a)(3)(A); S. Rep No. 99-11, at 16 (1985). The Senate committee also declares that there is an exception for EPA response authority where it discusses naturally occurring releases such as, "diseases or contamination resulting from animal waste" being excluded from the response program. S. Rep. No. 99-11, at 16 (1985).

EPA has also stated the purpose for reporting releases under CERCLA. In the Federal Register the agency has declared:

> "This purpose, as the Agency has previously stated on numerous occasions, is to require 'notification of releases so that the

> appropriate personnel can evaluate the need for a federal response action and undertaken any necessary response (removal or remedial action) in a timely fashion.' [citation omitted]… Thus if the Agency determines that the federal government would never, or would only rarely, take a response action as a consequence of the harm posed by the release or because of the infeasibility of a federal response, a basis for an exemption from the section 103 reporting requirements may exist." (Emphasis Supplied)

54 Fed. Reg. 22524, 22528

Based on this interpretation, EPA itself has exempted from reporting reportable quantities of radionuclide emissions from farming or building construction which disturbs the ground and causes natural releases. EPA also exempted the reporting of emissions in reportable quantities from dumping of coal and coal ash. Consequently, definition three was developed to exclude natural biological processes from being regulated since there is precedent for such exemption under CERCLA and EPCRA.

DEFINITION 4

Byproducts or constituent elements thereof, produced through natural biological processes of agricultural operations shall not be considered an agricultural waste when it is returned to the soil as fertilizers or soil conditioners or used in agricultural or industrial processes and it shall not be considered a discarded material.

The fourth definition draws its support from legislative history and case law. The question arises as to whether byproducts or constituent elements from farms and farming operations become a waste. The Congress in enacting the Resource and Conservation and Recovery Act (RCRA) 42 USC §6901 *et seq.* stated:

> waste itself is a misleading word in the context of the Committee's activity much industrial and agricultural waste is reclaimed or put to a new use and is therefore not a part of the discarded materials disposal problem the committee addresses. (H.R. No. 94-1491, Part 1 at 2)

The Committee goes on to state that "agricultural wastes which are returned to the soil as fertilizers or as soil conditioners are not considered discarded materials in a sense of this legislation."

The Courts have also addressed the issue of when materials are not considered discarded. The U.S. Court of Appeals for the D.C. Circuit has declared:

> "At this stage, all we can say with certainty is that at least some of the secondary material EPA seeks to regulate as solid waste is destined for reuse as part of a continuous industrial process and this is not abandoned or thrown away. Once again, "by regulating in-process secondary materials, EPA has acted in contravention of Congress' intent," 924 F.2d at 1193, because it has based its regulations on an improper interpretation of "discarded" and an incorrect reading of our *AMC I* decision.

Association of Battery Recyclers, Inc. v. EPA, 208 Fed. 3d 1047, 1056 (D.C. Cir. 2000)

This support makes it clear that if a by-product or a constituent is not discarded in the legal sense and is part of a continuous process then it is not discarded and not a waste and it is therefore not regulated under RCRA. Consequently it can be argued many agricultural wastes are not considered wastes and are exempted from regulation.

DEFINITION 5

Concurrent jurisdiction: where two or more statutes/regulations touch upon the same area, the media specific statutes/regulation shall control.

The last definition regarding concurrent jurisdiction deals with the concerns of that many have in agriculture about applying CERCLA and EPCRA to air emission discharges from agricultural sources. Air emissions should be regulated by the CAA and not statutes relating to cleanup or notification. The U.S. Supreme Court has dealt with this issue and has declared a well-established rule of statutory construction. That rule is where two statutes touch upon the same area or more specific statutes controls over the terms of the more general one. *Preiser v . Rodriguez,* 411 U.S. 475, 489, 93 S. Ct. 1827, 36 L. Ed. 2d 439.

CONCLUSION

These definitions are starting points for discussion. If the definition issue is not addressed, the Courts and other parties will define the issues for agriculture and not USDA.