

# PORK BITS

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## ENVIRONMENTAL UPDATE

### REQUIRED REPORTS FOR EMISSIONS OF AMMONIA AND HYDROGEN SULFIDE

A recent decision by the United States Court of Appeals for the District of Columbia Circuit that is currently being implemented will impose significant new regulatory burdens on pork producers and other livestock farmers across the United States.

#### Historical Background

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") in 1980 in response to large hazardous waste disasters. In addition to establishing the Superfund program to clean up hazardous waste sites, CERCLA requires persons in charge of a "facility" to report releases of "hazardous substance[s]" above specified quantities to the National Response Center (operated by the United States Coast Guard) and the Environmental Protection Agency. These reports were intended to facilitate emergency responses to releases of hazardous substances by the federal government.

Congress subsequently enacted the Emergency Planning and Community Right-to-Know Act ("EPCRA") in 1986 to aid

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**MATTHEW C. BERGER**  
Gislason & Hunter Attorney  
(866) 760-3429  
mberger@gislason.com  
New Ulm Office

**GISLASON & HUNTER** LLP

ATTORNEYS AT LAW

[www.gislason.com](http://www.gislason.com)



emergency planning and response efforts by state and local governments and to provide the state and local emergency response agencies with information about potential chemical hazards in their communities. Similar to CERCLA, EPCRA requires the owner or operator of a “facility” to report releases of “extremely hazardous substances” above specified quantities to state and local emergency response officials.

Both ammonia and hydrogen sulfide are designated as hazardous under CERCLA and extremely hazardous under EPCRA, and have reporting thresholds of 100 pounds per day. In other words, CERCLA and EPCRA require reports to federal, state, and local agencies of any emissions of ammonia or hydrogen sulfide from a “facility” in excess of 100 pounds per day.

### **Regulatory Exception for Emissions from Animal Waste**

The Environmental Protection Agency has long struggled to apply CERCLA and EPCRA to routine air emissions of ammonia and hydrogen sulfide generated by animal waste on farms because there is not sufficient data and no generally accepted methodology for estimating emission quantities from such farms. In 2005, the Environmental Protection Agency offered farmers the opportunity to enter into a consent agreement and participate in the National Air Emissions Monitoring Study, which was intended to develop emissions estimating methodologies for all types of livestock and poultry farms. This study, however, experienced numerous challenges, and the results of this study have never been published.

Additionally, recognizing that a federal response to routine air releases from animal waste on farms was “impractical and unlikely,” the Environmental Protection Agency published a regulation in December 2008 that exempted all farms from the requirements under CERCLA to report to the federal government releases into the air of hazardous substances from animal waste. The 2008 regulation also exempted most farms (except for concentrated animal feeding operations) from the requirements under EPCRA to report to state and local emergency response agencies releases into the air of hazardous substances from animal waste.

### **Re-Establishment of Reporting Requirements**

Several activist groups challenged the 2008 regulation that exempted farms from the CERCLA and EPCRA reporting requirements for routine air emissions from animal waste. In April 2017, the United States Court of Appeals for the District of Columbia Circuit held that this regulation was invalid. In other words, the court held that routine releases into the air of

ammonia and hydrogen sulfide generated from animal waste on farms would again be subject to the emission report obligations under CERCLA and EPCRA.

The effect of this decision has been stayed until at least January 22, 2018, to allow the Environmental Protection Agency to develop internal procedures and publish guidance to farmers to implement these reporting requirements. Toward this end, the Environmental Protection Agency has published administrative guidance regarding these requirements on its website at <https://www.epa.gov/epcra/cercla-and-epcra-reporting-requirements-air-releases-hazardous-substances-animal-waste-farms>. This guidance has been updated from time to time and should be checked on a regular basis as farmers assess whether the reporting requirements apply to their farm and prepare the necessary reports.

Consistent with the court decision, the administrative guidance published by the Environmental Protection Agency indicates that emissions of ammonia and hydrogen sulfide must be reported to the federal government under CERCLA. But reversing the agency’s prior position under the 2008 regulation, the administrative guidance now indicates that routine air emissions generated from animal waste on farms do not require reports to state and local governments under EPCRA because animal waste is a substance that “is used in routine agricultural operations” and therefore is not an “extremely hazardous substance” under the statute. This interpretation, however, may be challenged by the same activist groups who challenged the 2008 regulation.

### **What Farms Are Required to Report Emissions?**

Farms that release more than 100 pounds of ammonia or hydrogen sulfide in a day must report such releases to the National Response Center and the Environmental Protection Agency under CERCLA (unless the farm entered into and is in compliance with a consent agreement with the Environmental Protection Agency). But as the Environmental Protection Agency recognized in its recent administrative guidance, “it will be challenging for farmers to report releases from animal wastes because there is no generally accepted methodology for estimating emission quantities at this time.”

In estimating quantities of ammonia and hydrogen sulfide that may be released from a farm, the Environmental Protection Agency recognizes that farmers may rely on past release data, engineering estimates, the farmer’s knowledge of the facility’s operations and release history, the farmer’s best professional judgment, or information from trade associations or land-grant universities in the area of the farm. Actual monitoring data is not required.

To assist pork producers in estimating releases of ammonia and hydrogen sulfide from various types of hog farms, the National Pork Producers Council distributed a worksheet that can be used to estimate release rates based on available air quality research data from several studies. This worksheet is available via a link in the administrative guidance published by the Environmental Protection Agency at the following internet address: <http://aware.epa.gov/wp-content/uploads/2009/09/EPCRA-Report-Swine.pdf>.

## How Does a Farmer Report Emissions?

Although CERCLA generally requires a separate report for each release of a hazardous substance in excess of the specified threshold, reduced reporting requirements apply to releases that are “continuous and stable in quantity and rate.” The administrative guidance issued by the Environmental Protection Agency indicates that routine air emissions from animal waste are eligible for the reduced continuous release reporting requirements.

The continuous release reporting procedures require the following steps to be taken by the person in charge of a farm that is reporting routine emissions of ammonia or hydrogen sulfide from animal waste:

1. **Initial Report** – Under the CERCLA, a continuous release must first be reported by telephone to the National Response Center at (800) 424-8802. But the administrative guidance issued by the Environmental Protection Agency indicates that the initial report for farms reporting routine air emissions from animal waste may instead be made by e-mail to the following address: [farms@uscg.mil](mailto:farms@uscg.mil). Whether made by telephone or e-mail, the initial report should include the name of the person making the report, the county and state where the facility is located, and an estimate of the daily amount of the emission. The initial report must also state that it is a “continuous release report.” The National Response Center will provide an identification number that will need to be included on the subsequent written reports described below.

2. **Written Report** – A written report must be sent to the appropriate regional office of the Environmental Protection Agency within 30 days after the initial report is made to the National Response Center. Mailing information for the appropriate regional office for facilities located in each state are available in the administrative guidance issued by the Environmental Protection Agency. Sample forms for this written report are available from the Minnesota Pork Producers Association.

3. **Annual Follow-Up Report** – A second written report must be sent to the appropriate regional office of the Environmental Protection Agency within 30 days of the first anniversary of the initial written report. This report must verify the information contained in the initial written report.

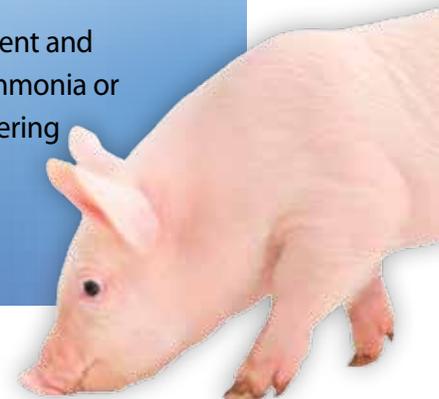
4. **Subsequent Reports** – Farmers must continue to evaluate releases on an annual basis and submit additional follow-up reports if there is a significant change in the estimated emissions from the facility.

As noted above, the decision of the United States Court of Appeals for the District of Columbia Circuit has been stayed until at least January 22, 2018. Once this decision becomes effective, the reporting requirements described above will be required for farms that release more than 100 pounds per day of ammonia or hydrogen sulfide.

## Conclusion

The newly re-established reporting requirements under CERCLA will impose significant new regulatory burdens on pork producers and other livestock farmers around the country. This article is intended to provide you with the basic information that you need to determine whether your farm is required to comply with these reporting requirements and, if so, the process that must be followed. The Minnesota Pork Producers Association will continue to provide you with important information as the Environmental Protection Agency continues to issue administrative guidance to assist farmers in implementing these requirements.

**ACTION ITEM:** Farmers should immediately assess, using their best professional judgment and the information available, whether their farm emits more than 100 pounds per day of ammonia or hydrogen sulfide. If these emission thresholds are exceeded, farmers should begin gathering the necessary information to make continuous release reports for each facility for which reports are required once the decision of the United States Court of Appeals for the District of Columbia Circuit becomes effective (on or after January 22, 2018).



## RESPONDING TO WORKPLACE INJURIES: OSHA

Unfortunately, employers cannot prevent all injuries from occurring in the workplace. Employers must continuously review their safety policies and practices to ensure the safety of their employees and make sure their supervisors know how to speedily and appropriately respond to injuries in the workplace. There are three steps employers should take when responding to workplace injuries.

### 1. Develop and Follow Safety Protocol.

Your company should have clear standards and procedures for dealing with safety and injuries in the workplace. These standards should be clearly displayed at every worksite and included in your employee handbook. Ideally, a safety policy should require employees to use good judgment and common sense in the workplace, as well as observe and adhere to all safety rules posted in the workplace and those imposed and enforced by the



**DAVID W. STURGES**  
Gislason & Hunter Attorney  
(507) 387-1115  
dsturges@gislason.com  
New Ulm Office



**BRITTANY KING-ASAMOAH**  
Gislason & Hunter Attorney  
(507) 387-1115  
bking-asamoah@gislason.com  
New Ulm Office

Occupational Safety and Health Administration (OSHA). The policy should also require employees to report workplace injuries and safety hazards immediately, whether they are involved in an accident or not.

Reporting procedures identified in safety policies cannot deter or discourage reporting. In this regard OSHA has explained that employers maintaining safety policies that require drug and alcohol testing following an injury or illness, without consideration of whether drugs or alcohol was actually involved, may be subject to penalty. Therefore, employers desiring to test employees involved in a work-related incident must limit their safety policies to require testing only in situations where drug or alcohol use likely contributed to the incident.

### 2. Document Employee Violations of Safety Procedures.

Employers should also use these policies as guidelines for evaluating employee performance. Violations of OSHA's safety regulations can result in steep penalties for employers and unimaginable costs for employees. Although it is unlawful for an employer to retaliate against an employee for reporting an injury or complaining about safety in the workplace, it is not unlawful for an employer to discipline an employee for failing to follow safety policies and procedures. Where an employee has clearly violated safety policies, procedures, or regulations, employers should document the violation in the employee's personnel file and, where appropriate, discipline the violating employee.

### 3. Post OSHA Safety Poster.

In addition to displaying an employer's own safety policies, employers subject to OSHA regulations must post OSHA's safety poster in a place that is clearly visible to employees. Farming operations, in most instances, are subject to OSHA regulations. The "small farm exception" is a noteworthy exception to this, which covers farming operations with 10 or fewer non-family employees and have not maintained a temporary labor camp within the preceding 12 months. Employers may download the safety poster from OSHA's website in English and nine other languages.



## ELECTRONIC SIGNATURES

As commerce is becoming more and more dependent upon technology, many companies are considering ways to move from paper-based transactions to transactions conducted solely by electronic means. Producers who operate or do business with such a company, should be aware of is the law surrounding the validity of electronic signatures.

Electronic signatures are primarily guided by the Federal Electronic Signatures and Global and National Commerce Act (the “E-Sign Act”) (15 U.S.C. §§ 7001, et seq.) and the Uniform Electronic Transactions Act (“UETA”), which is a “uniform law” that has been enacted in most states (including Minnesota). The E-Sign Act and UETA mimic each other in many respects. Both laws were designed to promote electronic commerce by permitting the use of electronic signatures in connection with contracts and other records and transactions, and both generally state that a contract bearing electronic signatures is valid. However, there are various important steps to take with regard to electronic transactions to ensure that the requirements of the E-Sign Act and UETA are followed.

First, all parties to the transaction must consent to the use of electronic records and electronic signatures

instead of paper documents and traditional signatures. Whether consent exists will depend upon the specific facts and circumstances of the transaction in question, but generally speaking, consent may be expressly stated or implied from the circumstances.

Second, any form of an electronic signature is sufficient to form a valid agreement. The “signature” can take a number of forms, including public-key encryption and third-party certifying authorities; e-mailed text or digitized images; passwords; personal identification numbers; biometrics such as voice prints; and the like. The key is that the electronic signature represents the intent of the person to sign the record and the logical association of that electronic signature with the record.

Finally, procedures must be used to ensure the integrity and security of electronic documents (i.e., who sent or may have altered it?) and electronic signatures (i.e., does it belong to that one particular person?). This “attribution” of an electronic signature to a specific person may be established through firsthand observations or by utilizing certain security procedures. Such security procedures include, for example, unique login IDs and password-protected access.

While the above is not an exhaustive list of the important provisions within the E-Sign Act and UETA, they provide a starting point for one’s inquiry into the legal provisions governing electronic transactions.



**CHRISTOPHER E. BOWLER**  
Gislason & Hunter Attorney  
(507) 354-3111  
cbowler@gislason.com  
New Ulm Office

### ACTION ITEM:

1. In adopting use of electronic signatures, a process should be in place that ensures:
  - a. Establishment of the intent of the parties to be bound by the electronic signature.
  - b. Establishment of attribution to a particular individual and/or representative of a company.
  - c. Maintenance of a record of the signature(s) to a document and proof of non-alterability after a signature has been affixed to a document.
  - d. Secure storage and access processes.
2. To ensure authenticity in case of a challenge to an electronic record and/or electronic signature, one should:
  - a. Provide an audit trail which identifies the signatory, the document that was signed, and when the document was signed, including date, time, and sequencing of events.
  - b. Make electronically signed documents inalterable.
  - c. Ensure that there is a credible custodian of the records to manage the retention process.
3. Consider contracting with a third-party vendor that specializes in electronic signatures (for example, DocuSign) and can assist you with implementing electronic transaction procedures.



## FACILITY SITE SELECTION



**KAITLIN M. PALS**  
Gislason & Hunter Attorney  
(866) 760-3429  
kpals@gislason.com  
New Ulm Office

Many different business factors go into evaluating sites for constructing new hog facilities, but in some cases, regulatory requirements at state, county and township levels can dramatically affect the cost and feasibility of new facility site development.

**Would My Target Site Require an Environmental Assessment Worksheet?** The criterion for the type of state and/or federal permit that is required for a new facility (e.g., NPDES permit, SDS permit, or construction short-form permit) is the capacity of the proposed facility. However, location can have a substantial impact on how long and expensive the permitting process may be.

Some sites requiring NPDES or SDS permits also require the producer to submit an Environmental Assessment Worksheet, or EAW. EAWs are intended to be “brief,” but are generally hundreds of pages long and require detailed information from engineers and other professionals. EAWs are required for any proposed site with capacity

of 1,000 animal units (“AUs”) or more, no matter where in the state they are located. (Remember, 1 finished pig = 0.3 AUs.)

However, EAWs are also required for proposed sites in “environmentally sensitive” areas if the site’s capacity is 500 AUs or more, or if capacity is 50 AUs or more and 100 citizens sign a petition to require an EAW. Environmentally sensitive areas include shoreland, floodplains and wild and scenic river districts.

**Are Feedlots Permitted in the Target Site’s Zoning District?** Every county except Hennepin and Ramsey Counties has the authority to create zoning districts and pass zoning ordinances. Individual townships also have authority to enact zoning ordinances to the extent they are more restrictive than the county’s regulations.

Counties and townships typically divide land into different districts based on their character and usage. For example, a rural township may establish Agricultural Districts, Conservation Districts and Rural Residential Districts. Each type of district will have its own rules regarding permissible land uses, setbacks, and other restrictions. Continuing with the example, a township may permit feedlots in Agricultural Districts and bar the same use in Conservation Districts.



### **Does the Target Site Meet Other Zoning Requirements?**

In addition to outright banning certain uses in zoning districts, zoning ordinances can place other restrictions on feedlot siting. Many ordinances require long minimum setbacks from existing residences, schools, churches or bodies of water. Some counties also require larger minimum lot sizes for feedlots as compared to other uses.

**Is a Conditional Use Permit Required?** Zoning ordinances usually include a list of “permitted uses” for each district. These uses are allowed in the district without any special approval from the Township Board or other governing body. Some ordinances include another category of uses, called “conditional uses.” These uses are allowed only on a case-by-case basis, upon approval by the Board and issuance of a Conditional Use Permit. In order to issue or deny a Conditional Use Permit, the Board must hold a public hearing.

**Is a County/Township Feedlot Permit Required?** In addition to Conditional Use Permits, some counties require owners and operators to obtain a county feedlot permit and/or MPCA compliance certificate through the county feedlot officer. The application process may require onsite inspections as well as written responses.

**Know Your Neighbors.** The people who live near the target site can make or break the regulatory approval process, and can cause headaches for years to come. Sometimes all it takes to address neighbors’ concerns is having a personal conversation. Find out what their concerns are and address those that you can. Offer a phone number for them to call if there’s a problem.

On the other hand, there are some people who are impossible to satisfy and willing to make your life miserable in the process. Public hearings on Conditional Use Permits or other phases of site approval may uncover some of these problems, but it’s more efficient to make these discoveries earlier in the investigation process. It’s important to consider whether both the short-term and long-term hassles of difficult neighbors make building at a particular site worth the effort.



### **ACTION ITEMS:**

It’s human nature to be less willing to walk away from a target facility site the more time, effort and money you’ve spent on the project. Research the following early on in the site selection process:

1. Is the target site in an environmentally sensitive area?
2. Do county or township zoning ordinances prohibit feedlots at the target site?
3. Does the target site meet all setback, minimum lot size, and similar feedlot-specific requirements?
4. Does the site require a Conditional Use Permit?
5. Does the site require a county feedlot permit?
6. Can I work with the neighbors?

## MPPA STAFF

**David Preisler**  
Chief Executive Officer  
david@mnppork.com

**Jill Resler**  
Chief Operating Officer  
jill@mnppork.com

**Pam Voelkel**  
Events Director  
pam@mnppork.com

**Lauren Servick**  
Communication and Marketing Director  
theresa@mnppork.com

**Colleen Carey**  
Support Staff/Receptionist  
colleen@mnppork.com

**Vicki Kopischke**  
Administrative Assistant/Accounting  
vicki@mnppork.com

## GISLASON & HUNTER LLP

Attorneys who practice in this area of law include:

**Daniel A. Beckman**  
**Matthew C. Berger**  
**Jeff C. Braegelmann**  
**Dustan J. Cross**  
**Michael S. Dove**  
**Reed H. Glawe**  
**Rick Halbur**  
**David Hoelmer**  
**David C. Kim**  
**Brittany R. King-Asamoah**  
**Kaitlin M. Pals**  
**Mark S. Ullery**  
**Wade R. Wacholz**  
**Andrew A. Willaert, Jr.**  
**Sara N. Wilson**  
**C. Thomas Wilson**  
**Dean Zimmerli**



**Mankato Office**  
151 Saint Andrews Court, Suite 810  
Mankato, MN 56001  
507-345-8814  
mnppork@mnppork.com  
www.mppainsider.org

**National Pork Producers Council**  
**National Office – Iowa**  
10664 Justin Drive  
Urbandale, IA 50322  
515-278-8012  
www.nppc.org

**Public Policy Center**  
**Washington, D.C.**  
122 C Street N.W., Suite 875  
Washington, D.C. 20001  
202-347-3600  
www.nppc.org

**GISLASON & HUNTER LLP**  
ATTORNEYS AT LAW  
www.gislason.com

**Minneapolis Office**  
Golden Hills Office Center  
701 Xenia Avenue S, Suite 500  
Minneapolis, MN 55416  
763-225-6000

**Des Moines Office**  
Bank of America Building  
317 Sixth Avenue, Suite 1400  
Des Moines, IA 50309  
515-244-6199

**Mankato Office**  
Landkamer Building  
124 E Walnut Street, Suite 200  
Mankato, MN 56001  
507-387-1115

**New Ulm Office**  
2700 South Broadway  
New Ulm, MN 56073  
507-354-3111

*Minnesota Pork Producers Association acts with integrity to provide visionary leadership through advocacy for our members.*

## Agricultural Law and Agribusiness Services

Gislason & Hunter LLP is recognized within Minnesota and throughout the Midwest for our knowledge and experience in the agriculture industry. Our lawyers represent local, regional and national agribusiness clients – grain farmers and livestock producers, packers and processing plants, agricultural co-ops, equipment manufacturers and input suppliers, agricultural lenders and other ag-related businesses – in all aspects of their operations.

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- Planning, zoning and land use
- Environmental regulation
- Water rights and wetland mitigation
- Ag financing and debt restructuring
- Agribusiness formation and transactions
- Agriculture contracts (e.g., production and marketing agreements)
- Employment matters
- Intellectual property rights
- Estate and succession planning
- Litigation (breach of contract, liens, pollution, etc.)
- Food safety and animal rights controversies

*This publication is not intended to be responsive to any individual situation or concerns as the content of this newsletter is intended for general informational purposes only. Readers are urged not to act upon the information contained in this publication without first consulting competent legal advice regarding implications of a particular factual situation. Questions and additional information can be submitted to your Gislason & Hunter Attorney.*

ADDRESS SERVICE REQUESTED

507.345.8814  
Mankato, MN 56001  
151 Saint Andrews Court, Suite 810  
Minnesota Pork Producers Association

Non-profit  
US Postage  
PAID  
Owatonna, MN  
55060  
Permit #110