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Court Decision Forces Senator To Reconsider Strategy On CAFO Exemptions

Idaho Republican Sen. Larry Craig is reconsidering his legislative strategy for exempting concentrated animal feeding operations (CAFOs) from Superfund reporting requirements in light of a new federal appellate decision expected to vastly increase the number of agricultural facilities required to report hazardous emissions, Craig's staff says.

The U.S. Court of Appeals for the 10th Circuit ruled Oct. 29 in *Sierra Club v. Seaboard Farms Inc.* that CAFOs must aggregate the total emissions of hazardous substances from their facilities to see whether they meet reporting thresholds prescribed in the Superfund law, rather than apply the threshold to each individual building or structure.

I don't know if there is a legislative remedy that can overturn the courts decision, a Craig aide says, adding that the senator's staff is now analyzing the impact of the courts opinion.

Industry had argued that each building or structure on a farm should be considered separately for reporting purposes, which would have greatly reduced the likelihood of triggering emissions reporting requirements. Environmentalists said the law applies to total emissions from an entire facility, not individual buildings or structures.

But the 10th Circuit found that the definition of facility in the Superfund statute -- or the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) -- is unambiguous, and must be interpreted broadly in terms of the laws intent to quickly remediate contaminated sites. As to the term facility, we will not extrapolate a definition when one has been provided in the text of the statute, the ruling states. CERCLAs broad remedial purposes further support our holding.

The ruling echoes a 2003 decision from a federal district court in Kentucky. The two rulings are the only ones to address the issue thus far.

An environmentalist says the ruling shows that CAFOs must comply with reporting requirements. Courts have made it clear that CERCLA and [Emergency Planning and Community Right-to-Know Act] EPCRA apply, the source says. The factory farm industry is now in a difficult spot.

A Seaboard attorney expressed disappointment with the ruling, and says the company is deciding its next move. An appeal is under consideration, the attorney says.

Earlier this year, Craig proposed a legislative rider to EPA's spending bill that would exempt CAFOs from reporting requirements under the federal Superfund law and EPCRA. The measure drew opposition from EPA officials, who charged it would

undermine a voluntary enforcement arrangement it is seeking with industry to provide CAFO emissions data in exchange for a temporary limit on enforcement.

Craig is seeking to discuss the issue with White House and Senate leaders before moving forward again.

Late last month, Craig told a local Idaho newspaper that the largest CAFOs may need to control pollution to some extent in part because large-scale operations are more equipped to develop waste management systems than smaller farms. He is clearly suggesting more needs to be done with regulation, but said that the Superfund law is not the direction EPA should go, the aide says. What he is suggesting is that EPA already has the ability to regulate these operations.

The aide says Craig is supporting EPA and the Idaho Department of Environmental Quality's attempts to address a suit filed by the Idaho Conservation League alleging that Idaho's state implementation plan under the Clean Air Act requires a proposed dairy to apply for a construction permit.

Environmentalists opposed to Craig's plans remain skeptical that the senator will abandon his position when it comes to regulating the largest CAFOs.

This is a significant departure from his earlier position that the Clean Air Act takes care of everything, an environmentalist says. But it wouldn't surprise me if he tried to exempt [CAFOs] under the Clean Air Act as well.

EPA is also expected to soon release a safe harbor agreement with industry that would exempt CAFOs from enforcement for air emissions in exchange for an industry-funded study into the issue. An attorney involved with that effort did not return a call about how *Seaboard* could affect those negotiations.