

AMERICAN FARM BUREAU FEDERATION

Questions & Answers On the EPA's Voluntary Air Compliance Agreement & National Monitoring Study for AFOs

EPA recently released a voluntary air quality compliance agreement to address air emissions from certain animal feeding operations (AFOs). The agreement was published in the *Federal Register* on Jan. 31, 2005 starting a sign-up period during which eligible farms may voluntarily enroll in the agreement and study. The *deadline for application to participate is July 1, 2005*.

What is the purpose of the agreement and the study?

The purpose of the agreement is to ensure future AFO compliance with applicable air quality laws while providing operations with some past and concurrent protections from federal enforcement liability. In recent years, increases in the scale and consolidation of agricultural operations - including poultry, swine and dairy operations - have been the focus of an increasing number of citizen complaints and concerns about possible health impacts.

Though the terms of the agreement and study are final, *EPA will accept public comments requesting clarifications about the agreement from April 1 until May 2, 2005*.

- Via internet, submit at <http://www.epa.gov/edocket>. Follow the online instructions.
- Via email, send comments to a-and-r-docket@epa.gov.
- Via post, mail comments in duplicate to "Air Docket, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., N.W., Washington, D.C. 20460"

What does American Farm Bureau Federation think about the agreement and the study?

AFBF neither endorses nor opposes the agreement or the study; we have no policy relating to either. The terms of the agreement and study may benefit some producers and be a burden to others – either way, participation is completely voluntary. AFBF is providing objective information on the agreement and study as a service to our members who may be individually considering the merits of participation.

Ultimately, individual legal, financial and personal circumstances and experience should dictate whether a producer or operation chooses to participate in the agreement. *Anyone considering the agreement is strongly advised to discuss their potential participation with a trusted attorney who understands the circumstance of that operation or producer.*

What concerns EPA about emissions on AFOs?

Currently, EPA considers emissions from AFO *barns, lagoons and retention ponds* subject to the air laws if emissions are above established pollutant thresholds. A 2002 report by the National Academy of Sciences called on EPA to improve its method for estimating emissions from AFOs – a key step in mitigating air pollution from those operations. EPA needs better data to determine which AFOs meet or exceed these thresholds – i.e. the purpose of the study.

Regulated substances potentially emitted by livestock and poultry include ammonia, hydrogen sulfide, volatile organic compounds (VOC), nitrous oxides and particulate matter (PM). PM is made up of PM10 (dust), PM2.5 (fine particles) and total suspended particulates (TSP); each has a regulatory standard. VOC includes methane and other chemicals that contribute to smog, haze and other adverse air conditions.

What are the “air laws”?

In short, the relevant “air laws” include the Clean Air Act (CAA), notification provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know Act (EPCRA).

Recent court decisions relating to these air laws establish that emissions of air pollutants from AFOs may be subject to requirements of the air laws. While EPA has brought very few air law enforcement actions against AFOs, the agency concedes that more updated emissions data is necessary to determine whether and which operations are in actual violation, as well as the nature and extent of any violations and the best practices needed to control emissions.

- Is agriculture exempted from these air laws?
No, there is no blanket exemption for agriculture from these air laws. CERCLA and EPCRA have some agriculture related exceptions, but none has been found to apply to air emissions from livestock and poultry operations.

How does CERCLA - the “Superfund” law - apply to agriculture?

CERCLA requires reporting when any “facility” releases more than a “reportable quantity” of a hazardous substance, such as ammonia and hydrogen sulfide. All emissions, including “fugitive” emissions (uncontrolled, e.g. from fields and open areas), are reportable if they exceed the reportable quantity, which is 100 pounds in any 24-hour period. Currently, the courts are tending towards defining a “facility” as a combination of all structures within an operation. However, it is uncertain whether the reporting requirement applies to quantities measured from individual barns/lagoons/ponds on an operation, or the combined emissions from these structures on the entire operation.

How does the Clean Air Act apply to agriculture?

Any operation found to be a “major source” of regulated emissions will be required to apply for and comply with a “Title V” operating permit. Of the substances potentially emitted by livestock and poultry operations, the CAA regulates hydrogen sulfide, oxides of nitrogen, VOC and PM.

Generally, a “source” qualifies as “major” if it emits or has the potential to emit 100 tons per year or more of any single regulated air pollutant. Lower thresholds apply in some states and where areas/regions are already in “non-attainment” with air quality standards for a particular pollutant. Permitting of these “minor sources” can apply at emission rates as low as five tons per year.

- Are all emissions from an operation subject to CAA?
In determining “major source” thresholds, the CAA “source” can include a large area of many emission points located in contiguous areas under common operational control. Currently, EPA regulations do not include “fugitive” emissions from large unenclosed areas in this determination, but nothing prevents EPA from revising the regulations to include such emissions.
- What about additional state air laws?
Many CAA-mandated “state implementation plans” (SIP) include requirements for “minor source” permits based on a state’s choice to set lower emission standards. Also, states may choose to regulate fugitive emissions as necessary to meet CAA national ambient air quality standards (NAQS). If incorporated into a state SIP, minor source and state-specific requirements are federally enforceable under the CAA.

States may also establish other types of laws relating to air quality so long as they are not contrary to the intents and purposes of the Clean Air Act. State and even local governments are increasingly choosing regulate AFO air emissions.

What is required of producers and operations who choose to participate in the agreement?

Producers would have to sign a formal consent agreement document with EPA and pay a small “penalty” fee by May 1, 2005. By signing the agreement and paying the penalty, participants are *not* admitting any guilt for *past* air law emissions violations. Rather, participants are helping to fund the study and are legally agreeing to later comply with the air laws should the study results indicate that the participant’s operation is above revised thresholds for air emissions.

Is participation mandatory?

Absolutely not - each producer must make a decision whether to participate and take advantage of the legal protections offered in the agreement. Participation is voluntary, but the sign-up period will not be reopened and the opportunity will not be offered by EPA again.

What “legal protections” do participants get?

Signing the agreement gives participants some limited legal protections without admitting any guilt or liability for possible past emissions’ violations. EPA will release participants from liability and promise not to sue the producer for past and

study-concurrent violations of the federal air laws. Specifically, the protections extend to potential civil violations of the permitting requirements in CAA Title V, *federally enforceable* SIP requirements for emissions monitored under the agreement, and for civil violations of CERCLA reporting requirements (other than a single, unexpected/accidental release such as from fire, explosion, etc.)

- How far back in time do the protections extend?

The statute of limitations on air law enforcement is five years: the agreement terms last until about 2007. Therefore, participants can expect protection from federal enforcement protection from 2007 backwards in time.

Do the legal protections apply to state laws, citizen suits, other civil laws or criminal liability?

No, the terms of the agreement only directly apply to federal enforcement of the air laws in the past and during the course of the study period. However, the structure of the consent agreement is believed by some in the legal community to create strong legal protections for participants who may have to defend citizen suits, or state and civil lawsuits, based on alleged emissions violations covered during the period of the agreement. The agreement does not release participants from criminal liability, and does not prevent EPA from acting in situations that may present an imminent and substantial endangerment to public health, welfare or the environment.

If participants are not admitting guilt of any wrongdoing, why do they have to pay a “penalty”?

The minimum “penalty,” or participation fee, of \$200 per operation (subject to adjustment for size or number of operations under common control) is paid as part of the legal procedure that provides the protection. Negotiators of the agreement suggest that, without the payment and use of the term “penalty,” the legal protections and integrity of the agreement would not be as strong.

What if a producer decides not participate?

Participation in the study and agreement is voluntary. Those producers with emissions above the final regulatory threshold who do not gain the protections of the consent agreement will be vulnerable to citizen, state and federal lawsuits for past and current emissions. Once the study is completed and the regulations for emissions are updated, all producers regardless of participation may be subject to regulation under the air laws depending on whether the operation meets the thresholds on the yet-to-be-determined look up charts.

Is there any way a participating producer can lose the legal protections?

Yes, participating producers could lose their protection by violating the terms of the agreement. Specifically, producers may lose protections in a couple of ways, including:

- 1) Once the look-up chart is available from EPA after the study is finished, producers will have several months to determine if they are subject to the laws and, if they are, undertake the necessary steps to comply with the air laws

- (e.g., file a CERCLA report, or apply for a Clean Air Act permit. This last step may also include eventually installing air emissions controls). If the participating producer refuses to comply with the air laws after the study has determined that the operation has emissions that are subject to the air laws (unless the producer can show that the study results do not apply to his particular farm), the producer will lose the legal protections all the way back to the date of signing the agreement; and/or
- 2) If during the course of the two-year air study, a state or local government authority brings a nuisance action, wins in court, wins any appeal the producer might file, and then the producer proceeds to violate the final court order – then the producer could lose the legal protections from the consent agreement.

What is the emissions monitoring study all about?

In return for EPA's release of liability to participants, producers within the pork, dairy, egg and poultry industries are asked to consider organizing, paying for and potentially participating in a comprehensive study of air emissions from operations across the country. The study will last about two years. During that time, EPA, USDA and a team of university scientists will monitor air emissions at selected pork, dairy, egg and poultry operations. EPA will use the data gathered from the study set emissions policies, identify appropriate exceedance levels, and to regulate excessive livestock and poultry air emissions. The air study is intended to be nationwide in scope and ultimately answer the specific questions of who should comply with air laws. For more information on the monitoring study, contact Sharon Nizich of EPA's Emission Standards Division at (919) 541-2825, or nizich.sharon@epa.gov.

- How exactly is the study funded?
The study will be paid for by funds from participants and, for some industry sectors, organizational and corporate contributions. Participants may be asked to pay up \$2500 “per operation” to cover unfunded study cost for their industry sector. The pork and egg sectors are covering most of the costs of their industry's study using check-off dollars and direct contributions from industry representatives.

The “penalty fees” paid by participants to enter the agreement will go into the federal government's general treasury.
- What is the structure of the study and how will the information be used?
The study's design and conduct, as well as the overall data collection and supervision of data conversion will be overseen by several levels of public review. EPA will not directly be conducting the study. Instead, university scientists will be selected to conduct the on-farm study based on credentials: well-qualified USDA –Agricultural Research Service and other scientists will supervise field activities. All of the scientific data will be made available to the public on EPA's website and will be basis of future regulatory revisions of the air laws for agriculture.

When signing the agreement, *participants should specify all business related information about their operation for which they would like to seek “confidential business information” (CBI) protections* – otherwise, CBI protection will not automatically extend to non-study, business information about the participating operation. However, the agreement’s legal protections will prevent the study-collected emissions data from being used against participants, regardless of whether their operations are actually being monitored in the study.

What will happen to participating producers after the monitoring study is over?

Once the study is over, EPA will publish the results in the form of “look-up” charts that producers will use to find out if their farm size and manure management methods require them to comply with the air laws. If they’re below the threshold, they will have only to send in a certification to EPA stating they are not subject to air laws.

If they are above the threshold, they will have several months to come into compliance with the laws. Some will simply have to file CERCLA pollutant release forms. Others with higher emissions levels may have to apply for an air permit and, at some point in time, install controls on their farms. Those controls are not yet determined.

What if a participating farm’s design isn’t covered by the air study and look-up chart?

If EPA notifies a participating producer that it is unable to develop a look-up chart to estimate emissions for a specific type of farm, the participating producer retains its legal protection for 180 days after that notice is mailed by EPA. During the 180 days the participating producer may attempt to provide data or adjust its operations to gain coverage by an addition to the look-up chart. If neither the EPA nor the producer is able to determine if the participating producer is subject to the CAA or CERCLA requirements, the producer retains its legal protections for past emissions but will have to decide for himself if his farm is subject to the air laws. If he misjudges he may be legally vulnerable for future emissions if they actually are determined to exceed the legal thresholds.

Can producers challenge how/whether the look-up charts apply to them?

Yes and no. Via the public comment process, agricultural representatives will have the opportunity to review the public data and verify that quality assurance standards are met. By signing the consent agreement, participating producers agree not to challenge the design or conduct of the study as a whole. They may, however, challenge the way in which the look-up charts would apply the air emissions data to their particular facility.

How will the air monitoring study be conducted?

The monitoring study is being developed by a team of academic, scientific, EPA, USDA, industry and environmental experts. The monitoring of the selected sites will be conducted by a team of scientists from various universities and overseen by Purdue University and EPA over a 22 to 24-month period to account for seasonality/temporal variability and operational change impacts. Conducting the study for a period in excess of

one year is intended to allow the team to check the repetitive nature of the data set and account for any data anomalies. Farm monitoring sites are selected based on: (a) how typical the site design is of the specific animal sector; (b) the age and size of the facility; (c) site geography and climate factors; (d) building ventilation methods; (e) proximity to important centers of production for each specific animal sector; and other factors. The number of sites selected is intended allow data from monitored operations to be extended to unmonitored operations for each of the animal types included in the study (i.e., pork, dairy, egg producers and meat birds (broilers and turkeys)). In addition to the air emissions data collected during the monitoring period, site specific operational information may also be collected to support future development of “process-based” emissions estimating methods as suggested in the National Academy of Sciences report on “Air Emissions from Animal Feeding Operations” (2003). The site specific operational information may include the following type(s) of information: (a) number, age and weight of animals; (b) geographic and climate conditions; (c) housing/confinement building type (e.g., open, closed, etc.); (d) quantity and nutrient analysis of manure generated; (e) manure management system type (e.g., deep pit, flush w/lagoon storage, belt w/dry storage, composting, etc.); (f) waste stream samples leaving the barn and recycled water samples entering the barn; (g) feed conversion data; and (h) other data needed to model the effects of process changes. Data collected during the monitoring period will be reviewed on a periodic basis, and the final data used to develop “emission factors;” process-based models; look-up charts; and regulatory decisions.

Will there be an effort to determine the effectiveness of emission controls?

The two-year study is intended to be a “bench marking” study designed to evaluate emissions without any new regulatory controls. Many farms are already using effective methods to control emissions (e.g., lagoon covers of straw or manmade materials), and a benchmark comparison will likely be undertaken if the opportunity presents itself to evaluate such methods side by side with untreated facilities. Following the completion of this two-year study, it is possible that the monitoring equipment will continue to be used for studies of such emissions control.

Is participation for integrated operations in the agreement “portable” – i.e., can other sign onto an existing participant’s agreement?

Under the terms of the agreement, for integrated operations both the operation’s producer and integrated entity would ideally sign the operation’s agreement for participation. Unless clarified by EPA during the comment period, the agreement terms do not currently allow for “portability” – i.e., if a participating operation’s producer decides to change contract integrators, the new integrator would not be allowed to sign onto the agreement for participation. It is legally unclear what effect this constraint has on the producer’s continued participation in or protections from the agreement.

Producers at integrated operations considering participation in the agreement should consult trusted legal counsel to establish their individual circumstance. Further, direct consultation with EPA is recommended to establish which entities should sign the agreement.

Does the agreement allow for participation of producers who are soon-to-be operational; lease parts of their operation; or, for existing operations to expand?

EPA should be consulted directly to determine individual status for eligibility under the agreement. After considering the terms of the agreement, individual operational circumstances and seeking legal advice, interested operations should contact:

Bruce Fergusson
(202) 564-1261 (phone)
fergusson.bruce@epa.gov (email)
Special Litigation and Projects Division (2248A)
EPA Office of Enforcement and Compliance Assurance
1200 Pennsylvania Ave., N.W., Washington, D.C. 20460

What should producers consider when deciding whether to participate in the agreement/study?

EPA suggests that a rule of thumb to determine whether an operation should participate in the program is whether they have reason to believe that they are already subject to reporting EPCRA and CERCLA reporting requirements (hazardous releases to the air of 100 pounds a day or more). However, most operations may not know what their emissions levels are so other factors must be considered.

Important considerations in determining whether to participate in the agreement include:

- *Is the operation a likely target for a regulatory violation of any kind– i.e., “high visibility” area, other nearby farms targeted, in a State declared “non-attainment zone”, neighbor complaints or regulators’ attention?*
- *Is the operation significant in size, scale or possible emissions, and likely to be regulated now or in the future? Large CAFOs are defined as those with 2,500 swine weighing more than 55 pounds or 10,000 swine weighing less than 55 pounds, 82,000 laying hens, 125,000 broilers, 55,000 turkeys, 700 mature dairy cows, or 1,000 dairy heifers.*
- *Can the operation afford the “penalty fee” and study funding apportionments? Under the agreement, any operation consisting of only one farm that is below the threshold for a “large” Concentrated Animal Feeding Operations (CAFO) under the Clean Water Act, would pay the \$200 penalty. Operations with multiple farms pay \$500 or \$1,000 per farm, depending on the size. Operations with more than 200 farms will pay the \$100,000 maximum penalty fee.*

Ultimately, individual legal, financial and personal circumstances and experience should dictate whether a producer or operation chooses to participate in agreement. Anyone considering the agreement is strongly advised to discuss their potential participation with a trusted attorney who understands the circumstance of that operation or producer.

When signing the agreement, participants should specify all business related information about their operation for which they would like to seek “confidential business information” (CBI) protections – otherwise, CBI protection will not automatically extend to non-study, business information about the participating operation.

- How and whom do I contact at EPA to find out more about the agreement and study and/or to sign up for participation?
 - The text of the agreement is available at <http://www.epa.gov/compliance/resources/agreements/caa/cafo-agr-050121.pdf>.
 - For questions or additional information on the monitoring study, contact Sharon Nizich of EPA's Emission Standards Division at (919) 541-2825, or nizich.sharon@epa.gov.
 - For questions and additional information on participation in the air compliance agreement, contact Bruce Fergusson of the Special Litigation and Projects Division in EPA's Office of Enforcement and Compliance Assurance at (202) 564-1261 or fergusson.bruce@epa.gov.
 - After considering the terms of the agreement, individual operational circumstances and seeking legal advice, interested operations should submit signed consent agreements and final orders to EPA Headquarters by July 1, 2005 to:
 - Special Litigation and Projects Division (2248A)*
 - Attn: Air Compliance Agreements, Office of Regulatory Enforcement*
 - Office of Enforcement and Compliance Assurance*
 - Environmental Protection Agency*
 - 1200 Pennsylvania Ave., N.W.*
 - Washington, D.C. 20460*