

# More answers to Air Agreement questions

by David L. Cook

**T**HE deadline for the EPA Air Quality Consent Agreement is fast approaching. By July 1, you will need to decide if you plan to file the necessary paperwork with EPA to participate or not. Here are some answers to common questions we have received about the Agreement:

## **How great is the prospect that any one dairy farm will actually be subject to an enforcement action by EPA?**

Unless you have experienced an Environmental Protection Agency enforcement action, either first hand or known about one because a friend or neighbor has been through the ordeal, you likely feel that laying low is all the protection you'll need.

While it is difficult to predict EPA's approach to dairy producers who fail to sign the Air Quality Consent Agreement ("Agreement"), it is clear that EPA is serious about enforcing clean air laws. Just because EPA is only recently beginning to focus its enforcement effort on animal feeding operations, several years after the clean air laws were enacted, that does not mean it is not serious about remedying violations by those in animal agriculture.

It is true that larger dairy farms are more likely to be subject to an EPA enforcement action, both because they are more visible and they are more likely to have emissions that exceed the limits. Small farms, however, should not consider themselves immune from an EPA enforcement action. We do not know for sure the number of cows that produce enough ammonia and hydrogen sulfide to violate clean air laws.

## **Why must the term "penalty" be used in the Agreement?**

I understand that it is difficult for some of you to pay what is termed a penalty as a part of signing the Agreement when you do not feel as though you have done anything wrong. First, it is important to note that the Agreement specifically states that the parties signing onto the Agreement admit no fault by doing so.

Second, you should realize that this term is included due to legal formalism. The use of "penalties" in consent agreements with enforcement agencies is a long stand-

ing practice. And those familiar with the practice do not view the payment as a sign of any wrongdoing. There must be the penalty because there is an exchange of value. EPA is providing you a covenant not to sue. In turn, you must provide EPA with something for that protection.

Nobody likes penalties, but they happen all the time. While it may seem wrong to pay that sum, it is very little compared to what could be owed if it is discovered that your dairy farm is in violation of the clean air laws.

## **Does the Agreement prevent third parties from filing citizen's suits against my farm?**

EPA does not have the power to prevent a citizen's suit from being filed. It could, however, act as a barrier to prevent a filed citizen's suit from being successful.

Citizen's suits are a tool included in certain statutes to allow local citizens to ensure that EPA and state agencies are doing their job. If a citizen believes that there is a violation which a federal or state agency is not actively working to remedy, that citizen can give notice that they will file a lawsuit in 60 days if the violator or government agencies do not take care of it. If the federal or state agency acts by filing a lawsuit against the alleged violator or by signing a consent agreement with the alleged violator, the violator can then ask a judge to dismiss any later filed citizen's suit.

There is no guarantee that a judge will dismiss the citizen's suit simply because a defendant makes the request, but the existence of a signed consent agreement including a plan to remedy the problem and a penalty provision will be convincing evidence that the problem is being addressed. This makes the citizen's suit not necessary.

## **Are there any limitations on expanding my farm if I sign the Agreement?**

A significant addition to your farm after entering the Agreement could trigger permitting requirements. The Clean Air Act requires specific permits if the level of air emissions from a farm exceed the thresholds.

If you increase the size of your herd after entering the Agreement, the Agreement's covenants not to sue will not cover you if you exceed permitting requirements and fail

to file necessary permits. While this does not mean that you cannot grow the size of your herd at all, you should make sure to obtain the necessary permits to remain in compliance with the clean air laws. There are no good estimates, right now, of the size of an expansion that would trigger these requirements. It may be useful to work with state agencies to help clarify the issue.

## **Why shouldn't dairy producers monitor emissions from their farms without entering the study and pay a penalty?**

By signing the Agreement, EPA will provide a "covenant not to sue" to producers who may have unknowingly violated the clean air laws. EPA also promises to not subject you to any applicable fines. This protection covers all past emissions and will run through the period of the Agreement, about 4 years.

While research conducted outside the protections of the Agreement may assist your efforts to comply with the environmental laws in the future, these independent trials do not offer any protection for past violations discovered by EPA after the Emissions Estimating Methodologies (the look-up charts) are published.

## **Why shouldn't dairy producers use existing tools and data to estimate emissions and begin reporting now without entering the Agreement?**

It is important to remember that, without the protections of the Agreement, any data collected could be used in actions against dairy operations for past emissions, even if you comply now and into the future. Additionally, monitoring and reporting without entering the Agreement offers no protection for past violations of the clean air laws and action by EPA. Therefore, if at the end of the study it is discovered that emissions from your farm have exceeded the reporting levels, there will be no protection for any period before you began reporting the emissions. You also run the risk of calling attention to your farm by reporting without the protection of the Agreement and by reporting with less accurate estimating methods.

## **Could there be public backlash if the dairy industry rejects**


## **this Agreement?**

It is possible that a substantial rejection of this Agreement could create a perception that the dairy industry is not concerned about protecting the environment. Many environmental groups are objecting to the Agreement because they believe the protections are too forgiving on farms. If the dairy industry rejects the Agreement, it could possibly send the message that, even when provided with a very generous Agreement, the dairy industry refused to participate in a study that would ultimately assist the federal and state regulatory agencies with protecting the environment.

Right now, our industry has an opportunity to take a proactive role in developing a national standard for clean air laws. This is completely different from the clean water laws which were developed in response to environmentalist lawsuits. The result was that regions created their own sets of laws. Some of them were developed on the basis of scientific research, while others were not. There still exists a fair amount of uncertainty related to what practices are environmentally friendly.

The Agreement provides that clean air laws will be scientifically based, be developed with our industry's input and in a transparent manner to guarantee that it's done fairly and appropriately. And, at the end of the study, we will know what the standards are and easily determine whether or not they apply to us. On top of that, until that day, we're not subject to being sued as the standards are developed.

Does the Agreement have its imperfections? Yes. But to me, those reasons right there make a very powerful argument. This Agreement gives us an opportunity to take ownership of how air emission laws will be applied to agriculture and gives us creditability with legislators, regulators, and the public. Sitting back and saying we're not going to cooperate will not give us that.

EPA intends to solve the air emission issue. My professional opinion is that it is in the best interest of the dairy industry to participate in the Agreement, fund the monitoring study, and remain a part of EPA's plans. The consequences of not doing so may be something our industry doesn't want to face. 

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