

**OVERVIEW OF  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
AIR QUALITY COMPLIANCE AGREEMENT  
FOR ANIMAL FEEDING OPERATIONS**

- I. INTRODUCTION** - In 2003, the National Academy of Sciences indicated that insufficient data exists to determine whether air emissions from dairy and livestock farms require compliance with the Clean Air Act (“CAA”). Therefore the United States Environmental Protection Agency (“EPA”) desires to develop methods for estimating the emissions of certain regulated air pollutants from dairy and livestock farms. EPA desires to partner with animal agriculture to obtain accurate data so that sound methods to estimate the emissions from various sources found on farms can be developed. EPA wants to develop Emission Estimating Methodologies (“EEMs”) to help both farmers and EPA make sure that farms are meeting existing air pollution control laws.

The Air Quality Compliance Agreement (“Agreement”) is one mechanism by which EPA can obtain the necessary data to develop the EEMs. The Agreement promises participating producers that they will not be the subject of environmental enforcement actions by the Federal Government for certain violations of existing laws protecting the environment. In return, the Agreement requires that participating producers pay a civil penalty and contribute a share to fund an air emissions monitoring study. Participating producers must also be willing to allow collaborating scientists to use their farm site for measuring emissions, if selected.

**II. BENEFITS TO DAIRY PRODUCERS FROM PARTICIPATION IN THE AGREEMENT**

- A. Data Development** – Dairy producers will have the opportunity for input in the collection of accurate emissions data from farms, and the development of regulatory requirements to help producers comply with applicable environmental laws. Without the agreement, data could be developed with little or no input from the dairy industry. The opportunity to partner with EPA will likely provide meaningful and sound data resulting in a regulatory framework that is more understanding of the needs of the dairy industry.
- B. Legal Protections** – By signing the Agreement, EPA will provide a “covenant not to sue” to producers who may have unknowingly violated environmental laws. This covenant not to sue will run through the period of the Agreement. The Agreement provides the following protections to participating producers.
1. Clean Air Act - The CAA was developed to improve the nation’s air quality because of increasing concerns about ozone deterioration, acid rain, smog, and the release of large quantities of hazardous substances into the air. Under the CAA state governments and the Federal government work together to protect the public health, welfare, and property from harm that can be caused by air pollution. The CAA provides permitting requirements that establish limits on the release of regulated air pollutants,

require monitoring of the releases of those pollutants, and require the reduction of releases of those pollutants. The CAA requires that producers obtain operating permits if emissions from their farms are greater than specified limits based on the overall air quality in their region. Penalties apply to producers who fail to obtain permits when required to do so.

**Protection under Agreement:** Protection from fines for current and past violations of CAA permitting requirements, as described above.

2. Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) - CERCLA, also known as Superfund, provides the Federal government with the power to deal with actual or threatened releases of hazardous substances. CERCLA provides for the clean up of hazardous waste sites and for the liability of those responsible for releases of hazardous substances. Releases of hazardous substances can occur as either emergencies (i.e. a tank failure) or on a continuous basis. A continuous release would be considered a regular and steady rate of emission from a barn or lagoon. CERCLA requires a producer to immediately notify the National Response Center when the producer knows that more than 100 pounds of ammonia or hydrogen sulfide has been released from their farm within any 24-hour period. CERCLA also provides for high penalties if a producer fails to meet the notification requirements. The penalties are \$25,000 or \$75,000 per violation depending on whether the producer has failed to report violations in the past. Also, the fines can be cumulative for each day that a producer fails to report the release.

**Protection under Agreement:** Protection from fines for current and past violations of the CERCLA hazardous substance release notification requirements for emissions of ammonia (NH<sub>3</sub>) and hydrogen sulfide (H<sub>2</sub>S) from animal agricultural barns and waste storage.

3. Emergency Planning and Community Right-To-Know Act (“EPCRA”) - EPCRA addresses the environmental and safety hazards that arise from the storage and handling of toxic chemicals. EPCRA is designed to increase the public knowledge and access to information regarding toxic chemicals and to protect fire fighters, police officers, and emergency medical technicians that respond to emergencies at facilities that store toxic chemicals on-site. EPCRA’s four major provisions address emergency planning, emergency release notifications, hazardous chemical storage reporting, and a toxic chemical release inventory. EPCRA requires that producers immediately notify the state and local emergency planning bodies for the areas or states likely to be affected if their farm emits more than 100 pounds of ammonia or hydrogen sulfide within a 24-hour period. EPCRA requires this communication so the local community is properly notified if a release of a dangerous amount of ammonia or hydrogen sulfide occurs. EPCRA provides for penalties of \$25,000 for a first

violation of the laws requirements and the penalty can be cumulative for each day that the violation continues. For a second or subsequent violation the penalty can be \$75,000 which can also be cumulative for each day that the violation continues

**Protection under Agreement:** Protection from fines for current and past violations of EPCRA emergency notification requirements to report emissions of ammonia and hydrogen sulfide caused by agricultural wastes.

C. **Additional Requirements to Maintain Applicability of EPA Covenants Not to Sue**

1. Special Provisions for Large Producers (7,000 dairy cows or 10,000 dairy heifers) – Within 120 days from receiving an executed copy of the Agreement back from EPA that producer must send written notice to the National Response Center that they raise cows that may generate ammonia in quantities above 100 pounds in a 24-hour period. The written notice must also contain a rough estimate of the releases, acknowledge participation in the monitoring study, and indicate the producer’s intent to comply with release notification requirements at the end of the study. The same notification must also be provided to relevant state and local emergency response authorities. Currently, we do not believe that any farms in the Northeast trigger these requirements.
2. Obligation Upon Conclusion of Study and Publication of EEMs - At the end of the study and after the EEMs are published by EPA, all producers (not just those that participated in the study) must use the EEMs and:
  - a. Certification - Certify to EPA that they are not subject to the requirements of the applicable environmental laws if emissions from their farms have not triggered CAA permitting requirements or CERCLA or EPCRA reporting requirements. This certification must occur within 60 days after EPA has published the applicable Emission Estimating Methodologies. The certification will not be required, at a minimum, for approximately three and one half years, or sometime during 2008.
  - b. CAA Compliance - Apply for and obtain applicable CAA permits, and if appropriate install Best Available Control Technology (“BACT”) in an attainment area (locations where air quality is good, like most of upstate New York) or technology meeting the Lowest Achievable Emission Rate (“LAER”) in a non-attainment area (locations where air quality is not good, typically around large metropolitan areas) BACT and LAER are general categories for air emission mitigation techniques. The appropriate technique must be installed within 120 days after EPA has published applicable EEMs. (Since the risk that dairy farms in the Northeast will

exceed emissions in excess of CAA threshold values appears to be relatively low, CAA permits and installation of additional technology appears unlikely at this time.)

- c Reporting - Report all releases of hydrogen sulfide and ammonia that trigger the reporting requirements of CERCLA or EPCRA. The report must be made within 120 days after EPA publishes applicable EEMs.

- D. Duration of Covenants Not to Sue - EPA's covenants not to sue under the Agreement cover past violations for individual emission units and violations that occur before the producer either submits the last required certification for an emission unit, or two years after the producer submits any required permit applications. The covenants not to sue end on the earlier of the two dates. The period of protection from the covenants not to sue could last as long as eight years.

### III. REQUIREMENTS FOR PRODUCER PARTICIPATION

- A. Civil Penalty Provision - Participating producers must pay a civil penalty based on the number of farms that they list on Attachment A of the Agreement. Even though producers must pay a civil penalty, signing the Agreement is not an acknowledgment of wrongdoing. The civil penalty provisions are included in the Agreement to provide a legal resolution between producers and EPA for possible past violations of the CAA, CERCLA, and EPCRA and allow the Agreement's protections to take effect.

- 1. Determining the Amount of the Penalty - When a producer is completing Attachment A of the Agreement, if two farms are on contiguous property then the farms should be listed as one farm. Any farms owned by a producer that are on non-contiguous parcels should be treated separately when completing Attachment A of the Agreement.
  - \$200 – If 1 Farm < 700 cows or 1000 heifers.
  - \$500 per farm - If 1 Farm > 700 cows or 1000 heifers, but < 7000 cows or 10,000 heifers. Also, if multiple farms < 7000 cows or 10,000 heifers.
  - \$1,000 per farm – If 1+ Farm > 7000 cows or 10,000 heifers.
- 2. Timing of Payment - The assessed civil penalty will be due 30-days after the producer receives an executed copy of the agreement back from EPA. EPA will not sign the Agreement if they find that dairy industry participation is insufficient based on the funds needed to support a minimum of four monitoring sites.

- B. Contribution To Monitoring Study Fund - The monitoring study fund will

provide the money necessary for independent scientists to carry out the collection of data from dairy farms around the country. The data collected will be used to create EEMs. Producers share financial responsibility to assure that the study is sufficiently funded. Because the emissions from farms vary from region to region, the data collection should take place in several regions of the country. If data collection does not occur, EEMs may be established for dairy source emissions based on studies from other animal industries. If a producer signs the Agreement, that producer is bound to participate in the study and contribute to the study fund, so long as EPA also signs the Agreement.

1. Amount of Contribution - The amount that each producer must contribute to the monitoring fund is based on the number of farms that the producer lists on Attachment A of the Agreement and the number of farms of the same species that participate in the study. The actual amount each producer will be required to contribute per farm will not be known until sometime after the 90-day sign up period closes. In no event, however, will a producer's initial contribution to the study exceed \$2,500 for each farm listed on Attachment A of the Agreement.
2. Minimum Study Requirements - EPA will enter into the Agreement if sufficient farms are monitored; the minimum number appears to be 4 nationally, one farm each in the Northeast, Mid-west, West, and South. Additional farms can be monitored at the discretion of the dairy industry to improve the completeness of the EEMs.

- C. Participation In Study Implementation - A few participating producers will be required to allow the study to take place on their farms. Producers will be required to allow the scientists carrying out the study to enter their premises to decide whether that farm would be a good representative of other farms in the region. It is unknown at this time how EPA will select farms for the study. It is anticipated that the selection of farms will be a cooperative effort.

#### IV. IMPORTANT ADDITIONAL CONSIDERATIONS

- A. Citizen Suits - While signing the Agreement may prevent the ultimate success of a citizen suit against a participating producer, it will not prevent a citizen suit from being filed. EPA does not have the authority to prevent members of the community from filing citizen suits.
- B. Criminal Action - Signing the Agreement only protects participants from enforcement actions for civil violations of the environmental laws, it does not protect a participating producer from conduct considered criminal. For example, criminal penalties can apply if producers are aware of a release that must be reported and do not report or that their farms do not comply with applicable permitting requirements and do not obtain the necessary permits.
- C. Environmental Violations - EPA also reserves the right to pursue legal action

against farms that are believed to be imminently and substantially endangering human health, human welfare, or the environment.

- D. **State Enforcement** - While signing the Agreement protects participants from enforcement of federal environmental laws it does not prevent a state from bringing an action for the violation of state environmental laws.
- E. **Use of Protocols** - Producers must comply with the protocols used or the data developed during the monitoring study. Challenging the protocols will result in a loss of protection from suit.
- F. **Inability to Establish EEMs** - It is possible that even if EPA signs the Agreement that EEMs for certain types of sources will not be able to be developed.
- G. **Design Capacity** - A significant addition to a farm after entering the Agreement could trigger permitting requirements. The CAA requires specific permits if the level of air emissions from a farm exceed the thresholds. If an increase in the size of a farm after entering the Agreement causes that farm's total air emissions to trigger permitting requirements, the Agreement's covenants not to sue will not cover producers who fail to obtain a permit for the addition. While this does not mean that a producer cannot increase the size of their farm at all, it does mean that producers should obtain the necessary permits if an expansion will cause emissions from their farm to exceed permitting requirements. There are no good estimates, at this time, of the size of an expansion that would trigger these requirements and it may be useful to work with state agencies to clarify the issue.
- I. **SUMMARY & CONCLUSION** - EPA has indicated its need to regulate animal agriculture air emissions; however insufficient data currently exists for producers to determine if they need to comply with existing laws and for EPA to enforce those laws. Lawsuits against swine and poultry operations have proceeded even without good data from which to estimate emissions. EPA has indicated that if dairy producers choose not to participate in the Agreement, then they will develop EEMs based on current data, emission data collected from other animal species, and/or by forcing individual dairy operations to monitor emissions at their own cost. None of these options are good for the dairy industry. Even though there continue to be concerns with the Agreement, the NEDPA Board of Directors has endorsed participation by individual farmers as a way for the dairy industry to proactively address environmental concerns of sustainable farming operations. Participation in the agreement should be viewed as a type of insurance policy or as peace of mind during the duration of the Agreement. This is especially true for large farms that could be targeted by EPA for enforcement actions to prove to environmental groups that they are serious about the problem of emissions from animal feeding operations. The foregoing is not intended as an exhaustive analysis of the Agreement. All producers are encouraged to thoroughly review the Agreement. If producers have individual questions regarding participation they should seek competent legal counsel. Copies of the Agreement can be obtained at <http://www.epa.gov/compliance/resources/agreements/caa/cafo-agr-050121.pdf>.

Producers have until May 1, 2005 to make a decision on the Agreement and file the appropriate paperwork with EPA. A timeline and flow chart for the implementation of the Agreement is attached and can be found at [www.prodairyfacilities.cornell.edu](http://www.prodairyfacilities.cornell.edu) –click on “air emissions.”

### Contributors

Nixon Peabody LLP  
1300 Clinton Square  
P.O. Box 31051  
Rochester, New York 14603-1051  
David L. Cook  
Phone – (585) 263-1381  
E-mail – [dcook@nixonpeabody.com](mailto:dcook@nixonpeabody.com)

Matthew A. Cole  
Phone – (585) 263-1457  
E-mail – [mcole@nixonpeabody.com](mailto:mcole@nixonpeabody.com)

PRO-DAIRY Facilities  
Cornell University  
Ithaca, NY  
Curt Gooch  
Phone - (607) 255-2088  
E-mail - [Cag26@cornell.edu](mailto:Cag26@cornell.edu)

Karl Czymmek  
Phone - (607) 255-4890  
E-mail – [kjc12@cornell.edu](mailto:kjc12@cornell.edu)