

March 2, 2005

Air Docket  
Environmental Protection Agency  
Mailcode: 6102T  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

To Whom It May Concern:

The State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO) are pleased to submit these comments on the U.S. Environmental Protection Agency's (EPA's) Proposed Animal Feeding Operations Consent Agreement and Final Order (AFO CA/FO), as published in the *Federal Register* on January 31, 2005 (70 *Federal Register* 4958). We previously raised serious concerns with prior versions of the agreement in letters to EPA dated April 7, 2003, and February 18, 2004. We continue to have these concerns with the agreement and, accordingly, urge EPA not to enter into a consent agreement with animal feeding operations (AFOs) that waives enforcement of important provisions of the Clean Air Act in order to obtain emissions data from AFOs. While we commend EPA for embarking on a longer-term strategy for dealing with agricultural air emissions, we believe the agency should be working more closely with states and localities to adequately address their concerns. Our comments on the proposal are outlined below and spelled out in detail in the attachment:

- The proposed AFO CA/FO interferes with the ability of states and localities to attain air quality standards and enforce air pollution control laws; several of the agreement's provisions are unclear with respect to state and local authorities and could be interpreted to limit the ability of states and localities to enforce air laws;
- EPA could make regulatory or policy decisions that would leave AFO emissions unregulated, even if monitoring indicates there are emissions from AFOs in amounts of concern:
  - Emissions from AFOs may be deemed fugitive by EPA and therefore would not count for purposes of determining whether a source is required to apply for a Title V permit or for the purposes of determining whether a source is major or minor and thus subject to applicable controls;
  - There are important definitional issues – whether each barn and lagoon at a farm constitutes a separate source, whether an entire farm constitutes a source, and

whether contiguous farms constitute a source – that will determine whether AFO emissions would trip any regulatory threshold;

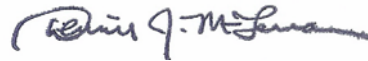
- The agreement provides participating AFOs with too much control over the monitoring program;
- The agreement does not ensure that participating AFOs will comply with the Clean Air Act, nor does it require participating AFOs to reduce their emissions or even test technologies or management practices to reduce their emissions;
- The agreement timelines are open-ended; and
- Given the purported national scope of the agreement, very few farms will be monitored and it is unclear how the farms to be monitored will be selected.

We welcome the opportunity to engage with EPA in a meaningful dialogue on an overarching approach to agricultural air policy. Given our concerns, however, we urge EPA not to go forward with the AFO CA/FO. If EPA proceeds nonetheless with obtaining emissions data through the mechanism of the AFO CA/FO, we urge that EPA consider our concerns with the agreement and modify it accordingly. Furthermore, EPA should involve states and localities in implementation of this agreement and development of EPA's long-term strategy on agricultural air issues.

Sincerely,



Nancy L. Seidman  
STAPPA President



Dennis McLerran  
ALAPCO President

Encl.

Attachment #1 to STAPPA/ALAPCO Comment Letter  
March 2, 2005

**I. The Agreement Impedes the Ability of States and Localities to Address AFO Emissions**

**A. The Agreement Interferes with the Ability of States and Localities to Attain Air Quality Standards and Enforce Air Laws**

- EPA's proposed Animal Feeding Operations Consent Agreement and Final Order (AFO CA/FO) includes the following enforcement waiver by EPA: EPA releases and covenants not to sue any participating AFOs for "[c]ivil violations of the permitting requirements in Title I, Parts C and D, and Title V, and any other federally enforceable state implementation plan (SIP) requirements for major or minor sources based on quantities, rates or concentrations of air emissions of pollutants that will be monitored under this agreement," which include volatile organic compounds (VOCs), hydrogen sulfide (H<sub>2</sub>S), particulate matter (PM) and ammonia. (§26(A).)
  - SIP requirements are necessary to attain or maintain the national ambient air quality standards (NAAQS) and thus enforcement of these requirements should *not* be waived by EPA, as then states and localities will need to look to other sources to obtain the reductions being "waived" by EPA.
  - EPA should clarify that this waiver does not affect state laws – including health-based air standards – or local ordinances that are listed in SIPs. Because any requirement in a SIP is federally enforceable, we are concerned that a participating AFO may claim, in any enforcement action brought by a state or locality, that the AFO CA/FO provides immunity from state laws or local ordinances listed in SIPs.
  - EPA needs to consider the impact this waiver will have on states with policies providing that the state may not be more stringent than the federal government. If EPA waives its enforcement authority, states with these kinds of policies may be required to similarly waive their enforcement authorities.
- The agreement provides that a participating AFO does not lose its release and covenant not to sue from EPA ("EPA enforcement waiver") if it is sued by a state or locality, with only a very limited exception. In order to keep its EPA enforcement waiver, a participating AFO must comply with "all final actions and final orders issued by the State or Local Authority that address a Nuisance arising from air emissions at the Farm" (§30).
  - This paragraph only specifies that a participating AFO comply with nuisance orders to maintain the EPA enforcement waiver. EPA should require a participant to comply with *any and all* state and local environmental laws in order to preserve its EPA enforcement waiver.
  - The requirement to comply with state and local orders covers only those actions and orders that are issued during the time period of the agreement and that concern pollutants emitted during the time period of the agreement.
    - This paragraph should be modified to require participating AFOs to also comply with a final action or order that was entered into concerning violations *prior* to the agreement.

- This paragraph should be modified to require a participating AFO to comply with a final action or order that concerns pollutants emitted during the pendency of the agreement and was issued after the time period of the agreement.
- The agreement provides that EPA may enter into an agreement with a farm currently being sued by EPA or a state (¶6). EPA should not grant an EPA enforcement waiver to a farm that is being sued by a state or locality.
- Paragraph 5 of the agreement provides that the agreement “shall not delay or interfere with the implementation or enforcement of State statutes *that eliminate exemptions to Clean Air Act requirements for agricultural sources of air pollution*” [emphasis added.] The agreement should contain a broader statement that the agreement shall not delay or interfere with the implementation or enforcement of *any* state statute or local ordinance that is applicable to agricultural sources, including AFOs.

**B. Several of the Provisions of the Agreement Are Unclear with Respect to State and Local Authorities and Could Be Interpreted to Limit the Ability of States and Localities to Enforce Air Laws**

We are very concerned that a particular major animal trade association is interpreting the AFO CA/FO to limit state and local enforcement authorities. EPA needs to include language in the AFO CA/FO that refutes the interpretations noted below.

- According to a “Questions and Answers” document about the AFO CA/FO on the National Pork Producers Council’s (NPPC’s) web site,<sup>1</sup> the agreement “allows participating pork producers to avoid state penalties for fence-line ambient air standards by promptly reporting and correcting the violation” (See A12). We presume that NPPC is referring to ¶35, which provides that if a Farm causes or contributes to a violation of any provision of a federally-approved SIP that requires compliance with an ambient air quality standard at the Farm’s property line, EPA releases and covenants not to sue a Farm if the Farm promptly reports and corrects the violation within 60 days; if it is a repeat violation, the Farm can still keep the immunity if it pays a penalty of \$500 per day and corrects the deficiency within 30 days.
  - We are concerned that the NPPC interprets this provision as allowing participating AFOs to avoid state penalties. Accordingly, the AFO CA/FO should state that “nothing in this agreement is intended to allow participating AFOs to avoid state penalties for violating fence-line ambient air standards.”
  - We also note that penalties under the Clean Air Act can be up to \$27,500 per day and request that EPA explain how it arrived at a \$500 figure, especially considering that this provision covers repeat violations and these violations are affecting public health.

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<sup>1</sup> See [www.nppc.org/hot\\_topics/airemissionsQ&A.html](http://www.nppc.org/hot_topics/airemissionsQ&A.html); copy attached.

- The NPPC also interprets the agreement as providing legal protection from state and local enforcement actions for any alleged emissions violations covered by the consent agreement during the period of the consent agreement. (See A14 – “The format of the consent agreement also creates legal protections for defending state and citizens’ lawsuits for any alleged emissions violations covered by the consent agreement during that period;” and A21 – California pork producers can participate in the EPA consent agreement “and thereby gain legal protection for past emissions.”) This contradicts EPA’s statement in the preamble that the agreement does not impact states’ authorities to “enforce compliance with nonfederally enforceable State laws, existing or future, that are applicable to AFOs” (p. 4959, 1<sup>st</sup> column). Accordingly, EPA should include the following provision in the AFO CA/FO: “Nothing in this agreement is intended to affect the ability of state and local officials to enforce compliance with state or local laws, existing or future, that are applicable to AFOs, including any actions with respect to any alleged emissions violations covered by the consent agreement during that period.”
- While the agreement provides that all the emissions data generated will be made publicly available and that any participating AFO “waives any right to claim any privilege with respect to such data” (§59), the NPPC claims that “[t]he legal protections of the consent agreement will prevent any group from using any of the collected emissions data against any of the participating pork producers, whether their farms are actually being monitored or not” (A20). EPA should include the following provision in the AFO CA/FO: “Nothing in this agreement is intended to affect the ability of state or local officials to use the emissions data collected under this agreement in developing or enforcing state laws or local ordinances.”

## **II. Emissions from AFOs May Be “Defined” Into Nonexistence, Leaving Air Emissions from AFOs Unregulated**

### **A. EPA Could Deem Any and All Emissions From AFOs Fugitive**

- The preamble of the *Federal Register* notice states that EPA plans to issue regulations and/or guidance on “whether emissions from different areas at AFOs should be treated as fugitive or nonfugitive” after the conclusion of the monitoring study (p.4959, 2<sup>nd</sup> column). In April 7, 2003, STAPPA and ALAPCO sent a letter to the EPA administrator expressing concern about reports that EPA was developing a policy that would deem most agricultural air emissions “fugitive” emissions, thus obviating the need for most large or medium-sized agricultural operations to obtain a Title V permit or comply with major or minor source control requirements. STAPPA/ALAPCO remain concerned that EPA will in the future deem any or all of the emissions from agricultural activities as “fugitive” emissions. EPA needs to clarify quickly the process it will undertake for making this determination, and it should closely involve state and local air authorities. It should make this determination by notice-and-comment rulemaking, not guidance.

## **B. EPA Could Define “Source” So that Emission from AFOs Do not Trigger Major/Minor Source Control or Permitting Requirements**

- The preamble provides that the agreement “does not define the scope of the term ‘source’ as it relates to animal agriculture and farm activities [and that EPA] plans to provide guidance on this issue at the conclusion of the monitoring study” (p. 4959, 3<sup>rd</sup> column). As with fugitive emissions, we are concerned that EPA may define “source” in such a way that emissions from AFOs do not rise to any threshold of regulatory concern. EPA needs to clarify quickly the process it will undertake for making this determination, and it should closely involve state and local air authorities. It should make this determination by notice-and-comment rulemaking, not guidance. While we reserve our full comments for submission in a rulemaking specific to this issue, we make the following observations:
  - In Sierra Club v. Seaboard Farms (10<sup>th</sup> Cir., Oct. 28, 2004), the court ruled that the term “facility” under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) should be construed broadly, so that an entire farm is considered a ‘facility’ rather than considering each barn, lagoon or land application area as a separate ‘facility.’ Under the latter interpretation, Seaboard would have only been required to report its ammonia emissions if these emissions at *each* individual structure exceeded one hundred pounds per day. The court instead said that emissions from each structure or area at a farm should be aggregated to determine whether the regulatory threshold requiring a ‘facility’ to report toxic emissions was exceeded. Like CERCLA, the Clean Air Act should be interpreted liberally to accomplish its goals of cleaning up the air and maintaining clean air.
  - The agreement in ¶28(C)(i)(b) provides that a Source’s annual emissions shall be determined based on the Source’s “current operating methods and on the maximum number of animals housed at the Source at any time over the 24 months” prior to EPA’s publication of the emission-estimation methodologies. This is contrary to the usual practice of determining potential-to-emit in permit determinations; accordingly, the Source’s emissions should be calculated based upon the operation’s maximum capacity and not what the maximum number of animals was over the last 24 months.

## **C. Interpretation of “Fugitive Emissions” and “Source” Impacts Other Industries**

- EPA needs to take into consideration that its interpretation of “fugitive emissions” and “source” in the context of AFOs will affect the interpretation of these terms as they apply to other industries.
  - Waste lagoons are similar to municipal waste treatment plant lagoons and barns are similar to other enclosed or semi-enclosed structures (whiskey warehouses, for example). Therefore, if EPA were to determine that emissions from waste lagoons and/or barns were fugitive, other industries with similar structures and lagoons may seek similar treatment for emissions from their structures and lagoons from EPA.
  - Factories or other industrial sites often contain many different emission points, and if EPA were to determine that barns and lagoons constituted separate sources of

emissions, other industries would likely seek to have their sites treated in a similar manner.

### **III. The Agreement Provides AFO Participants With Too Much Control Over the Monitoring Program**

- AFO participants exercise too much control over the National Air Emissions Monitoring Study Protocol (pp.4968-4977) (“Monitoring Program”).
  - AFOs establish a nonprofit entity, the Agricultural Air Research Council (AARC), which has been granted extensive authorities to run the Monitoring Program, including selection of the science adviser and the monitoring contractor (p.4970, 1<sup>st</sup> column).
  - The AARC consists of “representatives from the various animal husbandry industries” (p.4970, 3<sup>rd</sup> column). Please explain how EPA will ensure that these representatives are objective and how these representatives were selected.
  - AFOs fund the Monitoring Program. Thus the monitoring contractor and science advisor receive their funding from the AFOs, which gives at least the appearance of impairing their objectivity.
  - AFOs through the AARC are responsible for communicating progress of the study to the public (p.4970, 1<sup>st</sup> column). EPA should be responsible for communicating the results and progress of the Monitoring Program.
  
- According to the NPPC web site, Purdue University will serve as the science advisor, though no science advisor is named in the *Federal Register* notice. EPA should indicate which entity has been chosen to serve as the science advisor.

### **IV. The Agreement Does Not Ensure that AFOs Will Comply with the Clean Air Act**

- The *Federal Register* notice states that EPA believes the AFO CA/FO is the “quickest and most effective way . . . to bring all participating AFOs into compliance with all regulatory requirements” (p. 4958, 3<sup>rd</sup> column). The AFO CA/FO provides that, as a condition to participation in the agreement, a participating AFO agrees to accept the study protocols employed in and the emissions data developed by, the national air emissions monitoring study. If a participating AFO challenges the protocols or data, EPA’s release and covenant not to sue are void (¶33). STAPPA/ALAPCO is concerned that, despite ¶33, there still are several opportunities for AFOs to avoid complying with the Clean Air Act. For example,
  - the agreement does not prevent any participating AFO from challenging EPA’s emission-estimation methodology or how that methodology is applied to its farms; and
  - the agreement not restrict associations (e.g., NPPC) from suing on *any* issue (including the study protocols employed in and the emissions data developed by, the national air emissions monitoring study), and these associations do not face any risk of losing the EPA enforcement waiver.

## **V. The Agreement Does Not Require AFOs to Reduce Their Emissions or Even Test Technologies or Practices for Reducing Emissions**

- STAPPA/ALAPCO also believe that if EPA is going to proceed with the AFO CA/FO, it should include a requirement for participating AFOs to reduce emissions or at least to test technologies or management practices for reducing emissions. However, nothing in the agreement requires participating AFOs to reduce their emissions or even test any such technologies or management practices. In fact, even if there are funds left over after monitoring is finished, the agreement does not even suggest that the leftover funds be spent on testing technologies or management practices for reducing emissions. See ¶63.

## **VI. The Agreement Timelines Are Open-Ended**

- The agreement contemplates that the Monitoring Program will last 24 months, and that no later than 18 months following completion of monitoring for any species, EPA will release emission-estimation methodologies (see p. 4959, 3<sup>rd</sup> column and ¶32). Once these methodologies are released, AFOs are provided a certain amount of time to determine whether permit or major/minor source control requirements are triggered (¶¶28 (B) and (C)). However, these timelines are not absolute deadlines, which means the EPA waiver could last indefinitely.
  - The agreement states that EPA will publish emission-estimating methodologies within 18 months, but if it fails to do so, there is no impact on the agreement's provisions or timelines, including the duration of the waiver (¶32).
  - Paragraph 37 purports to limit the duration of the waiver in paragraphs 26 and 35 to cover only violations that occur before the earlier of: (a) the date the company submits the last required certification covering those "Emission Units;" or (b) 2 years after the company submits any permit applications pursuant to ¶28(C)(i) (This time period can be extended not more than 6 months.) However,
    - if EPA doesn't issue emission-estimation methodologies, neither (a) nor (b) triggered, and
    - if any AFO challenges the emission-estimation methodology in court, or challenges the application of the methodology to its farm, a judge may stay the requirements of ¶37(a) and (b), and thus extend the duration of the waiver.

## **VII. Concerns About Monitoring Program and Emission-Estimation Methodology Development**

- It is not clear how many farms or barns and lagoons will be monitored under the Monitoring Program. It appears that as few as 16 farms could be monitored: five swine farms, four laying hen farms, three meat bird farms and four dairy farms. EPA should clarify how many farms are going to be monitored, for which species, in what area and what structure is going to be monitored at each farm (barn, lagoon, or other). EPA should also indicate why it believes data from this number of farms is sufficient to



develop its emission-estimation methodology, and/or what other data it will use to develop these methodologies.

- It is not clear how the farms to be monitored will be selected or what role EPA has in the selection process. The Monitoring Protocol provides that the AARC will compile a list of candidate farms from those participating in the consent agreement and submit the list to the Science Advisor, who will “facilitate a process to select farms for monitoring” (pp. 4970-4971). EPA approves the comprehensive site plans, but it is not clear whether that means EPA approves or disapproves the farms that are selected or just the placement of the monitors at a particular site (p.4971, 1<sup>st</sup> column).
- Please clarify when the 24-month monitoring period begins, and whether the goal is to obtain 24 months of quality-assured data or monitor for 24 months and use whatever data is collected during that time, regardless of quality.
- We are troubled that EPA is not including land application of manure in the Monitoring Program. Many complaints received by state and local agencies are associated with land application of animal waste, because land application is often done at the edge of property boundaries and close to neighbors. For example, the operations associated with emptying an anaerobic digestion lagoon or holding tank and disposing of the effluent or sludge on land will result in significant amounts of ammonia release. A range of different operations or practices will result in differing amounts of release to the air. Considering the access that will be provided to farming operations as part of this agreement, it seems an ideal opportunity to do monitoring of this activity.
- For similar reasons, we believe the Monitoring Program should include Hazardous Air Pollutants (HAPs). Emissions of HAPs from AFOs are a major concern to states and localities and EPA should use the opportunity afforded by the Monitoring Program to measure HAPs.
- EPA should describe its plans for developing emission-estimation methodologies, including how it plans to incorporate other information besides that obtained in the Monitoring Program. Furthermore, it should describe its strategy for developing emission-estimation methodologies for animal species that don’t participate in the agreement and its contingency plans for developing emission-estimation methodologies if there is insufficient participation or funding under this agreement.

### **VIII. EPA Needs to Involve States and Localities in Agricultural Air Policy**

- The preamble of the *Federal Register* notice references EPA’s longer-term strategy for agricultural air emissions (p. 4960, 2<sup>nd</sup> column; and p. 4961, 1<sup>st</sup> column). EPA needs to involve states and localities in developing this strategy. To date, STAPPA and ALAPCO have not been involved in discussions about a longer-term strategy and we are troubled by this exclusion.

- The preamble also states that EPA will issue guidance and/or regulations on which emissions are fugitive and which are nonfugitive. States and localities need to be consulted in this process. We are concerned that procedures for releasing EPA guidance do not require public comment; accordingly, these determinations should be made by notice-and-comment rulemaking.
- EPA needs to involve states and localities in the implementation of the AFO CA/FO, if EPA decides to go forward with the agreement.
  - For example, ¶58 provides that the monitoring contractor shall meet periodically with EPA to discuss progress; states and localities should participate in these meetings.
  - State and local agencies should be involved in the selection of the facilities to be tested.
  - The quarterly reports required at ¶55 (D) should be shared with the state and local agencies at the time of submittal, especially those within whose jurisdiction the AFO operates.
- For these reasons, we therefore urge EPA to work closely with STAPPA/ALAPCO in 1/developing a longer-term strategy for agricultural air emissions and 2/implementing the AFO CA/FO, assuming it goes forward. There are numerous examples of areas where such partnerships have worked well, and EPA should follow this partnership model in addressing agricultural air emissions:
  - EPA provided funding to STAPPA/ALAPCO to develop a menu of options for controlling emissions of PM<sub>2.5</sub> and PM precursors (forthcoming spring 2005). EPA staff members are on the review committee that has reviewed drafts of the document.
  - STAPPA/ALAPCO participated extensively in phase one of the Air Quality Management Work Group, which was set up to provide recommendations to the Clean Air Act Advisory Committee on improving air quality management in the U.S.
  - STAPPA/ALAPCO and EPA cooperate extensively in planning such meetings as the Communicating Air Quality Conference, Air Toxics Workshop, Permitting and Enforcement Workshops, and the Air Innovations Conference.
  - Throughout the fall and winter of 2000/2001, STAPPA and ALAPCO established an extensive subgroup process during which members of state and local air agencies and EPA staff worked to develop a range of options for implementation of the 8-hour ozone standard.
  - EPA conducted a rulemaking that led to a rule that will regulate for the first time emissions from non-road diesel engines, and this rulemaking used a public process that EPA should emulate in its development of a longer-term strategy for agricultural air emissions.

**IX. Given the Structure and Length of the Comment Period, It Appears EPA Will Not Consider Any Changes to the AFO CA/FO**

- EPA has provided 30 days for the public to comment on a path-breaking, complicated agreement and monitoring protocol. Thirty days is not a substantial amount of time to provide detailed comments.
- In addition, given the way EPA has structured the comment period, it does not appear that even comments received during the 30 days will be considered. The public comment period of 30 days runs concurrently with the 90-day period for AFOs to sign up to the agreement (p. 4962, 1<sup>st</sup> column). This implies that EPA will not change the agreement – either substantially or even minutely – in response to public comment, because if EPA did change any terms of the agreement, any AFO that that signed on to the version published in the January 31<sup>st</sup> *Federal Register* notice would have to resign its agreement. This would make the 90-day sign-up period pointless, if all AFOs have to resign agreements.

Attachment #2 to STAPPA/ALAPCO Comments  
March 2, 2005

National Pork Producer Council website: [http://www.nppc.org/hot\\_topics/airemissionsQ&A.html](http://www.nppc.org/hot_topics/airemissionsQ&A.html)

**Questions and Answers  
on the  
Air Emissions Consent Agreement and National Monitoring Study**

**National Pork Producers Council (NPPC)  
January 2005**

**The following questions and answers were developed to help pork producers understand the complex legal and practical aspects of the pending air emissions consent agreement and the scientific aspects of the pending air monitoring study.**

**Q1: Why are we considering the consent agreement and monitoring study?**

**A1:** Both are designed to help protect the environment. The U.S. Environmental Protection Agency (EPA) and state air regulators expect large animal feeding operations to comply with relevant air laws but clearly lack the data needed to determine which farms exceed the regulatory thresholds for emissions of regulated pollutants. A two-year national air monitoring study will use state-of-the-art technologies and standardized procedures to establish these regulatory thresholds. EPA is engaged in all aspects of design, oversight and data interpretation. When the data is collected and the regulatory thresholds determined, animal feeding operations that exceed the newly-determined thresholds will be expected to comply with the air laws. For all pork producers who agree to participate, EPA has agreed to provide certain legal protections for past and current emissions. The consent agreement outlines those expectations, establishes the legal protections for past emissions for those who choose to participate, and identifies the responsibilities pork producers will have in terms of complying with the air laws going forward.

**Q2: What are the “air laws?”**

**A2:** Congress passed several laws that for many years were applied to “smoke stack” industries but not agriculture. Today, because of consolidation in the livestock industry and increased size of average farms, EPA considers emissions from animal feeding operation (AFO) barns, lagoons, and retention ponds, if above pollutant emission thresholds, subject to Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and Clean Air Act requirements. Recent lawsuits, court decisions and consent agreements tend to support those positions. The state of California, for example, had traditionally exempted animal feeding operations from its Clean Air Act permitting requirements. As a result of a Sierra Club lawsuit, EPA forced California to change its exemption policies and has established a schedule for permitting large AFOs. Similarly, a federal court in Kentucky recently ruled that the law requires the poultry industry to report emissions under CERCLA, whether the farms in question were owned by the integrator or were contract farms.

**Q3: CERCLA applies to hazard reporting. How does that apply to farming?**

**A3:** CERCLA requires reporting to EPA when a “facility” releases more than a “reportable quantity” of a hazardous substance like ammonia and hydrogen sulfide. All emissions (including “fugitive,” or uncontrollable, emissions from fields and other open areas) are reportable if they exceed the reportable quantity, which is 100 pounds in any 24-hour period. It is currently uncertain whether CERCLA’s reporting quantity threshold applies to the emissions from a specific building or lagoon on a farm site, or the collective emissions from all buildings and lagoons on a farm site. Reporting can be done on an annual basis if the emissions are ongoing.

**Q4: Is compliance with the Clean Air Act difficult?**

**A4:** Compliance with the Clean Air Act is much more complicated than CERCLA. Any farm found to be a “major source” of emissions will be required to apply for and comply with a Title V operating permit. Pollutants that might be of concern for livestock operations include particulate matter, volatile organic compounds, oxides of nitrogen, and hydrogen sulfide. Generally, a source is “major” if it emits or has the *potential* to emit 100 tons per year or more of any air pollutant. Much lower thresholds apply, however, in California and perhaps other areas that are in “non-attainment” with applicable air quality standards for the pollutant at issue. Minor source permitting can apply at emission rates as low as five tons per year.

**Q5: Are all emissions from a farm subject to the Clean Air Act?**

**A5:** In calculating whether emissions meet “major source” thresholds, a “source” can actually include a large area of many emissions sources which are adjacent and under common ownership. Under current EPA regulations, these calculations do not include fugitive emissions from large unenclosed areas, but EPA could issue rules requiring the inclusion of such emissions.

**Q6: Can states issue additional “air laws?”**

**A6:** Many State Implementation Plans (“SIPs”) also require permits for “minor sources” based on lower, state-specific emission thresholds. We are aware of thresholds as low as five tons per year. In addition, states may regulate fugitive particulate matter emissions as necessary to meet national ambient air quality standards. There is a trend of increasing state regulation of air emissions from concentrated animal feeding operations (CAFOs), and EPA has made this a high priority for increased regulation. If incorporated into a state’s SIP, minor source or other more stringent state-specific requirements are federally enforceable under the Clean Air Act.

**Q7: Are farms vulnerable to legal action because of these air laws?**

**A7:** Most producers aren’t even aware of their vulnerability. In the past few years several citizen, state and EPA lawsuits have resulted in consent agreements and court decisions that involve multi-million dollar penalties and requirements for corrective action. The air laws allow groups to sue for emissions violations that occurred in the past, with substantial penalties assessed for every day and every facility involved, even though AFO managers weren’t aware that the air laws could be applied to their farms. The high cost of attorney and consultant fees, disruption of normal business, and possible fines makes the risk of past and current emissions violations a threat to doing business.

**Q8: Is that why NPPC helped negotiate the legal protections in the consent agreement?A8:**

Yes, the pork industry saw the emerging legal liability as a critical issue for pork producers of all sizes and NPPC engaged in the efforts of a coalition of agricultural organizations to bring this about.

**Q9: Is participation in the consent agreement mandatory?**

**A9:** No, pork producers must make a decision whether to take the legal protections offered by EPA in the consent agreement or “go it alone” with this issue. Participation is voluntary, but if it’s not taken it won’t be offered again. NPPC will host meetings and publish information to help pork producers understand what’s at stake.

**Q10: What is required to participate and obtain the legal protections?**

**A10:** To get the legal protections needed, producers would have to sign a formal consent agreement and pay a nominal penalty. By signing the consent agreement a pork producer is not admitting any guilt for past emissions violations, but is agreeing to later come into compliance with the law should the study results indicate his farm is above the legal thresholds of air emissions established by law.

**Q11: What legal protections are you talking about?**

**A11:** Signing the consent agreement gains legal protections without admitting any guilt for alleged past emissions violations. The protections would cover the period from about 2007 backwards. EPA will release from liability and promise not to sue any participating producer who signs the agreement and pays a nominal penalty. The producer may also be asked to make his/her farm available for a national monitoring program that will be started in 2004, and agrees to abide by the law going forward after the study if the data produced indicates that the farm has air emissions that are greater than the threshold established by the air laws. To be specific, the protections extend to potential civil violations of the permitting requirements in Title I and Title V of the Clean Air Act, and any other federally enforceable state SIP requirements for emissions and pollutants monitored under this agreement; and for civil violations of CERCLA release reporting requirements, other than a singular unexpected or accidental release such as from a fire, explosion, etc.

**Q12: How does the consent agreement treat a state’s ambient air standards?**

**Q12:** The agreement allows participating pork producers to avoid state penalties for fence-line ambient air standard violations by promptly reporting and correcting the violation.

**Q13: How far back in time will the protections extend?**

**A13:** The statute of limitations is five years, so the consent agreement will protect a participating pork producer from lawsuits that are based on emissions anytime during that period.

**Q14: Will it protect pork producers from EPA lawsuits only? What about state and citizen suits?**

**A14:** The format of the consent agreement also creates legal protections for defending state and citizens’ lawsuits for any alleged emissions violations covered by the consent agreement during that period.

**Q15: If pork producers are not ‘guilty’ of any wrongdoing why do they have to pay a**

**penalty?A15:** The penalty is nominal (as little as \$200 per farm, adjusted by size and farm number per

company), and paying it is part of the legal procedure that provides the protections. Without the payment of a penalty, the legal protections would not be as strong.

**Q16: What is the air emissions monitoring study all about?**

**A16:** In return for EPA agreeing to release those pork producers from any liability for emissions that occurred in the past, pork producers must organize, pay for, and participate in a comprehensive study of air emissions from farms across the country. The study will last about two years. In the air emissions study, EPA, U.S. Department of Agriculture (USDA) and a team of university scientists will monitor air emissions at pork, dairy, egg and poultry farms across the country. At the conclusion of the study, EPA will use the information gathered to set air emissions policies, identify exceedance thresholds, and to regulate excessive livestock and poultry air emissions.

**Q17: Why is this air monitoring study needed?**

**A17:** The air laws have specific thresholds that trigger compliance with the requirements, but government agencies have not collected the data needed to determine how those thresholds apply to farm production systems. The new data will help regulators and farmers establish what sized farms and what manure handling procedures produce air emissions that exceed the thresholds for the regulated pollutants. The air study will be nationwide in scope and will be designed to answer the specific questions of who has to comply.

**Q18: What regulated air pollutants will be monitored?**

**A18:** Ammonia, hydrogen sulfide, particulate matter, nitrous oxides, and volatile organic compounds (VOCs) are all regulated pollutants and must be monitored to earn the legal protections in the consent agreement. Particulate matter is made up of PM10 (dust), PM2.5 (fine particulates), and TSP (total suspended particulates); each has a standard. VOCs include methane and many other chemicals that contribute to smog, haze and other adverse air conditions.

**Q19: Who will pay for the study?**

**A19:** The study will be paid for by funds from the participating industries including pork, dairy, poultry and egg producers; in some cases checkoff funds and in other cases direct contributions from industry representatives. Pork checkoff funds, administered by the National Pork Board, will pay for the pork industry's portion of the study. Purdue University will have responsibility for holding the funds, distributing the funds and obtaining public audits of the work.

**Q20: Will the results of the study be quality controlled and public?**

**A20:** Yes, the design and conduct of the study, the data collection and overall supervision of the conversion of the data to policy that will affect pork producers is to be overseen by several levels of public review. EPA will not be conducting the study. The actual university scientists doing the study will be carefully selected to have the best credentials for this type of on-farm monitoring work, and USDA-Agricultural Research Service and state university scientists selected for their broad backgrounds and reputations in this field will supervise them. Purdue University will supervise the conduct of the study and interact with EPA as the agency analyzes the data. All of the data will be publicly available on EPA's

website: <http://www.epa.gov>. The legal protections of the consent agreement will prevent any group from using any of the collected emissions data against any of the participating pork producers, whether their farms are actually being monitored or not.

**Q21: Can California pork producers participate, even with the recent state laws?**

**A21:** Yes, new state law requires farms above certain threshold sizes to apply for and comply with state-issued air permits and undertake controls on future emissions to help improve air quality. Most of these California pork producers can participate in the EPA consent agreement too, and thereby gain legal protections for past emissions.

**Q22: Will all pork producers be able to participate?**

**A22:** By and large, yes. However, EPA reserves the right to exclude some pork producers from the legal protections of the consent agreement, although the exact conditions under which that might occur are being negotiated. It is likely that EPA will exclude any farm that is currently involved in a legal action with EPA over these air laws.

**Q23: Do these air laws only apply to large farms? What is the minimum sized farm that should sign the consent agreement and gain the legal protections?**

**A23:** University research in Indiana, Missouri and Illinois indicates that any hog producer with two deep-pit finishing barns (1,000-pigs each) should consider signing up. Even a farm with only 1,000 hogs should seriously consider signing up also. The same is true for barns with flush systems when you add the lagoon emissions to those of the barns.

**Q24: What will happen to pork producers after the air emissions monitoring study is over?A24:**

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 have only to send in a certification to EPA stating they are not subject to the 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 greater levels of emissions may have to apply for an air permit and, at some point in time, install controls on their farms (California producers have a separate time schedule under state law). Those controls aren’t yet determined.

**Q25: What if a farm’s design isn’t covered by the air study and look-up chart?**

**A25:** If EPA notifies a participating pork producer that it is unable to develop a “look-up” chart of emissions estimating methodologies for its specific type of farm, the participating producer retains its legal protection for 180 days after such 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 EPA nor the producer is able to determine if the participating producer is subject to the CAA or CERCLA requirements, the pork 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.



**Q26: Can producers challenge how the “look up” charts apply to them?**

**A26:** Yes and no. Industry representatives helped design the study, helped select the technologies and standardized protocols used, recommended the specific farms to be monitored, and helped identify the monitoring contractor and the specific scientists to conduct the study. Industry will also 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. They may, however, challenge the way in which the “look-up” charts would apply the air emissions data to their particular facility.

**Q27: What if pork producers decide to “go it alone” and not participate?**

**A27:** Participation in the study and agreement is voluntary. Those pork 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.

**Q28: Is there any way a participating pork producer can lose the legal protections?**

**A28:** Yes, there are a couple of ways that could happen but not without the pork producer’s direct involvement: (a) Once the “look-up” chart is available on EPA’s website after the study is finished, pork producers will have several months to determine if they are subject to the laws and, if they are, undertake the necessary steps to comply (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 his farm has emissions that are subject to the air laws (unless he can show that the study results do not apply to his particular farm), he will lose his legal protections all the way back to the date he signed the agreement; and (b) 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. Of course, it is possible that all these things could happen, but it is unlikely that it all would happen in two years and if it did the pork producer could avoid the loss of the legal protections by complying with the consent agreement.

**Q29: Does this agreement only provide protections from civil liability?**

**A29:** This consent agreement does not release a participating pork producer from any 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.

**Q30: How will the air monitoring study be conducted?**

**A30:** The air monitoring study is being developed by a team of renowned scientists, EPA, USDA, industry and environmental experts. Once the plan is approved by EPA, 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. In addition, conducting the study for a period in excess of one year will allow the team to check the repetitive nature of the data set and account for any data anomalies. Farm monitoring sites will be 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 will 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; lookup charts; and regulatory decisions.

**Q31: Will there be an effort to determine the effectiveness of emission controls?**

**A31:** The two-year study is 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