



John Cowan, Exec. Director

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Managers Update

The TAD newsletter this month will focus on the Federal EPA Air Consent Agreement. The TAD organization has not taken a position of support or non-support of the USEPA Air Consent Agreement, and as such we are not recommending to you to sign or not sign the agreement. We know and understand that decision rest solely with you, the dairy owner / operator. What I can tell you is that the TAD organization has two board-member dairymen and myself who sit on a National Milk Producers Federation committee charged to evaluate the air consent agreement and provide as much information about the “agreement” as we can to assist you with your decision. I am reprinting, in part a summary of the USEPA Air Consent Agreement, which I feel does a good job of explaining the “agreement” by an attorney with Michael Best & Friedrich LLP, David A. Crass. The deadline for AFOs to sign up with U.S. EPA has been extended until July 1, 2005.

Summary of the US EPA Air Consent Agreement¹

April 15, 2005

On January 31, 2005, the United States Environmental Protection Agency (“EPA”) published in the Federal Register a formal notice of its proposed program to regulate airborne emissions of pollutants from certain farming operations pursuant to voluntary air compliance agreements in conjunction with a study of emissions from those farms. EPA proposes the Program in an effort to raise money to fund a study to assist EPA in developing scientific methodologies for measuring and regulating airborne pollutant emissions from livestock operations. Because many emissions from farming operations do not come from a single point, but rather accumulate from the operations as a whole, EPA has found it difficult to measure, monitor and apply federal environmental laws in the traditional manner.

EPA addresses the application of the following federal environmental laws under the Program: the federal Clean Air Act (“CAA”) regulating emissions of pollutants from stationary sources to the atmosphere; and provisions of both the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) and the Emergency Planning and Community Right-To-Know Act (“EPCRA”) requiring reporting to governmental agencies (federal, state and local) when certain pollutants are emitted or released to the environment in specified reportable quantities. Disputes have arisen as to when, if at all, the regulatory thresholds of these statutes are triggered given the lack of scientific data applicable to emissions of pollutants - such as ammonia, hydrogen sulfide and particulate matter - from livestock operations.

Generally speaking, under the Program participants (i) pay a penalty in exchange for a release and promise by EPA not to sue for potential past and ongoing violations of these statutes, and (ii) pay into a fund for an Emissions Monitoring Study overseen by a non-profit entity. The non-profit entity’s primary function is to administer funds for the Study and to employ independent contractors to conduct the Study. The purpose of the Study is to: “collect data and aggregate it with appropriate existing emissions data; analyze the monitoring results; and create tools (e.g., tables and/or emission models) that [farming operations] could use to determine whether they emit pollutants at levels that require them to apply for permits under the federal CAA or provide notifications under CERCLA or EPCRA.”.

EPA anticipates the Study will continue for two years, resulting in creation of Emissions-Estimating Methodologies for each type of farming operation and industry covered by the Program. Upon completion of the Study, EPA has generally agreed to publish the Emissions-Estimating Methodologies within 18 months thereafter. However, EPA is not required to do so if it concludes there is inadequate data for any or all of the operations or industries covered by the Study.

Briefly, to participate in the Program, each particular farming operation must be one of the types of farming operations eligible to participate, it must elect to participate by entering into an agreement with the EPA, EPA must agree to accept the operation into the Program and the producer must meet all his or her obligations imposed by the agreement with EPA. If the participant meets all obligations, EPA in turn agrees to release and promises not to sue the participant for certain past civil violations of the CAA, CERCLA and EPCRA during the Study period and for a limited time after. This memorandum will cover each of the above key items in greater detail below.

II. HOW TO PARTICIPATE IN THE PROGRAM

A. Eligibility

1. Animal Feeding Operations

EPA will only allow participation by farming operations that meet the definition of “animal feeding operations” (AFOs) under the federal Clean Water Act (“CWA”). Under the CWA, EPA generally defines AFOs as operations where animals are confined for at least 45 days in a 12-month period and no grass or other vegetation grows in the confinement area during the normal growing season. Importantly, the Program defines Farm to mean the livestock production area and not land application sites. Production areas that are adjacent and under common ownership are defined as one Farm for purposes of the Program.

2. Covered Emissions Units

The Program only applies to specified types of emissions, both in source and substance. The Program only applies to emissions from

¹ Reprinted in part by John Cowan from an analysis of the Air Consent Agreement by David A. Crass, of Michael Best Friedrich, LLP April 8, 2005.

buildings or structures housing livestock and emissions from installations used for storage or treatment of livestock waste, including lagoons. Collectively, these are known as "Emissions Units" under the Program. The Program will focus only on emissions of the following pollutants: Volatile Organic Compounds, Hydrogen Sulfide, Ammonia and Particulate Matter. AFOs that may participate in the Program include those that own, operate or control farms containing one or more Emission Unit(s) emitting one or more of the listed pollutants. AFOs that contract to raise livestock for someone else who owns the livestock, which have one or more Emission Unit(s) at the farm where it raises that livestock ("contract farm"), may also participate (known as "Contract Growers" under the Program).

B. Election to Participate: Consent Agreement and Final Order

Assuming the eligibility requirements are met, those wishing to participate in the Program must enter into a Consent Agreement and Final Order ("Consent Agreement") with EPA. Under the Consent Agreement, participating AFOs agree to meet certain obligations and pay forfeiture and a contribution to assist in funding the Study based on the size and number of farms. In exchange, EPA releases and agrees not to sue participants for civil violations of the CAA, CERCLA and EPCRA.

An executed copy of the Consent Agreement must be submitted to EPA by no later than July 1, 2005, including providing information about each of its farms to be covered. The required information includes identification of each Emission Unit to be covered by the Agreement. EPA then determines whether it will enter into the Consent Agreement with the particular AFO. If EPA agrees to allow the AFO to participate, EPA will return to the AFO the Consent Agreement signed by EPA.

EPA has discretion in deciding whether to execute the Consent Agreement with a particular AFO. For example, EPA may decline to enter into an Agreement if it decides there is inadequate representation of certain animal groups for types of farming operations or inadequate funding for the Study for the respective industry sector. In addition, EPA may decline to enter into an Agreement with any AFO that has been notified by the EPA or a state of a possible current violation of federal or state clean air acts, or CERCLA or EPCRA reporting requirements.

Assuming EPA decides to enter into the Consent Agreement, the AFO will then be bound to that Agreement and subject to an EPA enforcement action if it fails to pay the required penalty as discussed below. By entering into a Consent Agreement with EPA, the AFO does not admit liability. Specifically, participants who enter into the Agreement do not admit that their farms are subject to CERCLA or EPCRA reporting, are required to have a CAA permit, or that they have committed any violations of those statutes.

III. HOW THE PROGRAM OPERATES: OBLIGATIONS AND BENEFITS

In executing a Consent Agreement under the Program, the AFO agrees to pay a civil penalty, to pay funds to the Study, and to assist with the Study by making its farm available for monitoring. In addition, the AFO agrees to assume certain other future obligations with

respect to reporting or correcting certain emissions violations and to apply the results of the Study to its farm(s) when completed. AFOs make these agreements in exchange for EPA's release and promise not to sue for certain violations of the CAA, CERCLA and EPCRA for emission of pollutants at an AFOs' participating farms.

A. EPA's Release and Promise Not to Sue

1. What It Covers

Under the Consent Agreement, in exchange for an AFO meeting all of its obligations discussed below, EPA agrees to release and promises not to sue the AFO for certain past and ongoing civil violations related to emissions of pollutants at farms covered by the Agreement. EPA's release and promise not to sue under the Consent Agreement specifically applies to emissions from Emission Units at farms for the following:

- Civil violations of the permitting requirements under the Clean Air Act and any other federally-enforceable State Implementation Plan requirements for emissions:
- Civil violations of the reporting requirements under section 103 of CERCLA and section 304 of EPCRA requiring reporting of emissions of H2S and NH3 in enumerated quantities, except that participants will still be required to report "singular unexpected" or "accidental releases" of those substances, such as in the case of an explosion, and
- Civil violations of state and federal implementation plans for emissions of VOCs, H2S, NH3, TSP, PM10 and PM2.5 which violate an ambient air quality standard under those plans.

2. What It Does Not Cover

The Consent Agreement places limitations on EPA's release and promise not to sue, enumerating violations and situations to which it does not apply. In addition, the Agreement enumerates circumstances, which may void or cancel the protection. Those circumstances include some within the control of the participating AFO and some that are not. The Agreement also generally provides that an AFO's failure to comply with any requirement of a Consent Agreement will void the EPA's release and promise not to sue. Also, the release and promise not to sue does not protect farmers from or otherwise affect lawsuits brought by neighbors or other affected parties that allege that the operation is a nuisance or has damaged the property value of others.

First, EPA's release and promise not to sue does not apply to any criminal liability under environmental laws. Nor does it apply to situations that "may present an imminent and substantial endangerment to public health, welfare or the environment." In addition, the release and promise not to sue does not extend to emissions from other equipment or activities not specifically identified as an "Emission Unit" covered by the Consent Agreement. Finally, any expansion of a farm beyond its design capacity, as of the date the Consent Agreement is signed, which triggers CAA permitting requirements will also not be covered by the release and promise not to sue.

In addition to the above items that are simply not covered by the release and promise not to sue, certain circumstances or events can

trigger voiding or cancellation of the protections. Specifically, the following circumstances have been identified in the Agreement as those, which will void or cancel EPA's release and promise not to sue:

- EPA does not ultimately approve the plan for conducting the Study submitted by the independent contractor;
- The Study, or any part of it, cannot be completed because of insufficient funding, with respect to those operations and industries for which funding is insufficient;
- EPA concludes Emissions-Estimating Methodologies cannot be developed, with respect to any or all of the operations or industries covered by the Study for which Methodologies cannot be developed;
- The AFO challenges the protocols and data used and developed by the Study;
- The AFO fails to comply with all local and state nuisance actions or orders related to air emissions at the farms covered by the Consent Agreement, within the time frame required by the local or state authority, including a failure to, within 60 days of compliance, provide written certification to EPA that it has done so;
- The AFO fails to report and correct violations of federally-approved State Implementation Plans or an approved Federal Implementation Plan in accordance with all requirements of the Consent Agreement, including notification requirements and prevention of recurrence;
- The AFO (with 10 times the CAFO amount of a particular animal species) fails to provide required notices to the National Response Center and local and state emergency response authorities regarding certain emissions that may occur during the Study; and
- Following completion of the Study, and upon application of the Emissions-Estimating Methodologies developed by the Study, the AFO fails to submit permit applications or certifications which the Methodology indicates the AFO is required to submit, or fails to meet all the requirements of such permits, or to report "qualifying releases" as required by CERCLA and EPCRA.

Finally, EPA's release and promise not to sue will only apply to civil violations occurring before the earlier of: when the participating AFO submits its last required certification under the Consent Agreement, or two years after the AFO submits the required permit applications following completion of the Study. The release and covenant expire upon the earlier of those events because the AFO will have thereby gained compliance.

B. Penalties

As noted above, there are two payment obligations participants must meet: penalties and a contribution to fund the Study. The penalty amount that a particular AFO must pay is calculated based on the number and size of farms covered by the Consent Agreement. The Agreement requires AFOs with only one farm falling below the "large Concentrated Animal Feeding Operation" ("CAFO") threshold to pay a penalty of \$200. EPA considers a farm to be a CAFO if it has at least the following number of the specified animal species:

- 700 mature dairy cows; or
- 1000 dairy heifers

All other AFOs, including CAFOs, are assessed a penalty of \$500 per farm with the exception of farms that have more than 10 times the

CAFO threshold amount of an animal species (e.g., 820,000 laying hens). For such farms, the penalty is \$1,000 per farm. EPA has capped the total penalty that AFOs must pay, ranging from \$10,000 for an AFO with 10 or fewer farms to \$100,000 for an AFO with more than 200 farms.

The penalty amount must be paid to the United States Treasury within 30 calendar days of the date the AFO receives the signed Consent Agreement back from EPA. The Consent Agreement contains specific instructions, with addresses, regarding where and how to pay the penalty, including sending copies to the EPA. Failure to timely pay the penalty can subject the AFO to an enforcement action by EPA to collect the penalty amount plus EPA's costs and attorneys' fees incurred in the enforcement action.

B. Contribution for the Study

The Consent Agreement also requires participating AFOs to make a contribution in favor of the Study. The AFO must pay the lesser of \$2500 for each farm covered by the Consent Agreement, or a pro rata share of the total amount needed to fully fund the Study for the applicant's livestock species. A contribution may not be necessary for a contract farm if a contribution has been made for that farm under another Agreement (either by the Contract Grower or integrator of the contract farm). In addition to making a contribution, AFO's must make participating farms available during the Study for monitoring by both the contractor conducting the Study and the EPA.

Even if an AFO makes the required contribution for the Study, EPA will not consider the AFO's obligation met under the Consent Agreement unless and until the occurrence of certain events related to the Study. Those events include: the establishment of the non-profit entity to administer funds; the non-profit entity enters into an agreement with an independent contractor(s) to conduct the Study; and the independent contractor(s) meets all its obligations in conducting the Study, including completing the Study within two years of EPA's approval of its plans. Presumably, although not expressly stated in the Agreement, if any of those events do not occur, EPA's release and promise not to sue are not effective. In addition, the Agreement specifically provides that if the independent contractor fails to submit a plan for conducting the Study that EPA ultimately approves, the release and promise not to sue become void.

Furthermore, if the Study cannot be completed due to lack of funding, including any portion covering particular operations or industries, EPA's releases and promises not to sue become ineffective with respect to those portions of the Study. Although the Program requires the non-profit entity and the independent contractor conducting the Study to attempt to secure additional funding, there are no guarantees. In addition, it's likely that if the Study faces insufficient funding down the road, AFOs may be asked to contribute more funds so as to complete the Study or risk facing loss of the benefits of the Agreement, namely the release and promise not to sue.

C. Other Obligations Imposed on AFOs' by the Consent Agreement

In addition to the above requirements, AFO's with farms housing more than 10 times the CAFO threshold of a particular animal species must provide certain notices within 120 days of receiving a copy of the

executed Consent Agreement from EPA. The required notices must be made to the National Response Center and local and state emergency response authorities (under EPCRA), must describe the AFO's location, and must include a statement (in the form specified in the Agreement) describing its emissions. A copy of the notice must also be sent to EPA at the address specified in the Agreement.

Finally, even if a participating AFO meets all its obligations during the Study, EPA may conclude that Emissions-Estimating Methodologies cannot be developed from the Study results for any or all of the operations and industry sectors covered by the Study. In such a case, EPA will provide notice to the AFO identifying the types of industries, farms or emitting structures for which it cannot develop Methodologies. To the extent an AFO's operations fall within those described in EPA's notice, EPA's release and promise not to sue will only cover potential violations occurring on or before 120 days after the date EPA mails the notice. Following receipt of such a notice, the Agreement would no longer require the AFO to provide certain compliance certifications to EPA that it would have been required to provide upon development of the Methodology.

1. Obligations Following Completion of the Study

In addition to meeting all its obligations during the Study, an AFO must also take several actions following completion of the Study for an AFO to maintain the protection of the EPA's release and covenant not to sue. These obligations relate to application of the Emissions-Estimating Methodologies resulting from the Study to the AFO's operations to ensure compliance with the CAA, CERCLA and EPCRA. Following the date of EPA's publication of the Emissions-Estimating Methodologies resulting from the Study, an AFO must do all of the following for each farm and each Emission Unit covered by the Consent Agreement:

- Within 60 days, if an AFO determines it is not covered by the CAA, or CERCLA and EPCRA notification requirements based on application of the Emissions-Estimating Methodologies to the AFO's operations, the AFO must identify to EPA each particular source at each of its farms that it believes are not covered and certify to EPA that they are not covered;
- Within 120 days, based on the application of the Emissions-Estimating Methodologies to the AFO's operations, AFOs must apply for all required Clean Air Act permits. In applying the Methodology, the annual emissions should be calculated based

- On the AFO's current operations and methods, and should also be based on the maximum number of animals housed over the last 24 months. Following the submission of permit applications, the AFO must respond promptly to any EPA notifications that permit applications are incomplete or incorrect;
- Within 120 days, the AFO must report all emissions of H2S and NH3 which are considered "qualifying releases" upon application of the Emissions-Estimating Methodologies as required by section 103 of CERCLA and section 304 of EPCRA; and
- The AFO must "timely" install all emission control equipment and implement all practices required by the Consent Agreement or as required by any CAA permits issued following the required permit applications discussed above. In addition, the AFO must provide written certification to EPA that it has met this requirement within 30 days of meeting the requirement or an acknowledgement of compliance issued by a (state or local) permitting authority.

Participating AFOs may choose to install systems that process livestock waste to produce energy ("waste-to-energy" systems), but are not required to do so under the Program. When an AFO elects to install such systems, it will be subject to additional requirements and extended timelines (an additional 180 days) to comply with the above requirements.

2. Waiver of Certain Rights and Privileges

Participating AFOs also agree to give up certain rights and privileges when they enter into the Consent Agreement with EPA. First, they must agree to accept the protocols and emissions data developed during and as a result of the Study and may not challenge same. Any challenge of such protocols and data will void the EPA release and promise not to sue.

Second, AFOs give up certain rights to challenge EPA's actions taken pursuant to the Consent Agreement. For example, participants waive rights they might otherwise have under a typical consent agreement, including the right to request an adjudicatory hearing on the Agreement, to confer with an Administrator before the Agreement becomes effective, and the right to seek judicial review of the penalty assessed under the Agreement.

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