

ANIMAL FEEDING OPERATIONS AIR COMPLIANCE CONSENT AGREEMENT

Iowa Pork Producers Association
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Background

- Voluntary agreement between producer and U.S. Environmental Protection Agency
- No legal requirement to sign up
- Legal protections in agreement only available to producers who sign the agreement
- Deadline (extended) for sign up is July 1, 2005

Background

- One-time opportunity -- If producer misses the deadline, no additional opportunity to sign up
- Can only sign up farms that are in operation as of date of sign up
 - For farms that commence operation after the sign up deadline, producer may consider taking steps to comply with federal air emissions laws at the outset
- Agreement covers swine, poultry, dairy – open cattle feedlots for beef production are not covered

Background

- Compliance requirements adopted by EPA will be applied to all AFO's who qualify – not just those who sign up
- Producer may sign up all or part of the farms owned, operated or otherwise controlled
- Failure to comply with the terms of the agreement affects only the farm or farms that are not in compliance – other farms that are in compliance remain protected under the agreement

Background

- Monitoring study - swine
 - 2 years
 - Compounds monitored:
 - Volatile Organic Compounds (VOC's)
 - Hydrogen Sulfide (H₂S)
 - Particulate matter (TSP, PM10 and PM2.5)
 - Ammonia (NH₃)
- Within 18 months of completion of the monitoring study, EPA will evaluate data and publish Emissions-Estimating Methodologies (look-up charts) on a "rolling basis"

Federal Law Requirements

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) & Emergency Planning and Community Right-to-Know Act (EPCRA) reporting requirements:
 - Qualifying Releases must be reported: more than 100 pounds of H₂S or NH₃ per 24 hour period
- Clean Air Act (CAA) permitting requirements:
 - Limit emissions of VOC's, TSP, PM10, PM2.5, H₂S, or NH₃
 - Civil penalties of up to \$25,000 per day

What does producer get?

- Protection from EPA penalties for:
 - Violations of federal air emissions law
 - CERCLA - portions of the law relating to hazardous substance release notification
 - EPCRA - portions of the law relating to emergency notification
 - Clean Air Act
 - That occurred:
 - Before agreement signed
 - After agreement signed and until emissions methodologies required after monitoring study and data analysis period

What does producer get?

- No admission of liability for past CERCLA, EPCRA, or CAA violations
- No admission of negligent or improper operation or violation of any federal, state or local law or regulation
- Potential protection from citizen suits alleging violations of CERCLA, EPCRA, and CAA

What doesn't producer get?

- No protection for situations that imminently and substantially endanger public health, welfare or the environment.
- No protection from criminal liability
- No protection from state air quality laws (for example, Iowa's law on H₂S (30 ppb), NH₃, and odor; currently being monitored at neighboring residences)
- No protection from nuisance lawsuits

What does EPA/U.S. Govt. get?

(EPA currently has authority on a case-by-case basis to require AFO's to monitor emissions and comply with CERCLA, EPCRA and CAA)

- EPA's concerns with this approach:
 - Uncertainty regarding AFO emissions
 - Applies only to the individual AFO's)
- Agreement gives EPA AFO emissions data that EPA believes will be the quickest and most effective way to:
 - Remove uncertainty regarding AFO emissions
 - Bring all participating AFO's into compliance with CERCLA, EPCRA, and CAA
- Payment of penalties to U.S. general fund

What must producer do to get benefits?

- Sign the agreement with EPA
- Pay a civil penalty within 30 days after EPA returns a signed copy of the agreement to the producer
- Be responsible for funding the monitoring study, if individual funding is necessary
- Facilitate implementation of the monitoring study by agreeing to allow monitoring on the farms signed up for the agreement
 - This requirement does not apply if the farm is signed up by a contractor (pig owner) and the contract grower does not sign up

What must producer do to get benefits?

- Follow requirements of Emissions-Estimating Methodologies, within 120 days after publication, that apply to individual farms:
 - File reports for qualifying releases under CERCLA & EPCRA
 - Install all equipment and implement practices required by the Agreement or CAA permits

What must producer do to get benefits?

- If a farm houses 25,000 pigs or more that weigh more than 55 pounds or 100,000 pigs that weigh less than 55 pounds, the producer must submit a report within 120 days of receiving the agreement back from EPA
- The report must estimate the farm's routine ammonia emissions for a 24 hour period

Agreement Definitions

- Ag Waste: manure, wastewater, litter (including bedding) from "dairy cattle, swine and/or poultry among others"
- Contract grower: raises livestock or produces milk or eggs under a contract
- Emissions-estimating methodologies: procedures from EPA based on data from monitoring study and any other relevant data and information to estimate daily and total annual emissions from AFO's

Agreement Definitions

- Farm: the production area of an AFO (adjacent and under common ownership) where animals are confined and where ag waste is handled and stored
 - Does not include land application areas
 - Definition does not establish precedent for other regulatory purposes

Penalty for a producer signing up one farm:

- \$200 if the farm houses less than 2,500 pigs that weigh more than 55 pounds or 10,000 pigs that weigh less than 55 pounds
- \$500 if the farm houses between 2,500 and 25,000 pigs that weigh more than 55 pounds or between 10,000 and 100,000 pigs that weigh less than 55 pounds
- \$1,000 if the farm houses 25,000 pigs or more that weigh more than 55 pounds or 100,000 pigs or more that weigh less than 55 pounds

Penalty for a producer signing up more than one farm:

- \$500 per farm for farms that house less than 25,000 pigs that weigh more than 55 pounds or 100,000 pigs that weigh less than 55 pounds
- \$1,000 per farm for farms that house 25,000 pigs or more that weigh more than 55 pounds or 100,000 pigs or more that weigh less than 55 pounds

The Total Penalty Cannot Exceed:

- \$10,000 for a producer signing up 1 to 10 farms;
- \$30,000 for 11 to 50 farms;
- \$60,000 for 51 to 100 farms;
- \$80,000 for 101 to 150 farms;
- \$90,000 for 151 to 200 farms; and
- \$100,000 for more than 200 farms.

Penalties - Payment

- Certified check or money order due within 30 days after producer receives copy of agreement signed by EPA
- If penalty not paid when due, EPA may take action to collect penalty, interest, handling charges, enforcement expenses including attorney fees, and nonpayment penalty (10% of unpaid penalty)
- Producer agrees not to claim penalty as a federal income tax deduction

Monitoring fees

- Producer responsible for paying the lesser of:
 - \$2,500 for each farm signed up; or
 - Producers pro rata share needed to fully fund the monitoring study, including any unfunded balance to complete the 2 year study
 - The pro rata share is based on the farms signed up with the same species
- The full funding level will be estimated within 60 days of the date EPA returns the agreement to the producer
- Pork checkoff funds have been allocated to pay for the monitoring study

Contract Feeding

- Both contractor (pig owner) and contract grower may sign up
- The legal benefits apply only if the person signs the agreement
- Each must pay the penalty that applies to their operations for the number and size of their farms
- Contract grower is not responsible for potential monitoring fees if the contractor agrees to be responsible

Contract Feeding

- If the Emissions-Estimating Methodologies require reporting, installation of equipment, or implementation of practices; the contract grower must comply or the contractor does not have legal protection under the agreement

Contract Feeding

- Who is potentially liable under CERCLA reporting requirements?
 - The legal standard is "any person in charge" of a facility as soon as the person has knowledge of any qualifying release of a regulated pollutant
 - 2003 Kentucky federal court decision: A "person in charge" is a person who has responsibility and power over the AFO and can make timely discovery of a release, direct the activities that result in pollution, and can prevent and abate the environmental damage.

Contract Feeding

- Who is potentially liable under CERCLA reporting requirements?
 - Contract grower is potentially liable as a "person in charge"
 - Contractor: Under the 2003 Kentucky federal court decision, a contractor in a poultry feeding contract was liable as a "person in charge" because the contractor in that case met the requirements

Leased facilities (landlord/tenant)

- Who is potentially liable under CERCLA reporting requirements?
 - Tenant is potentially liable as a “person in charge”
 - Landlord: 2003 Kentucky federal court decision: Landlord with no active role in managing the property is not a “person in charge”

Contract Feeding

- Who is potentially liable under EPCRA reporting requirements?
 - The legal standard is “owner or operator” of a facility that has had a qualifying release of a regulated pollutant must immediately submit notice
 - 2003 Kentucky federal court decision: An “operator” is a person who manages, directs, or conducts operations specifically related to pollution

Contract Feeding

- Who is potentially liable under EPCRA reporting requirements?
 - Contract grower is an owner or operator
 - Contractor: Under the 2003 Kentucky federal court decision, a contractor in a poultry feeding contract was liable as an “operator” because the contractor in that case managed and/or directed many of the operations related to the venting of ammonia

Leased facilities (landlord/tenant)

- Who is potentially liable under EPCRA reporting requirements?
 - Tenant is potentially liable as an “owner or operator”
 - Landlord: 2003 Kentucky federal court decision: Landlord who has no control over the operations of a facility or knowledge of a reportable release is not subject to EPCRA reporting requirements as an owner or operator

Contract feeding & leased sites

- Who is potentially liable under CAA requirements?
 - Same “owner or operator” standard that applies for EPCRA reporting requirements applies for Clean Air Act permitting requirements

EPA Discretion to Accept Agreement

- EPA may not accept the agreement if it determines:
 - There is inadequate funding for air monitoring;
 - There is inadequate representation of eligible animal groups and types of farms, facilities, or emission units; or
 - An operation has been notified by EPA or state of a state or federal CAA, CERCLA or EPCRA enforcement action

Inability to develop EEM's

- If EPA determines that it cannot develop Emissions-Estimating Methodologies for a particular type of emissions unit (buildings or manure storage structures), EPA will:
 - Notify the producer by regular mail
 - The producer will have the legal benefits of the agreement for violations that occur on or before 120 days after the notice is mailed – but no legal protections for violations that occur after that date

Acceptance of monitoring protocol & emissions data

- As a condition of participation in the agreement, the Producer agrees to accept the monitoring protocols and emissions data developed by the monitoring study
- Producer agrees to accept the monitoring protocols and data even if the protocols or data are successfully challenged in a “collateral” legal proceeding
- If the Producer challenges the monitoring protocols or data, the Producer loses the legal benefits under the agreement

Conclusion: Sign or don't sign?

- Before making a decision, producers and/or their advisors should review all pertinent information including EPA responses to public comments
- Each individual producer must get legal and technical advice regarding their individual situation
- Each individual producer must weigh the potential risks and benefits of signing the agreement against the potential risks and benefits of not signing the agreement