ANIMAL FEEDING OPERATIONS
AIR COMPLIANCE CONSENT AGREEMENT
Iowa Pork Producers Association
March 29, 2005
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Background
- Voluntary agreement between producer and U.S. Environmental Protection Agency
- No legal requirement to signup
- Legal protections in agreement only available to producers who sign the agreement
- Deadline (extended) for signup is July 1, 2005

Federal Law Requirements
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) & Emergency Planning and Community Right-to-Know Act (EPRCA) 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

Background
- One-time opportunity -- If producer misses the deadline, no additional opportunity to signup
- Can only signup farms that are in operation as of date of signup
  - For farms that commence operation after the signup 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 signup
- 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”
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
  - EPRCA - 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

- 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 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

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- No protection from nuisance lawsuits

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.

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EPA Air Emissions Consent Agreement: What it Means for Iowa Pork Producers

IPIC/IPPA/ISUE Satellite program March 29, 2005
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

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.

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?
  - 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

- 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 active role in managing the property is not a “person in charge”

Contract Feeding

- Who is potentially liable under EPCRA 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 & leased sites

- Who is potentially liable under CAA reporting 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