* Association of Irritated Residents * Center on Race, Poverty & the Environment * Environmental Defense * Environmental Integrity Project * Natural Resources Defense Council * Sierra Club *

May 5, 2003

Via Electronic Mail and First Class Mail

The Honorable Christine Todd Whitman
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave. NW
Washington, D.C. 20460

Re: EPA Implementation of Title V and NSR Permitting at Concentrated Animal Feeding Operations; Proposed Safe Harbor Agreement

Dear Governor Whitman:

The coalition of local and national environmental and public health advocates listed above object to two imminent EPA policy decisions that would effectively exempt concentrated animal feeding operations ("CAFOs") from regulation under Titles I and V of the Clean Air Act, as well as the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"). These facilities present a widespread, severe air quality problem, both to neighboring residents and impacted airsheds. We share many of the concerns stated in the recent letter on this topic by the State and Territorial Air Pollution Program Administrator ("STAPPA"), and we also represent the views of rural members of our organizations, many of whom are embroiled in legal fights to protect their families' health and quality of life. We request a meeting with you as soon as possible and prior to any decision, in order to directly present our views and concerns.

Evidence continues to mount correlating CAFO air emissions with detrimental public health and environmental impacts.[1] Peer-reviewed studies show air emissions from a 6,000-head hog operation in North Carolina caused increased headaches, sore throats, excessive coughing, diarrhea, burning eyes, and reduced quality of life for nearby residents. Another study shows increased eye and upper respiratory symptoms in residents within two miles of a large hog

[1] See Iowa State University and The University of Iowa Study Group, IOWA CONCENTRATED ANIMAL FEEDING OPERATIONS AIR QUALITY STUDY (February 2002); Renee Sharp and Bill Walker, Environmental Working Group, PARTICLE CIVICS: HOW CLEANER AIR IN CALIFORNIA WILL SAVE LIVES AND SAVE MONEY (2002).

operation in Iowa.[2] Stories abound of the horrific impacts from these types of facilities; witness the recent, immense nuisance verdicts rendered by courts in Iowa against Iowa Select and in Ohio against Buckeye Egg. Serious questions have also been raised in the San Joaquin Valley – an area heavily polluted by agricultural operations – with respect to CAFOs' contribution to total air pollution and the corresponding health effects associated with smog and particulate matter pollution.[3]

In the face of this serious problem, EPA is retreating. Regional Air Administrators from EPA Regions IV, VI, VII, and IX are in the process of formulating a policy recommendation for a fugitive emissions determination at CAFOs. In addition, we have learned that lobbyists for the CAFO industry have been in contact with EPA concerning a retrospective and prospective agreement providing "safe harbor" from liability for violations of the Clean Air Act and CERCLA. Enforcement and regulation must be vigilant, not abdicated, in the face of this air pollution problem. We oppose any and all efforts to remove CAFOs from the Clean Air Act's permit programs and to grant "safe harbor" to CAFOs for violations of federal law.

FUGITIVE EMISSIONS

Any EPA decision that would classify CAFO air emissions as fugitive runs contrary to the Clean Air Act's implementing regulations and EPA's prior interpretations of those regulations. Our constituents vehemently oppose any attempt to appease a politically powerful, polluting industry which, until recent citizen action, has managed to avoid meaningful air pollution regulation.

The classification of CAFO emissions as fugitive or nonfugitive affects whether the CAFO industry shall be regulated under the Clean Air Act. For the purpose of determining whether CAFOs are subject to permits required by Titles I and V of the Clean Air Act, regulations implementing the Clean Air Act do not include fugitive emissions as part of the tonnage threshold for classification as a major source. See 40 CFR § 51.165(a)(1)(iv)(C). Fugitive emissions are defined to mean "those emissions which could not reasonably pass through a stack, chimney, vent or other functionally equivalent opening." 40 CFR § 51.165(a)(1)(ix).

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[2] S. Wing & S. Wolf, INTENSIVE LIVESTOCK OPERATIONS, HEALTH, AND QUALITY OF LIFE AMONG EASTERN NORTH CAROLINA RESIDENTS, 108 Envtl. Health Persp. 223-38 (2000); K. Thu et al., A CONTROL STUDY OF THE PHYSICAL AND MENTAL HEALTH OF RESIDENTS LIVING NEAR A LARGE-SCALE SWINE OPERATION, 3 J. Agric. Safety & Health 1, 13-26 (1997).

[3] California Air Resources Board, A PRELIMINARY ASSESSMENT OF AIR EMISSIONS FROM DAIRY OPERATIONS IN THE SAN JOAQUIN VALLEY (Nov. 2000); American Lung Association, ANNOTATED BIBLIOGRAPHY OF RECENT STUDIES OF THE HEALTH EFFECTS OF AIR POLLUTION (2002); American Lung Association, SELECTED KEY STUDIES ON PARTICULATE MATTER AND HEALTH: 1997-2001 (2001); American Lung Association, ANNOTATED BIBLIOGRAPHY OF RECENT STUDIES OF THE HEALTH EFFECTS OF OZONE AIR POLLUTION 1997-2001 (2001). Attached as Exhibit 1.

EPA has issued a number of interpretive memoranda and guidance documents concerning fugitive emissions.[4] In the most recently issued document in 1999, the Fugitive Emissions Guidance, EPA discussed how fugitive emissions should be accounted for in determining Title V applicability for the printing, whiskey, and paint manufacturing industries. The memorandum states that where "emissions are not actually collected at a particular site, the question of whether the emissions are fugitive or nonfugitive should be based on a factual, case-by-case determination made by the permitting authority."[5] The memorandum then relies on the 1994 Landfill Guidance memorandum to reach applicability determinations. The latter guidance states:

> In determining whether emissions could reasonably be collected (or if any emissions source could reasonably pass through a stack, etc.), "reasonableness" should be construed broadly. The existence of collection technology in use by other sources in a source category creates a presumption that collection is reasonable. Furthermore, in certain circumstances, the collection of emissions from a specific pollutant emitting activity can create a presumption that collection is reasonable for a similar pollutant-emitting activity, even if that activity is located within a different source category.[6]

In the CAFO industry, animal confinement barns, coops, and animal waste storage and distribution systems directly emit criteria pollutants and their precursors, as well as a host of toxic air contaminants. In the case of barns and coops, emissions are nonfugitive because exhaust vents typical of enclosed animal production systems are "other functionally equivalent openings" under the definition of fugitive emissions, for the reasons discussed in the 1994 Landfill Guidance and the April 16, 1996 letter from Cheryl Newton.

Likewise, emissions from animal waste storage lagoons and distribution systems are nonfugitive. These emissions can be reasonably collected given existing capture and treatment technology employed nationally at CAFOs, as discussed in the 1994 Landfill Guidance. EPA's

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[4] INTERPRETATION OF THE DEFINITION OF FUGITIVE EMISSIONS IN PARTS 70 AND 71 from Thomas C. Curran, Director, Information Transfer and Program, Integration Division, to Judith M. Katz, Director, Air Protection Division, Region III (February 10, 1999) (hereafter "Fugitive Emissions Guidance"); CLASSIFICATION OF EMISSIONS FROM LANDFILLS FOR NSR APPLICABILITY PURPOSES from John S. Seitz, Director, Office of Air Quality Planning and Standards, to Air Division Directors (October 21, 1994) (hereinafter "1994 Landfill Guidance"); Letter from Robert G. Kellam Acting Director, Information Transfer and Program Integration Division, to Donald P. Gabrielson, Pinal County Air Quality Control District (March 1, 1996) (Title V applicability to open-pit mining operations); Letter from Cheryl Newton, Chief Permits and Grants Section to Paul Dubenetzky, Permit Branch, Office of Air Management, Indiana Department of Environmental Management (April 16, 1996) (whiskey storage fugitive emissions). Attached as Exhibit 2.

[5] Fugitive Emissions Guidance at 2.

[6] Landfill Guidance at 2.

own website publications demonstrate and verify the reasonableness of capture. See www.epa.gov/agstar (EPA's AgSTAR Program). For instance, in a 2002 brochure, EPA writes:

> Biogas recovery systems are a proven technology. Currently, more than 30 digester systems are in operation at commercial U.S. livestock farms, and an additional 30 are expected to be in operation by 2003.[7]

Emissions from CAFOs can reasonably pass through stacks, vents, or other equivalent openings.[8] As such, these emissions are nonfugitive and should count towards the threshold determination of whether individual CAFOs are subject to the requirements of Titles I and V of the Clean Air Act. The technology exists to control these pollutants and protect rural communities. We strongly urge EPA to adhere to the already applied interpretation of fugitive emissions in order to protect the environmental health and welfare of rural communities.

SAFE HARBOR

Sources within EPA have confirmed that EPA and agricultural industry groups are engaged in negotiations to grant CAFOs "safe harbor" from liability arising from violations of the Clean Air Act and CERCLA. Members of the environmental community have not been asked to participate in the formulation of this policy decision, which will grant every CAFO in the United States retrospective and prospective immunity from liability.[9]

This policy abrogates the clear congressional mandate for all major stationary sources to obtain New Source Review and Title V operating permits. A safe harbor policy constitutes a *de facto* exemption for CAFOs from the duty to obtain permits, and exceeds EPA's statutory authority. See e.g. 42 U.S.C. § 7661a(a). The safe harbor policy also interferes with citizens' ability to enforce violations of the Clean Air Act,[10] in contradiction to the congressionally-granted right to initiate an enforcement action against "any person" for failing to comply with New Source Review or Title V. 42 U.S.C. § 7604(a).

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[7] MANAGING MANURE WITH BIOGAS RECOVERY SYSTEMS: IMPROVED PERFORMANCE AT COMPETITIVE COSTS, The AgSTAR Program, Office of Air and Radiation, EPA-430-F-02-004, Winter 2002. Attached as Exhibit 3.

[8] Cheng, Jiayang, et. al, EVALUATION OF COVERED ANAEROBIC LAGOON SYSTEM FOR SWINE WASTE TREATMENT AND ENERGY RECOVERY, Proceedings of the North Carolina State University Animal Waste Management Symposium (1999); AgSTAR Digest, Office of Air and Radiation, EPA-430-F-00-012, Winter 2002; Sierra Club, DAIRY WASTE POLLUTION REDUCTION (2002). Attached as Exhibit 4.

[9] See Outline for a Possible Livestock & Poultry Monitoring and Safe Harbor Agreement, from John Thorne, Capitolink, and Richard Schwartz, Crowell & Moring, to David Nelson, Director Multimedia Enforcement Division, and Sally Shaver, Director, Air Quality Strategies and Standards Division (June 11, 2002) (hereinafter "Safe Harbor Proposal"). Attached as Exhibit 5.

[10] Safe Harbor Proposal at 4.

Most importantly, the policy defers the substantial public health consequences of unabated CAFO air pollution. By doing so, EPA turns a blind eye to the health and safety of the public it is charged with protecting. A safe harbor agreement would allow literally thousands and thousands of CAFOs to continue emitting pollutants that include, but are not limited to, low-level ozone (smog) precursors, primary PM_{10}, secondary $PM_{2.5}$ precursors, ammonia, hydrogen sulfide, and odor-related compounds.[11]

Now, under the guise of "more study is needed," EPA is prepared to grant a sweeping liability shield to the entire industry. We take issue with the notion that this policy decision is justified by the lack of data on CAFO air emissions. To the contrary, the public stands to receive no consideration for a safe harbor agreement, as numerous air quality studies at CAFOs have already been completed or are underway. The Agricultural Research Service (ARS) of the United States Department of Agriculture (USDA) has long been investigating the air quality impacts of agriculture. Some of this work goes back for decades. Further evidence of the extensive air pollution research that is being conducted by ARS may be located on the internet.[12]

Numerous studies have documented air pollution problems from animal feeding operations. Iowa has documented air pollution effects from CAFOs.[13] The Animal and Poultry Waste Center at North Carolina State University is conducting extensive research into various methods to control air pollution from animal feeding operations. In addition, the USDA and EPA are undertaking further studies to assess air emissions from animal operations. In particular, the USDA has funded a multi-state research project to measure emissions from different types of animal production facilities.

In any event, EPA need not trade off regulation for some additional research funding. The agency retains congressional authority to demand emission monitoring data from CAFOs without the need to exempt an entire industry in the process. See 42 U.S.C. § 7414(a).

FEDERAL ADVISORY COMMITTEE ACT

The signatories to this letter demand that EPA cease its effort to deregulate the CAFO industry while cutting the affected public out of the process. EPA's reliance on a group of agribusiness representatives in developing a nationwide policy on CAFO emissions appears to violate the Federal Advisory Committee Act (FACA). FACA was enacted to prevent exactly the type of special interest influence which appears to be driving EPA's regulatory approach to CAFO air emissions. The signatories to this letter demand that EPA cease conducting closed-door policymaking and follow FACA's mandate for balanced representation on advisory committees and full disclosure of committee proceedings.

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[11] Final Report, AIR EMISSIONS FROM ANIMAL FEEDING OPERATIONS: CURRENT KNOWLEDGE, FUTURE NEEDS, National Research Council of the National Academies (2002).
[12] See http://www.nps.ars.usda.gov/programs/programs.htm?NPNUMBER=203.
[13] See note 1, supra.

NOTICE AND COMMENT

Finally, the misguided policy decisions to interpret CAFO emissions as fugitive and/or grant an industry immunity from citizen and federal enforcement actions, at a minimum, reflect final agency actions that must undergo notice and comment rulemaking under the Administrative Procedure Act. A change in EPA's interpretation of fugitive emissions for CAFOs significantly revises its earlier interpretations of the law and requires notice and comment rulemaking. Paralyzed Veterans of America v. D.C. Arena L.P, 117 F.3d 579, 586 (D.C. Cir. 1997). A safe harbor agreement substantively exempts an entire industry from CERCLA and exempts CAFO major stationary sources from the duties to obtain, and comply with, permits required under Titles I and V of the Clean Air Act. EPA must comply with the Administrative Procedure Act.

CONCLUSION

On behalf of our members and clients, who suffer the direct effects of CAFO air emissions, and the public in general, we urge you to rescind all efforts in the direction of relaxing enforcement and regulation of these industrial-scale pollution sources. Instead, the agency should forge ahead with a program that takes immediate enforcement against those facilities that violate the Clean Air Act and CERCLA, and that imposes swift and certain controls over polluting facilities.

Sincerely,

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