

Settlement Confidential

To: David A. Nielsen, Director, Multimedia Enforcement Division, U.S. EPA
Sally Shaver, Director, Air Quality Strategies and Standards Division, U.S. EPA

From: John Thorne, Capitolink
Richard Schwartz, Crowell & Moring

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Re: Outline for a Possible Livestock & Poultry Monitoring and Safe Harbor Agreement

Introduction

Below is animal agriculture's proposal for a program of air emissions monitoring coupled with protections from enforcement actions based on air emissions that may be subject to CERCLA or Clean Air Act regulations.

1. Approval of scientific design /team/analysis:

- OAR and scientists from the NAS panel would select the technologies and develop the experimental design for the study. The design will enable the development of valid emissions factors. This work will not be part of the current NAS panel's contract with EPA.
- OAR and OECA would supervise monitoring, data collection, and analysis. Farm representatives could participate.
- To minimize costs and variability, the same team of scientists would do all the monitoring across farms of a given species.
- Once emissions data are collected on a given site and while monitoring equipment is still in place, producers may choose to add selected BMPs (e.g., blown straw on the surface of lagoons) to permit a determination of emission reductions as a result of the BMPs.

2. Selection of farms to monitor:

- OAR and scientists from the National Academy of Sciences ("NAS") would identify farm selection criteria. This work will not be part of the panel's existing contract with EPA.

- Based on these selection criteria, OAR would select farms for monitoring from the pool advanced by industry (all of which had signed up at the beginning of the period).
- The number of farms to be monitored would be determined by the experimental design, but would likely vary by animal species.

3. Handling of notification and sign-up:

- EPA would announce the safe harbor agreement and announce a fixed sign-up deadline for the farms above the established threshold.
- Industry communications would be used to reach all appropriate producers.
- State regulatory agencies could help through mailings to all permitted operations.

4. Timelines for Monitoring:

- Sign-up: All above-threshold farms (for any species) would sign up at the outset to get immediate enforcement protection.
- Monitoring would be phased over 2.5 years:
- Likely schedule:
 - Proposed Agreement- September 2002
 - Public Comment- October 2002
 - Final Agreement- November 2002
 - Communications & Sign-up- November – January 2002
 - Farm Selection- February & March 2003
 - Monitoring- starting in May 2003
 - Data Analysis- thereafter

5. On-farm monitoring locations:

- The purpose of the monitoring is to allow development of valid emission factors for equivalent (but unmonitored) farms, so the identification of valid locations for set up of the monitoring equipment is important.
- Background measurements should be of air intake into a typical barn, or upwind of lagoons and barns.
- Emissions factors should be determined by measurements of the air egress from barns or other appropriate locations at lagoons or barns.

6. “Substantially similar” equivalence or applicability factors for extending findings to unmonitored farms:

- Region or climate factors
- Size and animal number
- Species and stage of growth
- Nutrition
- Waste handling methods
- Animal confinement structure types

7. Funding for monitoring:

- Rather than requiring those farms chosen to monitor to pay the entire cost, we propose that the industries (by species) form pools to fund monitoring.
- Estimated cost per farm to monitor for one year = \$200,000
- Total cost will depend on the number of farms selected to monitor and the length of time the monitoring continues at each site.

8. Safe Harbor Protection for smaller CAFOs:

- Smaller concentrated animal feeding operations (“CAFOs”) would receive safe harbor protection in return for the largest farms’ agreement to participate in the monitoring program. Accordingly, farms with livestock or poultry in numbers below a certain threshold (to be determined) would not have to individually sign up for monitoring in order to qualify for the safe harbor.
- These thresholds would be established on the basis of species, animal number and the method by which the manure is captured or stored.
- The safe harbor would provide protection from enforcement actions challenging failures to report emissions under CERCLA, failures to get a permit under CAA, or actions brought for any other reason (excluding “imminent and substantial endangerment”) under these statutes. The protection would apply to all claims related to the type of emissions covered by the monitoring program described

herein. It would also give protection from enforcement actions concerning emissions that occur during the period that the monitoring program is underway.

- EPA would publish a notice in the Federal Register announcing that, based on available data and other information, including the final report of the National Academy of Sciences (NAS) panel on animal air emissions, EPA has determined that, pending the outcome of the monitoring program, facilities below this size should not be subject to enforcement actions under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) or the Clean Air Act (“CAA”). The notice would also explain that the safe harbor for these farms is part of a larger enforcement agreement with these entire farm sectors.

9. Signup Safe Harbor Agreements for the Largest CAFOs with Air Monitoring:

- Farms above the applicable size threshold could gain the safe harbor protections if they sign individual enforcement agreements that would make their sites available for monitoring. There would be an adequate period of time available for communication and signup.

10. Exclusions from safe harbor:

- Companies and farms would be eligible for the safe harbor unless EPA or a state has an existing enforcement action against them. Pending citizen suits or information requests would not exclude a farm or company.
- This exclusion would apply only to the specific farms named in a federal or state enforcement action, not to farms unnamed in the suits.
- This exclusion would not apply to companies sued solely by citizen groups.

11. The safe harbor for farms that sign individual enforcement agreements: Those farms above the size threshold that do not sign up for monitoring would not be eligible for the safe harbor protections. Signing up does not necessarily mean that one or more of the company’s farms will be monitored. Those farms that sign up but are never monitored still get the safe harbor for the duration of the project. Whether the safe harbor is permanent will depend on what a given farm does after monitoring is finished. Farms would not get enforcement protection if they declined the opportunity to “cure.”

12. Role of cure period -- options for going forward:

- The safe harbor agreement would not bind any party to any interpretations of the law. It would provide enforcement protection prior to and during monitoring, during the process of establishing emission factors, and during the cure period.

- When monitoring is finished and EPA publishes a guidance notice in the Federal Register and on its website establishing emission factors, the guidance would trigger a “cure” period. After this date, individual farms (larger than the size threshold established from the monitoring program) will have a certain number of days to decide: (a) whether any CERCLA or CAA requirements apply to them; and (b) if so, whether they will comply with those requirements (“cure”) to keep the “safe harbor” enforcement protection.
- Once the trigger date occurs, farms (monitored or unmonitored) larger than the newly-established threshold could have several options. First, if no CERCLA or CAA requirement applies to them, they need not do anything more.

Second, if they exceed a threshold they could choose to do nothing. They would lose the safe harbor protection and could be exposed to enforcement actions.

Third, producers who want the safe harbor permanently could (once the trigger date occurs), choose to meet the following cure requirements and keep the safe harbor for prior emissions permanently. Doing so would maintain the protection against enforcement actions for past and current emissions through the cure period.

- Reporting: farms required to report emissions under CERCLA would have 90 days to report.
 - Permits: farms required to have Clean Air Act (or state implementation plan) permits would have 120 days to apply for a permit.
 - Other Requirements: farms needing to cure a violation of any other requirement (such as implementing best management practices) would have 120 days to submit a schedule to come into compliance.
- Farms may elect to permanently cease operations or reduce them to below-threshold levels within 180 days after the trigger date rather than adopt cure, and not be sued for potential past violations unless their operations resume or expand, respectively.