

# **Questions and Answers on the Air Emissions Consent Agreement and National Monitoring Study**

**National Pork Producers Council (NPPC)  
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**The following questions and answers were developed to help pork producers understand the complex legal and practical aspects of the pending air emissions consent agreement and the scientific aspects of the pending air monitoring study.**

**Q1: Why are we considering the consent agreement and monitoring study?**

**A1:** Both are designed to help protect the environment. The U.S. Environmental Protection Agency (EPA) and state air regulators expect large animal feeding operations to comply with relevant air laws but clearly lack the data needed to determine which farms exceed the regulatory thresholds for emissions of regulated pollutants. A two-year national air monitoring study will use state-of-the-art technologies and standardized procedures to establish these regulatory thresholds. EPA is engaged in all aspects of design, oversight and data interpretation. When the data is collected and the regulatory thresholds determined, animal feeding operations that exceed the newly-determined thresholds will be expected to comply with the air laws. For all pork producers who agree to participate, EPA has agreed to provide certain legal protections for past and current emissions. The consent agreement outlines those expectations, establishes the legal protections for past emissions for those who choose to participate, and identifies the responsibilities pork producers will have in terms of complying with the air laws going forward.

**Q2: What are the “air laws?”**

**A2:** Congress passed several laws that for many years were applied to “smoke stack” industries but not agriculture. Today, because of consolidation in the livestock industry and increased size of average farms, EPA considers emissions from animal feeding operation (AFO) barns, lagoons, and retention ponds, if above pollutant emission thresholds, subject to Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and Clean Air Act requirements. Recent lawsuits, court decisions and consent agreements tend to support those positions. The state of California, for example, had traditionally exempted animal feeding operations from its Clean Air Act permitting requirements. As a result of a Sierra Club lawsuit, EPA forced California to change its exemption policies and has established a schedule for permitting large AFOs. Similarly, a federal court in Kentucky recently ruled that the law requires the poultry industry to report emissions under CERCLA, whether the farms in question were owned by the integrator or were contract farms.

**Q3: CERCLA applies to hazard reporting. How does that apply to farming?**

**A3:** CERCLA requires reporting to EPA when a “facility” releases more than a “reportable quantity” of a hazardous substance like ammonia and hydrogen sulfide. All emissions (including “fugitive,” or uncontrollable, emissions from fields and other open areas) are reportable if they exceed the reportable quantity, which is 100 pounds in any 24-hour period. It is currently uncertain whether CERCLA’s reporting

quantity threshold applies to the emissions from a specific building or lagoon on a farm site, or the collective emissions from all buildings and lagoons on a farm site. Reporting can be done on an annual basis if the emissions are ongoing.

**Q4: Is compliance with the Clean Air Act difficult?**

**A4:** Compliance with the Clean Air Act is much more complicated than CERCLA. Any farm found to be a "major source" of emissions will be required to apply for and comply with a Title V operating permit. Pollutants that might be of concern for livestock operations include particulate matter, volatile organic compounds, oxides of nitrogen, and hydrogen sulfide. Generally, a source is "major" if it emits or has the *potential* to emit 100 tons per year or more of any air pollutant. Much lower thresholds apply, however, in California and perhaps other areas that are in "non-attainment" with applicable air quality standards for the pollutant at issue. Minor source permitting can apply at emission rates as low as five tons per year.

**Q5: Are all emissions from a farm subject to the Clean Air Act?**

**A5:** In calculating whether emissions meet "major source" thresholds, a "source" can actually include a large area of many emissions sources which are adjacent and under common ownership. Under current EPA regulations, these calculations do not include fugitive emissions from large unenclosed areas, but EPA could issue rules requiring the inclusion of such emissions.

**Q6: Can states issue additional "air laws?"**

**A6:** Many State Implementation Plans ("SIPs") also require permits for "minor sources" based on lower, state-specific emission thresholds. We are aware of thresholds as low as five tons per year. In addition, states may regulate fugitive particulate matter emissions as necessary to meet national ambient air quality standards. There is a trend of increasing state regulation of air emissions from concentrated animal feeding operations (CAFOs), and EPA has made this a high priority for increased regulation. If incorporated into a state's SIP, minor source or other more stringent state-specific requirements are federally enforceable under the Clean Air Act.

**Q7: Are farms vulnerable to legal action because of these air laws?**

**A7:** Most producers aren't even aware of their vulnerability. In the past few years several citizen, state and EPA lawsuits have resulted in consent agreements and court decisions that involve multi-million dollar penalties and requirements for corrective action. The air laws allow groups to sue for emissions violations that occurred in the past, with substantial penalties assessed for every day and every facility involved, even though AFO managers weren't aware that the air laws could be applied to their farms. The high cost of attorney and consultant fees, disruption of normal business, and possible fines makes the risk of past and current emissions violations a threat to doing business.

**Q8: Is that why NPPC helped negotiate the legal protections in the consent agreement?A8:**

Yes, the pork industry saw the emerging legal liability as a critical issue for pork producers of all sizes and NPPC engaged in the efforts of a coalition of agricultural organizations to bring this about.

**Q9: Is participation in the consent agreement mandatory?**

**A9:** No, pork producers must make a decision whether to take the legal protections offered by EPA in the consent agreement or “go it alone” with this issue. Participation is voluntary, but if it’s not taken it won’t be offered again. NPPC will host meetings and publish information to help pork producers understand what’s at stake.

**Q10: What is required to participate and obtain the legal protections?**

**A10:** To get the legal protections needed, producers would have to sign a formal consent agreement and pay a nominal penalty. By signing the consent agreement a pork producer is not admitting any guilt for past emissions violations, but is agreeing to later come into compliance with the law should the study results indicate his farm is above the legal thresholds of air emissions established by law.

**Q11: What legal protections are you talking about?**

**A11:** Signing the consent agreement gains legal protections without admitting any guilt for alleged past emissions violations. The protections would cover the period from about 2007 backwards. EPA will release from liability and promise not to sue any participating producer who signs the agreement and pays a nominal penalty. The producer may also be asked to make his/her farm available for a national monitoring program that will be started in 2004, and agrees to abide by the law going forward after the study if the data produced indicates that the farm has air emissions that are greater than the threshold established by the air laws. To be specific, the protections extend to potential civil violations of the permitting requirements in Title I and Title V of the Clean Air Act, and any other federally enforceable state SIP requirements for emissions and pollutants monitored under this agreement; and for civil violations of CERCLA release reporting requirements, other than a singular unexpected or accidental release such as from a fire, explosion, etc.

**Q12: How does the consent agreement treat a state’s ambient air standards?**

**A12:** The agreement allows participating pork producers to avoid state penalties for fence-line ambient air standard violations by promptly reporting and correcting the violation.

**Q13: How far back in time will the protections extend?**

**A13:** The statute of limitations is five years, so the consent agreement will protect a participating pork producer from lawsuits that are based on emissions anytime during that period.

**Q14: Will it protect pork producers from EPA lawsuits only? What about state and citizen suits?**

**A14:** The format of the consent agreement also creates legal protections for defending state and citizens’ lawsuits for any alleged emissions violations covered by the consent agreement during that period.

**Q15: If pork producers are not ‘guilty’ of any wrongdoing why do they have to pay a penalty?**

**A15:** The penalty is nominal (as little as \$200 per farm, adjusted by size and farm number per company), and paying it is part of the legal procedure that provides the protections. Without the payment of a penalty, the legal protections would not be as strong.

**Q16: What is the air emissions monitoring study all about?**

**A16:** In return for EPA agreeing to release those pork producers from any liability for emissions that occurred in the past, pork producers must organize, pay for, and participate in a comprehensive study of air emissions from farms across the country. The study will last about two years. In the air emissions study, EPA, U.S. Department of Agriculture (USDA) and a team of university scientists will monitor air emissions at pork, dairy, egg and poultry farms across the country. At the conclusion of the study, EPA will use the information gathered to set air emissions policies, identify exceedance thresholds, and to regulate excessive livestock and poultry air emissions.

**Q17: Why is this air monitoring study needed?**

**A17:** The air laws have specific thresholds that trigger compliance with the requirements, but government agencies have not collected the data needed to determine how those thresholds apply to farm production systems. The new data will help regulators and farmers establish what sized farms and what manure handling procedures produce air emissions that exceed the thresholds for the regulated pollutants. The air study will be nationwide in scope and will be designed to answer the specific questions of who has to comply.

**Q18: What regulated air pollutants will be monitored?**

**A18:** Ammonia, hydrogen sulfide, particulate matter, nitrous oxides, and volatile organic compounds (VOCs) are all regulated pollutants and must be monitored to earn the legal protections in the consent agreement. Particulate matter is made up of PM10 (dust), PM2.5 (fine particulates), and TSP (total suspended particulates); each has a standard. VOCs include methane and many other chemicals that contribute to smog, haze and other adverse air conditions.

**Q19: Who will pay for the study?**

**A19:** The study will be paid for by funds from the participating industries including pork, dairy, poultry and egg producers; in some cases checkoff funds and in other cases direct contributions from industry representatives. Pork checkoff funds, administered by the National Pork Board, will pay for the pork industry's portion of the study. Purdue University will have responsibility for holding the funds, distributing the funds and obtaining public audits of the work.

**Q20: Will the results of the study be quality controlled and public?**

**A20:** Yes, the design and conduct of the study, the data collection and overall supervision of the conversion of the data to policy that will affect pork producers is to be overseen by several levels of public review. EPA will not be conducting the study. The actual university scientists doing the study will be carefully selected to have the best credentials for this type of on-farm monitoring work, and USDA-Agricultural Research Service and state university scientists selected for their broad backgrounds and reputations in this field will supervise them. Purdue University will supervise the conduct of the study and interact with EPA as the agency analyzes the data. All of the data will be publicly available on EPA's website: <http://www.epa.gov>. The legal protections of the consent agreement will prevent any group from using any of the collected emissions data against any of the participating pork producers, whether their farms are actually being monitored or not.

**Q21: Can California pork producers participate, even with the recent state laws?**

**A21:** Yes, new state law requires farms above certain threshold sizes to apply for and comply with state-issued air permits and undertake controls on future emissions to help improve air quality. Most of these California pork producers can participate in the EPA consent agreement too, and thereby gain legal protections for past emissions.

**Q22: Will all pork producers be able to participate?**

**A22:** By and large, yes. However, EPA reserves the right to exclude some pork producers from the legal protections of the consent agreement, although the exact conditions under which that might occur are being negotiated. It is likely that EPA will exclude any farm that is currently involved in a legal action with EPA over these air laws.

**Q23: Do these air laws only apply to large farms? What is the minimum sized farm that should sign the consent agreement and gain the legal protections?**

**A23:** University research in Indiana, Missouri and Illinois indicates that any hog producer with two deep-pit finishing barns (1,000-pigs each) should consider signing up. Even a farm with only 1,000 hogs should seriously consider signing up also. The same is true for barns with flush systems when you add the lagoon emissions to those of the barns.

**Q24: What will happen to pork producers after the air emissions monitoring study is over?**

**A24:** Once the study is over, EPA will publish the results in the form of “look-up” charts that producers will use to find out if their farm size and manure management methods require them to comply with the air laws. If they’re below the threshold, they have only to send in a certification to EPA stating they are not subject to the air laws. If they are above the threshold, they will have several months to come into compliance with the laws. Some will simply have to file CERCLA pollutant release forms. Others with greater levels of emissions may have to apply for an air permit and, at some point in time, install controls on their farms (California producers have a separate time schedule under state law). Those controls aren’t yet determined.

**Q25: What if a farm’s design isn’t covered by the air study and look-up chart?**

**A25:** If EPA notifies a participating pork producer that it is unable to develop a “look-up” chart of emissions estimating methodologies for its specific type of farm, the participating producer retains its legal protection for 180 days after such notice is mailed by EPA. During the 180 days the participating producer may attempt to provide data or adjust its operations to gain coverage by an addition to the look up chart. If neither EPA nor the producer is able to determine if the participating producer is subject to the CAA or CERCLA requirements, the pork producer retains its legal protections for past emissions but will have to decide for himself if his farm is subject to the air laws. If he misjudges he may be legally vulnerable for future emissions if they actually are determined to exceed the legal thresholds.

**Q26: Can producers challenge how the “look up” charts apply to them?**

**A26:** Yes and no. Industry representatives helped design the study, helped select the technologies and standardized protocols used, recommended the specific farms to be monitored, and helped identify

the monitoring contractor and the specific scientists to conduct the study. Industry will also have the opportunity to review the public data and verify that quality assurance standards are met. By signing the consent agreement, participating producers agree not to challenge the design or conduct of the study. They may, however, challenge the way in which the “look-up” charts would apply the air emissions data to their particular facility.

**Q27: What if pork producers decide to “go it alone” and not participate?**

**A27:** Participation in the study and agreement is voluntary. Those pork producers with emissions above the final regulatory threshold who do not gain the protections of the consent agreement will be vulnerable to citizen, state and federal lawsuits for past and current emissions.

**Q28: Is there any way a participating pork producer can lose the legal protections?**

**A28:** Yes, there are a couple of ways that could happen but not without the pork producer’s direct involvement: (a) Once the “look-up” chart is available on EPA’s website after the study is finished, pork producers will have several months to determine if they are subject to the laws and, if they are, undertake the necessary steps to comply (e.g., file a CERCLA report, or apply for a Clean Air Act permit. This last step may also include eventually installing air emissions controls). If the participating producer refuses to comply with the air laws after the study has determined that his farm has emissions that are subject to the air laws (unless he can show that the study results do not apply to his particular farm), he will lose his legal protections all the way back to the date he signed the agreement; and (b) if during the course of the two-year air study, a state or local government authority brings a nuisance action, wins in court, wins any appeal the producer might file, and then the producer proceeds to violate the final court order – then the producer could lose the legal protections from the consent agreement. Of course, it is possible that all these things could happen, but it is unlikely that it all would happen in two years and if it did the pork producer could avoid the loss of the legal protections by complying with the consent agreement.

**Q29: Does this agreement only provide protections from civil liability?**

**A29:** This consent agreement does not release a participating pork producer from any criminal liability, and does not prevent EPA from acting in situations that may present an imminent and substantial endangerment to public health, welfare or the environment.

**Q30: How will the air monitoring study be conducted?**

**A30:** The air monitoring study is being developed by a team of renowned scientists, EPA, USDA, industry and environmental experts. Once the plan is approved by EPA, monitoring of the selected sites will be conducted by a team of scientists from various universities and overseen by Purdue University and EPA over a 22 to 24-month period to account for seasonality/temporal variability and operational change impacts. In addition, conducting the study for a period in excess of one year will allow the team to check the repetitive nature of the data set and account for any data anomalies. Farm monitoring sites will be selected based on: (a) how typical the site design is of the specific animal sector; (b) the age and size of the facility; (c) site geography and climate factors; (d) building ventilation methods; (e) proximity to important centers of production for each specific animal sector; and other factors. The number of sites selected will allow data from monitored operations to be extended to unmonitored operations for each of the animal types included in the study (i.e., pork, dairy, egg producers and meat birds (broilers and

turkeys). In addition to the air emissions data collected during the monitoring period, site specific operational information may also be collected to support future development of “process-based” emissions estimating methods as suggested in the National Academy of Sciences report on “Air Emissions from Animal Feeding Operations” (2003). The site specific operational information may include the following type(s) of information: (a) number, age and weight of animals; (b) geographic and climate conditions; (c) housing/confinement building type (e.g., open, closed etc.); (d) quantity and nutrient analysis of manure generated; (e) manure management system type (e.g., deep pit, flush w/lagoon storage, belt w/dry storage, composting etc.); (f) waste stream samples leaving the barn and recycled water samples entering the barn; (g) feed conversion data; and (h) other data needed to model the effects of process changes. Data collected during the monitoring period will be reviewed on a periodic basis, and the final data used to develop “emission factors,” process-based models; lookup charts; and regulatory decisions.

**Q31: Will there be an effort to determine the effectiveness of emission controls?**

**A31:** The two-year study is a “bench marking” study designed to evaluate emissions without any new regulatory controls. Many farms are already using effective methods to control emissions (e.g., lagoon covers of straw or manmade materials), and a benchmark comparison will likely be undertaken if the opportunity presents itself to evaluate such methods side by side with untreated facilities. Following the completion of this two-year study it is possible that the monitoring equipment will continue to be used for studies of such emissions control.