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Via Electronic Mail and Facsimile

Air Docket
Animal Feeding Operations Consent Agreement and Final Order
U.S. Environmental Protection Agency
Mailcode: 6102T
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Dear Madam/Sir:

Re: Docket ID No. OAR-2004-0237

Farmers' Legal Action Group, Inc. submits these comments on behalf of the Campaign for Family Farms ("CFF") concerning the Notice of Animal Feeding Operations Consent Agreement and Final Order ("Consent Agreement"), and request for public comment, published at 70 Fed. Reg. 4958 (January 31, 2005).

CFF is an association of family farm and community membership organizations including Iowa Citizens for Community Improvement, the Missouri Rural Crisis Center, the Land Stewardship Project, the Illinois Stewardship Alliance, and Citizens Action Coalition of Indiana. CFF has commented on issues relating to concentrated animal feeding operations ("CAFOs") on several occasions.

CFF supports the notion of the EPA monitoring CAFOs, but opposes the broad grant of immunity for *all* CAFOs, whether or not they are being monitored. CFF believes that the EPA authority for granting such immunity is questionable at best. CFF further opposes the structure of the "study," as it improperly delegates the EPA's duties to private industry groups.

No Statutory Authority Exists for EPA Granting Blanket Immunity.

The EPA has been charged with *enforcing* federal environmental laws, not granting blanket immunity from those laws to hundreds or maybe thousands of entities without a single charge or investigation. The Consent Agreement represents a complete abdication of its duties. There is no authority in any of the three statutes in question for blanket immunity to entities and persons not named in a lawsuit. By conferring broad immunity on an entire category of entities that is

not provided for in the statute, the EPA is in fact legislating. The immunity provisions thus violate the separation of powers doctrine.

No Statutory Authority Exists for Assessing Cookie-Cutter Penalties.

Appendix 1 sets forth what the EPA believes to be the applicable authority. Under all three statutes cited by the EPA that are relevant to the Consent Agreement—the Clean Air Act, CERCLA, and EPCRA—the EPA is without authority for assessing penalties where no violation has occurred. See 42 U.S.C. § 7413 (Clean Air Act) (penalties permissible only for violations of the Clean Air Act); 42 U.S.C. § 9609 (CERCLA) (permits penalties only for violations of CERCLA) and 42 U.S.C. § 9603 (permits penalties for facilities that fail to notify the EPA of the release of a hazardous substance); 42 U.S.C. § 11045 (EPCRA) (penalties permissible only for violations of EPCRA or failure to report). There is no public record of the EPA charging any of the CAFOs for failure to report, and the individual agreements CAFO operators are to sign specifically deny that they are in violation of any laws.¹

The general procedures the EPA cites for authority for the Consent Agreement likewise are inapplicable. The EPA cites 40 C.F.R. § 22.13(b) as authority, but that provision only applies to “proceedings” commenced simultaneously with a consent agreement by “parties” to a settlement of a cause of action. 40 C.F.R. §§ 22.18(2) and (3), also cited by the EPA for authority, likewise apply only to a “respondent” who wishes to resolve “a proceeding.” Here, there have been no proceedings commenced against any or all of these individual CAFO operators, so 40 C.F.R. § 22.13 and 40 C.F.R. §§ 22.18(2) and (3) do not provide the EPA with the authority to enter into the Consent Agreement. The Consent Agreement thus exceeds the EPA’s statutory and regulatory authority.

Broad Immunity for Factory Farms is Unnecessary.

If the point of the Consent Agreement is truly to collect data, the EPA already has the authority to collect that data. 42 U.S.C § 7403(a). The EPA did not have to agree to broad legal immunity for all CAFOs in order to obtain information it is able to obtain and is charged with obtaining under existing authority.

The Consent Agreement Unlawfully Purports to Shield the AFO Industry from State and Citizen Enforcement.

According to the Federal Register notice, “[t]he [Consent] Agreement resolves Respondent’s civil liability for certain potential violations of the Clean Air Act,

¹Although the EPA may make a regulatory presumption that certain CAFOs or groups of CAFOs violate the CAA, CERCLA, and/or EPCRA, it apparently has not yet done so.

CERCLA, and/or EPCRA.” 70 Fed. Reg. 4958, 4962. However, according to the notice, “[t]he [Consent] Agreement will not affect the ability of States or citizens to enforce compliance with nonfederally enforceable State laws, existing or future, that are applicable to AFOs.” 70 Fed. Reg. 4958, 4959; see *also* 70 Fed. Reg. 4958, 4961 (“The Agreement is not intended to affect the ability of States or citizens to enforce compliance with nonfederally enforceable State laws applicable to AFOs.”). This statement appears to imply that the Consent Agreement will prevent state and citizen enforcement of federally enforceable state laws, federally enforceable state implementation plan provisions, federally enforceable Clean Air Act provisions, and possibly CERCLA and EPCRA provisions.

The Clean Air Act only precludes state or citizen enforcement when “the Administrator or State has commenced and is diligently prosecuting a civil action *in a court* of the United States or a State.” 42 U.S.C. § 7604(b)(1)(B) (emphasis added). The plain language of the statute limits the agency’s ability to preclude citizen and state enforcement only upon diligently prosecuting a civil action in court and excludes administrative enforcement actions. See *Texans United for a Safe Economy Education Fund v. Crown Central Petroleum Corp.*, 207 F.3d 789, 795 (5th Cir. 2000). Similarly, any preclusive effect on citizen and state enforcement of CERCLA and EPCRA is conditioned on EPA’s adherence to its administrative enforcement regulations, which EPA has failed to follow. Therefore, the Consent Agreement has no preclusive effect on citizen and state enforcement of the Clean Air Act, CERCLA, or EPCRA, and EPA should clarify in a subsequent Federal Register notice the limited immunity provided by the agreement.

The Consent Agreement Wrongly Places Control Over the “Study” in the Hands of Private Industry or Industry-Led Organizations.

By agreeing to the study provided for in the Consent Agreement, the EPA is improperly delegating its duties to private industry groups. Under the Consent Agreement, the EPA: *will not* select the CAFOs to be monitored; *will not* do the actual monitoring; *will not* provide the equipment necessary for the monitoring; *will not* do any of the monitoring or even observe any of the monitoring; *will not* fund the studies; and *will not* conduct the studies. Instead, under the Consent Agreement, the EPA has improperly delegated all of these activities to private industry or commodity groups. The EPA is entirely absent from any meaningful role in the monitoring or the “study.”

In addition to the obvious flaw that the “study” is structured so that these private industry groups—who have no incentive whatsoever to provide comprehensive, thorough, or accurate information—are responsible for all meaningful aspects, there are other problems inherent in delegating the government’s role to investigate and prosecute CAFOs for violations of federal environmental laws. For

instance, although the Consent Agreement requires that all emissions data collected from individuals who sign will be public, will the same be true for all aspects of the "study"? If the monitoring and analysis will be funded and conducted by private parties with privately-owned equipment, will all aspects of the monitoring and "study" be made public, or will these groups claim they have a proprietary interest in the information, some portion of the study, or the equipment? How will the EPA know if the monitoring is being done accurately? Will it simply trust the word of the private individuals charged with those responsibilities? How will the EPA know if it has received complete monitoring information? How will the EPA know if it has received all information and notes relating to the "study," particularly if they contain information certain members of the industry would consider damaging? Apparently the EPA does not even know that pork industry officials have already contracted with Purdue University to act as the Independent Monitoring Contractor. Alan Guebert, *Sweet Deal for Large Farms Likely Will Raise a Big Stink*, Farm and Food File (Feb. 10, 2005). If the EPA does not have any control over the selection of the persons who will be doing the monitoring and the "study," how can it ensure those persons are qualified and—more importantly—neutral and unbiased? The "study," as designed, does not address these important questions and leaves the EPA with too little actual authority for and control over it.

Other Problems Associated With the Study.

The "study" contemplates that only 28 CAFOs from around the country will be monitored. EPA *Animal Feeding Operations Air Quality Compliance Agreement Fact Sheet*, January 21, 2005, <http://www.epa.gov/compliance/resources/agreements/caa/cafo-fcsht-0501.html>. In the pork industry, only five CAFOs will be monitored. *National Air Emissions Research Study Questions and Answers*, <http://www.porkboard.org/environment/Information/National%20Air%20Emission%20Study%20QA.rtf>. Given the great differences among CAFOs in different industries and different regions, this can hardly represent a statistically "representative sampling," and it immediately puts the credibility of the "study" at risk before it even begins.

More fundamentally wrong, however, is the fact that, while only 28 operations will be monitored, any factory farm can sign up for at least seven years' worth of immunity from these environmental laws. Even at the maximum capped price of \$100,000, this is a bargain, since penalties for violations can carry fines of \$25,000 per day. See, e.g., 42 U.S.C. § 9609(a) and (b) (CERCLA); 42 U.S.C. § 11045(a) and (b) (EPCRA). So in exchange for four days' worth of fines, factory farms can receive seven years of immunity. The Consent Agreement thus gives incentives for the largest factory farms—who are the most likely violators of environmental laws—to buy immunity at this bargain basement price. This is just plain wrong.

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The Campaign for Family Farms does not oppose the monitoring of factory farm air emissions or a true, legitimate field study of the results of that monitoring. Unfortunately, the monitoring and "study" provided for in this Consent Agreement do not pass muster. Moreover, there is no reason to provide a safe harbor for every factory farm that signs an agreement with the EPA, whether or not that operation is in fact being monitored. The EPA is charged with enforcing environmental laws, and it should vigorously do so with respect to CAFOs that violate those laws. The Campaign and its member organizations strongly oppose the EPA agreeing to give factory farms a free pass to pollute our air.

Sincerely,

FARMERS' LEGAL ACTION GROUP, INC.

s/Susan E. Stokes

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