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Michael Regan
Administrator
Environmental Protection Agency
Office of the Administrator (1101A)
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**Re: Petition to Rescind the Air Consent Agreement and Enforce Clean Air Laws
Against Animal Feeding Operations**

Dear Mr. Regan,

I write on behalf of the twenty-four petitioner groups that filed the Petition to Rescind the Air Consent Agreement and Enforce Clean Air Laws Against Animal Feeding Operations on October 26, 2021 (“Petition”).¹ It has been nearly a year and a half since Petitioners submitted the Petition to the Environmental Protection Agency (“EPA” or the “Agency”). Not only have we yet to receive the Agency’s response, but EPA has only agreed to meet with Petitioners once since the filing, rebuffing our further efforts to secure a meeting focused on impacted community members and the environmental justice burdens they shoulder due to the Agency’s inaction.

Meanwhile, the Air Consent Agreement remains in force, not only impeding federal enforcement of clean air laws against Animal Feeding Operations (“AFOs”), but also state implementation and enforcement of these critical air pollution laws. Most recently, the Air Consent Agreement and EPA’s protracted Emissions Estimating Methodology (“EEM”) development process stymied efforts to regulate AFO air pollution in Oregon. As explained further below, despite the State’s clear authority and obligation to enforce the Clean Air Act against large dairy operations whose emissions exceed federal regulatory thresholds, and the State’s express acknowledgement of several unpermitted dairy AFOs currently operating in violation of federal law, the Oregon Department of Environmental Quality (“Oregon DEQ”) has refused to implement the Clean Air Act requirements applicable to these operators. It cites the ongoing EEMs process as justification for its failure to act.

¹ Animal Legal Defense Fund et. al., *Petition to Rescind the Air Consent Agreement and Enforce Clean Air Laws Against Animal Feeding Operations* (Oct. 26, 2021), available at: <https://www.foodandwaterwatch.org/wp-content/uploads/2021/10/2021.10.26-Petition-re-2005-Air-Consent-Agreement-1.pdf>.

This dereliction of duty is unacceptable, and could have been avoided entirely had EPA abandoned its fatally flawed EEMs and ended the Air Consent Agreement as Petitioners urged. We implore EPA to step in and correct Oregon’s willful failure to enforce the Clean Air Act, which was based on an inaccurate understanding of the EEMs process and the effect it has on state regulation. We also continue to urge EPA to grant Petitioners’ original request. The Agency has finally determined it cannot develop viable EEMs for volatile organic compounds (“VOCs”), and it has still failed to finalize any others. If it ever does, they will lack scientific legitimacy for the reasons explained in the Petition. Failing to correct Oregon’s mistakes and end the NAEMS debacle will only further exacerbate the ripple effect of inaction that EPA has created. Finally, we renew our now six-month-old request for a meeting so that EPA can hear from the impacted communities suffering day in and day out from AFO air pollution. If the Agency is truly committed to advancing environmental justice, as it claims, then it must not continue to ignore those living with the environmental injustices caused by this industry.

I. Oregon’s Refusal to Regulate AFO Air Pollution Stems from its Mistaken Belief that the EEMs Process Will Result in Binding Federal Regulation and that VOC EEMs Were Imminent

Air pollution from Oregon’s growing number of exceedingly large mega-dairies threatens the public health and safety of Oregonians as well as the environment. Nevertheless, the State has never attempted to regulate this industrial source of air pollution. To combat this problem, on August 17, 2022, twenty-two advocacy organizations representing a diverse array of environmental, public health, family farm, environmental justice, animal protection, and community interests filed a petition with Oregon DEQ to finally begin regulating air emissions from large dairy operations.² The petition not only explained the urgent need for such regulations,³ but also detailed the state and federal laws that not only empowered, but also required the State to act.⁴ The Clean Air Act is one such mandate, requiring state permitting authorities to regulate AFO emissions that trigger federal permitting requirements.⁵ Petitioners provided Oregon DEQ with detailed emissions modeling analysis demonstrating that several large dairy AFOs in the state were operating without Clean Air Act permits even though their emissions of volatile organic compounds and methanol exceeded permitting thresholds.⁶

After a thorough review of the petition and the best available emissions science and modeling, Oregon DEQ concluded that indeed, at least three Oregon dairy AFOs exceeded federal permitting thresholds for volatile organic compounds and were operating without the

² See Food & Water Watch et. al., Petition to Promulgate Dairy Air Emissions Regulatory Program (Aug. 17, 2022) [hereinafter “Oregon Petition”], available at: <https://www.foodandwaterwatch.org/wp-content/uploads/2022/08/2022.8.17-Dairy-Air-Petition.pdf>.

³ *Id.* at 12–23.

⁴ *Id.* at 23–37.

⁵ *Id.* at 24–27.

⁶ *Id.* at 27–32.

requisite Title V permit.⁷ Yet in spite of this finding, Oregon DEQ’s decision-making body denied the petition, thereby refusing to regulate these sources.⁸ It did so based on a staff recommendation that fundamentally mischaracterized the impact the Air Consent Agreement and the EEMs process has on a state’s obligation to implement and enforce the Clean Air Act against AFOs.

In Oregon DEQ’s mistaken view, the ongoing EEMs process precludes state action against AFO polluters at this time because “actual federal permit requirements will be determined from the emissions methods established in NAEMS.”⁹ Oregon DEQ further asserted that “since the study and EPA’s direction from that study will define what federal requirements Oregon must adopt for permitting sources that might be included in a federal program,” it should not move forward with an AFO permitting program until the process is complete and federal regulations are issued.¹⁰

Oregon DEQ also relied on EPA’s representations that final VOC EEMs—the most relevant to Clean Air Act regulation of dairy AFOs in Oregon—were soon forthcoming. As stated in the Staff Report, “EPA is due to release draft models for VOC emissions from dairy farms in 2022 and intends to publish final emission estimating methodologies in late 2023/early 2024.” Indeed, EPA confirmed this timeline with Oregon DEQ in October 2022 via email, indicating that the VOC report was “currently under management review and should be released in the next week” and that the Agency was on target for final publication in “late 2023 early 2024.”¹¹ It was not until after Oregon DEQ denied the petition, refusing to regulate AFO emissions under the Clean Air Act, that EPA released its progress report on VOC EEMs development, in which the Agency ultimately concluded that “the NAEMS VOC data lack the quality and quantity to develop a total VOC EEMs using a statistical modeling process utilized for the other pollutants.”¹²

II. EPA Must Direct Oregon to Faithfully Implement the Clean Air Act and End Federal Amnesty for AFOs Exceeding VOC Emissions Thresholds

Given Oregon DEQ’s acknowledgment that dairy AFOs within state borders are violating the Clean Air Act, it is incumbent upon EPA to clear up the State’s mistaken belief that it cannot and should not enforce the Clean Air Act against these polluters while the EEMs process is

⁷ DEQ, *Staff Report for Item A: Petition to Promulgate Dairy Air Emissions Regulatory Program (Action)* Nov. 9, 2022, *EQC special meeting*, 1 and 21 (Nov. 2, 2022), available at: https://www.oregon.gov/deq/EQCdocs/110922_A_PetitionAction.pdf.

⁸ See DEQ, *Notes: Oregon Environmental Quality Commission meeting*, 7–8 (Nov. 9, 2022) (documenting the denial decision), available at: https://www.oregon.gov/deq/EQCdocs/111722_A_DraftMinutes.pdf.

⁹ Environmental Quality Commission Special Meeting, at 16:13–16:22 (Nov. 9, 2022), recording available at: <https://www.youtube.com/watch?v=KhknzyfdnCM>

¹⁰ *Id.* at 24:47–25:23.

¹¹ See Email from Bill Schrock to Heather Kuoppamaki dated October 5, 2022, entitled “Re: CAFO air emissions,” obtained through an Oregon Public Records Request.

¹² EPA, *Development of VOC Emissions Estimating Methodologies for Animal Feeding Operations Draft*, 12 (November 2022).

pending. As Petitioners explained to Oregon DEQ—and as EPA well knows—the Air Consent Agreement does not impact a state’s ability or obligation to regulate AFOs under the Clean Air Act, nor will the EEMs process result in any binding federal regulations. The safe harbor provision of the Air Consent Agreement only applies to *federal* enforcement of the Clean Air Act and other clean air laws against the subset of participating AFOs¹³ that signed onto the agreement.¹⁴ The plain terms of the agreement do not apply to state enforcement and “shall not delay or interfere with the implementation or enforcement of state statutes that eliminate exemptions to Clean Air Act requirements for agricultural sources of air pollution.”¹⁵ Moreover, the EEMs process was never intended to and will not result in nationally applicable federal regulations that could conflict with or supersede state regulatory programs implementing the Clean Air Act and state laws. The goal was to develop emission models that EPA could use in its enforcement actions against participating AFOs, as well as a resource that “may be useful for general estimates of air emissions from [AFO] operations across the United States or comparisons between operations in different regions.”¹⁶ In other words, states and AFO operators “may,” but need not, use EPA’s emission models if and when finalized.

Furthermore, in light of EPA’s recent finding that it cannot develop a viable VOC EEM from NAEMS data or other peer-reviewed literature, it must immediately end federal enforcement amnesty with regard to this pollutant, as EPA committed to doing in accordance with the Office of Inspector General’s (“OIG”) 2017 recommendations.¹⁷ Nearly six years ago, OIG directed EPA to “determine and document the decision as to whether the EPA is able to develop scientifically and statistically sound emission estimating methodologies for each originally planned emission source and pollutant combination.”¹⁸ After conducting those reviews, OIG recommended that EPA should “[f]or any emission source and pollutant combinations for which the Office of Air and Radiation determines it cannot develop emission estimating methodologies, notify Air Consent Agreement participants of this determination, and that the release and covenant not to sue for those emission sources and pollutant types will expire in accordance with paragraph 38 of the 2005 Air [Consent] Agreement.”¹⁹ The Agency has now firmly concluded that NAEMS data are utterly unusable for VOC model development, and after more than a decade of failed attempts, the Agency is unable to develop a total VOC EEM.

¹³ The three Oregon Dairy AFOs in question—TMCF Sixmile Dairy, TMCF Columbia River Dairy, and Farmland Reserve Inc.—are not amongst the participating AFOs that signed onto the Air Consent Agreement. See EPA, *Summary of the AFO Air Compliance Agreement Participants* (Feb. 23, 2009).

¹⁴ See Animal Feeding Operation Consent Agreement and Final Order, 70 Fed. Reg. 4958, 4959 (Jan 31, 2005).

¹⁵ *Id.* at 4962.

¹⁶ EPA, *Fact Sheet: Draft Dairy Air Emissions Models for Animal Feeding Operation*, 1 (July 2022), available at: https://www.epa.gov/system/files/documents/2022-07/Fact%20Sheet_Dairy_Models_07.2022.pdf.

¹⁷ EPA OIG, *Improving Air Quality: Eleven Years After Agreement EPA Has Not Developed Reliable Emissions Estimation Methodologies to Determine Whether Animal Feeding Operations Comply with Clean Air Act and Other Statutes*, Report No. 17-P-0396, 24 and 32 (Sep. 19, 2017), available at: https://www.epa.gov/sites/default/files/2017-09/documents/epaig_20170919-17-p-0396.pdf.

¹⁸ *Id.* at 23

¹⁹ *Id.*

Instead, it has decided to “continu[e] to search literature for data” and “release an updated draft . . . by summer 2023.”²⁰ Enough is enough. EPA has already reviewed the literature and found it lacking.²¹ It must now follow OIG recommendations and end amnesty with regard to VOCs without further delay.

We stand ready to schedule a meeting with EPA representatives to discuss this matter further, and once again ask the Agency to give impacted community members the opportunity to share their lived experiences with AFO air pollution. For the nearly twenty years that the Air Consent Agreement has been in force, EPA has ignored the problems these communities face. It should not continue that disappointing trend by refusing to hear from these stakeholders now.

Sincerely,

A handwritten signature in blue ink that reads "Emily Miller".

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On behalf of Petitioners

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²⁰ EPA, *Development of VOC Emissions Estimating Methodologies for Animal Feeding Operations Draft*, 12 (November 2022).

²¹ *Id.* at 11.