



Dairy CARES Report

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Lawsuit risk may be lower for dairies if EPA adopts plan to fix ‘stranger-than-fiction’ error

After much delay, the U.S Environmental Protection Agency is moving to correct a bureaucratic error that left some dairy families bogged down in litigation, and many others exposed. While we had hoped EPA would act much sooner, CARES coalition members support this important action and applaud EPA for taking action to fix the problem.

To understand what happened, go back more than four years ago to September 2003. That’s when California lawmakers adopted Senate Bill 700 – ending a broad statewide exemption for agriculture from air pollution permitting.

State lawmakers said ‘yes’ to air pollution permits for large farms, but wisely chose to include limited protections as they opened the floodgates of regulation. They included measures to assist farmers with the transition and time to develop science-based regulations:

- **Only farms emitting above a certain threshold (half the federal standards) would be required to seek permits.** Smaller farms emitting below the new, stricter threshold were allowed to continue with the exemption from permits, but were still required to comply with other applicable air regulations, such as regional dust control regulations.
- **Agricultural sources would not be required to purchase pollution offset credits unless they could also bank those credits when reducing their own emissions beyond required levels.** Other regulated industries enjoy this protection, which allows businesses to recover part of their investment when they reduce emissions through technology, changes in management or other measures. This protection was especially important for dairies, because of the lack of accurate science-based emissions estimates.

In May 2004, U.S. EPA officially acknowledged passage of SB 700 and the end of the “blanket” exemption for California farmers. However, in a move that might be compared to a child’s game of “Simon Says,” EPA did not specifically say that the “blanket” was being replaced with a system that included the limitations described above.

Environmental lawyers noted the procedural error and leapt on the opportunity to file lawsuits. They claimed the protections described above didn’t exist – essentially because the federal government forgot to say they did. That meant, by their bizarre interpretation – that all farms needed permits and that farms could be required to buy offset credits even if they were not allowed to sell them.

It was as though a law, adopted by the California legislature and signed by the governor, then formally included in clean air plans adopted by the California Air Resources Board and regional air districts, suddenly meant nothing.

Not only did activist lawyers take this absurd position, but they argued that dairy operators should somehow have known better – that they should have ignored the laws on the books and applied for permits that the air district was telling them they did not need.

It might seem comical, except to the dairy families and dairy industry groups who've invested hundreds of thousands of dollars defending against absurd lawsuits.

At last, on February 20, 2008, U.S. EPA acted to correct the situation, publishing a proposal to revise the federally adopted State Implementation Plan for California to reflect all of the SB 700 law passed in 2003.

CARES has filed comments supporting EPA's proposal, along with other groups representing agriculture, including the California Farm Bureau Federation. Allowing EPA to fix its mistake will allow everyone who is actually doing something to clean the air – such farmers and air quality officials – to get back to work.

Rest assured, there will be a loud cry from so-called environmental advocates as they see another opportunity dry up. They will certainly mourn losing this chance to use the courts to continue to harass dairy families, raise funds and advance political agendas. No doubt, they may try to persuade one or two news reporters to characterize this as “just another attempt by the Bush Administration to relax environmental regulations.”

Hopefully, no one will be fooled. Maybe news reporters will have a long enough memory to recall that SB 700 was adopted not by the Bush administration, but a bipartisan majority of the Democrat-controlled California Legislature and signed by Democrat Gray Davis. Maybe they will see clearly that this is not U.S. EPA getting in the way of California, but rather, getting out of the way as California adopts (once again) the nation's most stringent environmental regulations.

The action EPA is proposing is simply to adopt the law everybody thought California passed more than four years ago. SB 700 is no tougher and no easier than it was then. The facts are that SB 700, burdensome as it is on California farmers, is doing what it was supposed to do.

The air is cleaner and farmers, including dairy families, are doing their part.

CARES is a statewide coalition supporting economic and environmental sustainability for California's dairy industry. CARES members include the Alliance of Western Milk Producers, Bank of the West, California Dairies Inc., California Dairy Campaign, Dairy Farmers of America-California, Dairy Institute of California, Hilmar Cheese Co., HP Hood, Joseph Gallo Farms, Land O' Lakes, Milk Producers Council, Saputo Cheese, Turlock Dairy & Refrigeration, Western United Dairywomen, and others. For information about CARES, visit our web site at www.dairycares.com, write dairycares@aol.com or call 916-441-3318.