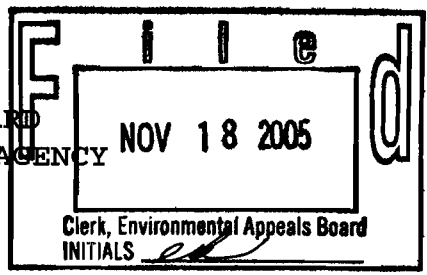


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)	Consent Agreement and
Consent Agreements and Proposed)	Final Order
Final Orders for Animal Feeding)	CAA-HQ-2005-xx
Operations)	CERCLA-HQ-2005-xx
)	EPCRA-HQ-2005-xx

ORDER SCHEDULING HEARING AND
REQUESTING SUPPLEMENTAL INFORMATION

On November 9, 2005, the Environmental Appeals Board ("Board") received for approval twenty Consent Agreements and Proposed Final Orders ("Agreements")¹ from the Office of Enforcement and Compliance Assurance ("OECA"), in accordance with 40 C.F.R. § 22.18(b)(3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Proceedings and the Revocation/Termination or Suspension of Permits, 40 C.F.R. pt. 22.² The Agreements are part of a large group of proposed

¹The Office of Enforcement and Compliance Assurance provided a list of the twenty companies (or "Respondents") that entered into these Agreements. See Attachment U to Memorandum from Granta Y. Nakayama on Consent Agreements and Proposed Final Orders for Animal Feeding Operations to Environmental Appeals Board (Nov. 4, 2005). This attachment has been incorporated into this Order as Attachment 1. This Order applies to all the Respondents listed in the Attachment.

²Section 22.18(b)(3) provides that "No settlement or consent agreement shall dispose of any proceeding under these Consolidated Rules of Practice without * * *, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board, ratifying the parties' consent agreement." 40 C.F.R.

agreements the Environmental Protection Agency ("EPA") has received in response to a nationwide offer EPA made to animal feeding operations ("AFOs"). EPA offered this industry the opportunity to sign voluntary consent agreements to resolve potential liabilities under the Clean Air Act ("CAA"), the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), and the Emergency Planning and Community Right-To-Know Act ("EPCRA"). See 70 Fed. Reg. 4958 (Jan. 31, 2005).

The twenty Agreements before us would settle liability for certain potential violations of the CAA, CERCLA, and EPCRA by the companies listed in Attachment 1.³ As part of the Agreements, the listed companies will pay a civil penalty based on the number and size of the farms covered by the Agreement in accordance with a table set forth therein. The companies would also share responsibility for funding a two-year nationwide emissions monitoring study aimed at the development of methodologies for estimating emissions from AFOs, which in turn would be used to determine participating companies regulatory status and responsibilities. As part of the Agreements, the companies would receive a release and covenant not to sue for potential violations of specified requirements of the CAA, CERCLA, and

§ 22.18(b)(3); see also *id.* § 22.4(a).

³ See *supra* note 1.

EPCRA that may have already occurred or that may occur during the study period.

The Board has preliminarily examined the proposed Agreements, the memorandum submitted by OECA explaining the nature and scope of these Agreements⁴, and the background materials submitted with this memorandum and has determined that additional explanation on the following topics will assist the Board in its consideration of this matter. Accordingly, OECA shall provide a supplemental memorandum addressing the following:⁵

1. Scope of Board Review: Explain whether OECA believes that the Board has jurisdiction, under the Consolidated Rules of Practice or Agency delegations of authority, to independently review the compliance aspects of these Agreements along with the assessed penalty, or just the penalty component of the Agreements. In this regard, note that section 22.1, which defines the scope of Part 22, as to violations under the CAA,

⁴ See Memorandum on Consent Agreements and Proposed Final Orders for Animal Feeding Operations from Granta Y. Nakayama to Environmental Appeals Board (Nov. 4, 2005).

⁵ The areas and questions identified in this Order are intended solely to aid the Board in its review of this consent agreement. This order should not be interpreted to suggest the Board has made any determinations on the merits regarding any of the facts, issues or legal matters relating to this matter.

CERCLA, and EPCRA, 40 C.F.R. § 22.1(a)(2), (7)-(8) only lists the assessment of penalties, whereas sections 22.4(a) and 22.18(b)(3), which require the Board to approve or ratify consent agreements under the Consolidated Rules of Practice, do not expressly contain the same limitation.

Please also confirm our understanding that the Monitoring Fund does not constitute any part of the penalty in this case, but rather is part of the compliance aspects of the Agreement. In this regard, please also describe the statutory or other basis for collecting money from the regulated community to perform monitoring contemplated by the Agreement.

2. Compliance with Part 22: Explain how these Agreements satisfy the prerequisites for consent agreements under 40 C.F.R. part 22, specifically the requirement that a consent agreement contains the elements described in sections 22.14(a)(2) and (3), which require that the agreement specifically reference the requirements "which respondent is alleged to have violated" and a "concise statement of factual basis for each alleged violation." See 40 C.F.R. § 22.18(b)(2) ("the consent agreement shall contain the elements described at § 22.14(a)(1)-(3) and (8)").

3. Penalty Policy and Statutory Criteria: First, explain how the penalty amounts relate to the statutory penalty criteria for each of the three statutes involved. Second, explain whether these Agreements implement the applicable penalty policies (i.e., *EPA's Clean Air Act Stationary Source Civil Penalty Policy* (Oct. 25, 1991); *Final Enforcement Response Policy for Sections 304, 311, and 312 of EPCRA, and Section 103 of CERCLA* (Sept. 30, 1999)). If so, provide any worksheet or similar documentation demonstrating how these policies were applied. If not, explain whether there was a formal determination as to why these policies do not apply.

Accordingly, the Board hereby orders OECA to file,⁶ on or before December 6, 2005, a supplemental memorandum addressing the issues listed above. Any Respondent listed in Attachment 1 may, if it so desires, also submit a filing addressing these issues by no later than December 6, 2005.

The Board also believes that a hearing addressing these matters will assist it in its deliberations. Therefore, OECA is hereby advised that the Board has scheduled a hearing for Tuesday, December 13, 2005, at 10:00 A.M. EST in the

⁶ Documents are "filed" with the Board on the date they are received.

Administrative Courtroom, U.S. EPA, EPA East Building, Room 1152, 1201 Constitution Avenue, N.W., Washington, D.C. The Board has allocated 60 minutes for the hearing. Any Respondent interested in participating in the hearing shall notify the Clerk of the Board by no later than December 6, 2005, of their interest. No later than December 6, 2005, OECA (and any participating Respondent) shall advise the Clerk of the names of counsel who will participate in the hearing.⁷

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 11/18/05

By: 
Edward E. Reich
Environmental Appeals Judge

⁷ The Clerk can be reached at (202) 233-0122.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Scheduling Hearing and Requesting Supplemental Information in the matter of Consent Agreements and Proposed Final Orders for Animal Feeding Operations, were sent to the following persons in the manner indicated:

By Interoffice Mail
(and copy by facsimile):

Robert A. Kaplan
Bruce Fergusson
Special Litigation & Projects
Division
Office of Civil Enforcement (2248-A)
U.S. Environmental Protection
Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460
202-564-0010 FAX

By U.S. First Class Mail:

Lee Poepe
P & W Eggs
2313 Hilltop
Anita, Iowa 50020

Steven A. Nichols
MCM Poultry Farm
5611 Peck Road
Arcadia, CA 91006-5851

Mike Osterholt
Water Works
2104 E 300 South
Portland, IN 47371

Kim Wendel
Bob Wendel & Son's Poultry
14830 Cochran Road
New Weston, OH 45348

K-Brand Farms
715 Glen Wild Road
P.O. Box 119
Woodridge, NY 12789

Henningsen Foods, Inc.
Shell Egg Division
851 Third Street
P.O. Box 70
David City, NE 68632

Lennartz Farms
3178 St. Peter Rd.
Ft. Recovery, Ohio 45846

Center Fresh Egg Farm, LLP
546 9th Ave. East
Oskaloosa, Iowa 52577

Steven C. Badgett
Badgett Enterprises LTD
743 Mercer Darke County Line Rd.
Ft. Recovery, OH 45846

Greg B. Nelson
8690 Quail Circle
Manhattan, KS 66502

Fairway Farms
328 Monterey Rd.
Franklin, KY 42134

William Brenton
Brenton Brothers, Inc.
P.O. Box 190
Dalles Center, Iowa 50063-0190

Russell Roe
Roe Farms, Inc.
72368 110th St.
LeRoy, MN 55951

Terry Finnerty
10347 W. SR 26
Dunkirk, IN 47336

Jerry and Ruth Warren
6873 E. 625 N
Union City, IN 47390

Ronald Evans
E & S Swine, Inc.
2492 Mobleys Bridge Rd.
Grimesland, N.C. 27837

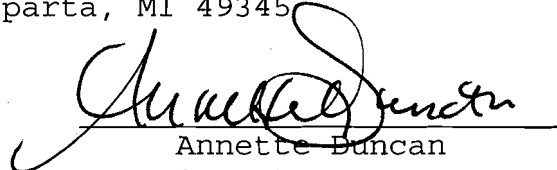
Kenneth Carroll
C & C Farms
4201 Hayes Mill Rd.
Godwin, N.C. 28344

Williamson Swine Farms
1325 Lisbon Street
Clinton, N.C. 28328

James A. Zoltenko
RR1, Box 106
Courtland, KS 66939

Kober Farms LLC
8990 Peach Ridge
Sparta, MI 49345

Dated: NOV 18 2005


Annette Duncan
Secretary

ATTACHMENT U

RESPONDENT LIST (10 Egg-layers, 10 Swine)

Egg Layers

1. P & W Eggs
2313 Hilltop
Anita, Iowa 50020
2. MCM Poultry Farm
5611 Peck Road
Arcadia, CA 91006-5851
3. Water Works
2104 E 300 South
Portland, IN 47371
4. Bob Wendel & Son's Poultry
14830 Cochran Road
New Weston, OH 45348
5. K-Brand Farms
715 Glen Wild Road
Box 119
WoodRidge, NY 12789
6. Henningsen Foods, Inc.
Shell Egg Division
851 Third Street
P.O. Box 70
David City, NE 68632
7. Lennartz Farms
3178 St. Peter Rd.
Ft. Recovery, Ohio 45846
8. Center Fresh Egg Farm, LLP
546 9th Ave. East
Oskaloosa, Iowa 52577
9. Badgett Enterprises LTD
743 Mercer Darke County Line Rd.
Ft. Recovery, OH 45846

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RESPONDENT LIST (10 Egg-layers, 10 Swine), cont'd:

10. Greg B. Nelson
8690 Quail Circle
Manhattan, KS 66502

Swine

11. Fairway Farms
328 Monterey Rd.
Franklin, KY 42134
12. Brenton Brothers, Inc.
P.O. Box 190 - 1415 Walnut
Dalles Center, Iowa 50063
13. Roe Farm, Inc.
72368 110th St.
LeRoy, MN 55951
14. Terry Finnerty
10347 W. SR 26
Dunkirk, IN 47336
15. Jerry and Ruth Warren
6873 E. 625 N
Union City, IN 47390
16. E & S Swine, Inc.
2492 Mobleys Bridge Rd.
Grimesland, N.C. 27837
17. C & C Farms
4201 Hayes Mill Rd.
Godwin, N.C. 28344
18. Kermit Williamson Farm
17 Pond Lane Rd.
Clinton, N.C. 28328

ATTACHMENT U

Respondent List (10 Egg-layers, 10 Swine), cont'd:

19. James A. Zoltenko
RR1, Box 106
Courtland, KS 66939

20. Kober Farms LLC
8990 Peach Ridge
Sparta, MI 49345