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

FILED
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CLERK ENVIRONMENTAL APPEALS BOARD
INITIALS

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

FINAL ORDER

I. *BACKGROUND*

On April 11, 2006, the Environmental Appeals Board ("Board") received for review and ratification seven hundred and two Consent Agreements and Proposed Final Orders ("Agreements")[1] from the EPA's Office of Enforcement and Compliance Assurance ("OECA", also referred to as "Complainant") in accordance with 40 C.F.R. § 22.18(b)(3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. pt. 22

[1] The Office of Enforcement and Compliance Assurance provided a list of the seven hundred and two companies (or "Respondents") that entered into these Agreements. *See* Attachment A to Memorandum from Granta Y. Nakayama on Consent Agreements and Proposed Final Orders for Animal Feeding Operations to Environmental Appeals Board (April 6, 2006). This attachment has been incorporated into this Order as Attachment 1. This Order applies to all the Respondents listed in the Attachment.

("Part 22").[2] The Agreements are part of a large group of proposed agreements EPA has received in response to a nationwide offer EPA made to animal feeding operations ("AFOs") in the egg, broiler, chicken, turkey, dairy, and swine industries that meet the definition of an AFO under the Clean Water Act. *See* Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4958, 4959 (Jan. 31, 2005).

EPA offered these AFOs the opportunity to sign consent agreements to resolve potential liabilities under the Clean Air Act ("CAA"), CAA §§ 101-618, 42 U.S.C §§ 7401-7671q, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), CERCLA §§ 101-405, 42 U.S.C. §§ 9601-967, and the Emergency Planning and Community Right-To-Know Act ("EPCRA"), EPCRA §§ 301-330, 42 U.S.C. §§ 1101-11050. *See* Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4958 (Jan. 31, 2005); *see also* Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 40016 (July 12, 2005).

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[2] According to section 22.18(b)(3), settlements or consent agreements arising from proceedings commenced at EPA Headquarters need the Board's approval before becoming final Agency action. 40 C.F.R. § 22.18(b)(3) ("No settlement or consent agreement shall dispose of any proceeding under these Consolidated Rules of Practice without a final order from * * *, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board, ratifying the parties' consent agreement."). *See also id.* § 22.4(a) ("The Environmental Appeals Board * * * approves settlements of proceedings under these Consolidated Rules of Practice commenced at EPA Headquarters").

Under the model agreement published in the January 31, 2005 Federal Register notice, participating AFOs will pay a civil penalty based on the number and size of the farms and the number of animals at each AFO covered by the Agreement, in accordance with a table set forth therein. Participating AFOs 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 compliance under the CAA, CERCLA, and EPCRA. As part of the Agreements, the companies would receive a release and covenant not to sue for potential civil violations of specified requirements of these statutes that may have already occurred or that may occur during the study period.

This is the second group of Agreements the Board has received for review and ratification under this initiative. The first group consisted of twenty Agreements, which, after careful examination,[3] the Board ratified by Final Order dated January 27,

[3] On November 18, 2005, after a preliminary examination of the first group of Agreements and the supporting documentation OECA submitted, the Board issued an order identifying various areas that needed clarification and requesting OECA to file a supplemental memorandum answering several questions. The Board also scheduled a hearing inviting OECA and any interested Respondents to address the areas identified in the order. *See* Order Scheduling Hearing and Requesting Supplemental Information (EAB, Nov. 18, 2005). On December 6, 2005, the Board received a

2006. *See* Consent Agreements and Proposed Final Order for Animal Feeding Operations (EAB, Jan. 27, 2006). In its review of the first twenty Agreements, the Board found that: (1) the Agreements were administrative penalty orders subject to Board review; (2) the Agreements did not violate the Clean Air Act or Part 22; and (3) the penalty amounts set forth in the Agreements followed the applicable statutory penalty criteria and any deviations from EPA's penalty policies were appropriately explained. *Id.* 8-34. The discussion and findings in that earlier order apply with equal force to these Agreements as well.

In its transmittal memorandum, OECA represents that the Agreements in this current group are identical to the twenty Agreements previously ratified by the Board, the model agreement

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joint request from various community and environmental groups (collectively referred to as "AIR"), seeking, among other things, to file a memorandum to respond to OECA's supplemental brief and asking to participate at the hearing. By order dated December 8, 2005, the Board granted AIR the opportunity to participate at the hearing. *See* Order Granting Opportunity to Participate at Hearing and Allocating Time (EAB, Dec. 8, 2005). By a separate order, the Board allowed AIR to file a non-party brief. *See* Order Denying Motion for Leave to Intervene (EAB, Dec. 8, 2005).

The Board held the hearing on December 13, 2005. OECA, counsel for six of the Respondents, and AIR participated at the hearing. On December 20, 2005, AIR filed a non-party brief responding to OECA's supplemental brief. On January 6, 2006, OECA and Respondents each filed a response brief to AIR's non-party brief. Upon consideration of all responsive filings, the Board issued a Final Order on January 27, 2006, ratifying the Agreements.

published in the January 31, 2005 Federal Register notice, and the sample Agreement attached to its transmittal memorandum.[4] The transmittal memorandum further states that each penalty assessed by the Agreements is in accordance with the formula established in Paragraph 48 of the model agreement.[5]

Upon review, the Board hereby issues the following order.

II. *FINAL ORDER*

Pursuant to 40 C.F.R. § 22.18(b), the Board issues this Final Order ratifying the Agreement executed by the Complainant and each Respondent listed in Attachment 1 to this Order as submitted to the Board by Complainant on April 11, 2006. Complainant and Respondent have consented to the entry of this Final Order and have agreed to comply with the Agreement. It is hereby ORDERED that:

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[4] Memorandum on Consent Agreements and Proposed Final Orders for Animal Feeding Operations from Granta Y. Nakayama to Environmental Appeals Board (April 6, 2006) at 2.

[5] *Id.* The Board has previously found that this paragraph is consistent with all applicable statutory penalty criteria and that any deviations from applicable penalty policies are appropriate. Consent Agreements and Proposed Final Order for Animal Feeding Operations (EAB, Jan. 27, 2006) at 25-34.

1. Respondent shall comply with all the terms of the Agreement, incorporated herein by reference;

2. Nothing in the Agreement relieves Respondent from otherwise complying with the applicable requirements set forth in the CAA, CERCLA, and EPCRA.

3. Respondent is hereby assessed a civil penalty in the sum of the amount determined by Paragraph 48 of the Agreement.

4. Respondent shall, within thirty (30) days of the date that an executed copy of the Agreement is received by the Respondent, forward a certified check or money order, payable to the United States Treasurer, in the amount determined by Paragraph 48 of the Agreement to:

U.S. Environmental Protection Agency
(Washington, D.C. Hearing Clerk)
Docket No. [insert Respondent's case docket number]
P.O. Box 360277
Pittsburgh, PA 15251-6277

The check or money order shall bear the notation of the name of the Respondent and the appropriate case docket number. A transmittal letter, indicating Respondent's name, complete address, and the case docket number must accompany the payment.

Respondent shall file a copy of the check and the transmittal letter by mailing the copies to:

U.S. Mail Address
Office of Hearing Clerk
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
MC 1900L
Washington, D.C. 20460-0001

Courier/FedEx Address
U.S. EPA Office of the Hearing Clerk
1099 14th Street, NW
Suite 350, Franklin Court
Washington, D.C. 20005

5. Failure to remit the civil penalty assessed under the Agreement may subject the Respondent to civil action pursuant to section 113 of the CAA, 42 U.S.C. § 7413, section 109 of CERCLA, 42 U.S.C. § 9609, and/or section 325 of EPCRA, 42 U.S.C. § 11045, to collect any unpaid portion of the monies owed, together with the interest, handling charges, enforcement expenses, including attorney fees and nonpayment penalties set forth in Paragraphs 51 and 52 of the Agreement.

6. With respect to all requirements of the Agreement except for those related to the assessment and payment of penalties in Paragraphs 48-52, failure to comply with these other requirements will void the releases and covenants not to sue granted by the Agreement as provided for in Paragraph 37 of the Agreement.

7. Complainant is ordered to serve each of the Respondents listed in Attachment 1. Complainant shall submit to the Board a certificate of service confirming that such service has been made.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: Apr. 17, 2006

By: _____
Edward E. Reich
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Final Order 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
Tim Sullivan
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

Dated: APR 17 200

Annette Duncan
Secretary