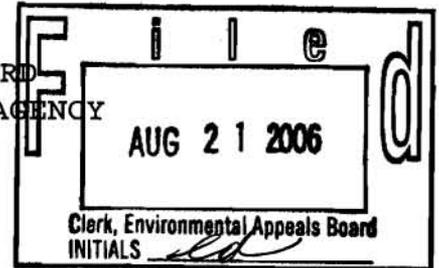


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
) Consent Agreement and
) Final Order
Consent Agreement and Proposed)
Final Order for Animal Feeding) CAA-HQ-2005-2682
Operations - Seaboard Foods LP) CERCLA-HQ-2005-2682
) EPCRA-HQ-2005-2682
)
)

FINAL ORDER

I. BACKGROUND

On August 16, 2006, the Environmental Appeals Board ("Board") received for review and ratification a Consent Agreement and Proposed Final Order ("Agreement")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 same submittal also included for Board review an Agreement with Foster Brothers Farm Inc. (Docket No. CAA-HQ-2005-2684, CERCLA-HQ-2005-2684, EPCRA-HQ-2005-2684). See Memorandum from Granta Y. Nakayama on Consent Agreements and Proposed Final Orders for Animal Feeding Operations to Environmental Appeals Board (August 15, 2006). This Order only applies to Seaboard Foods LP (formerly Seaboard Foods LLC and Seaboard Farms, Inc.) (hereinafter referred to as "Respondent"). The Board issued an order ratifying the Agreement between OECA and Foster Brothers Farm Inc. on August 17, 2006. See Consent Agreement and Proposed Final Order for Animal Feeding Operations - Foster Brothers Farm, Inc. (EAB, Aug. 17, 2006).

("Part 22").² This Agreement is 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 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).

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.

The Agreement between OECA and Seaboard Foods LP³ (the "Seaboard Foods Agreement") is one of two thousand five hundred and sixty-eight final Agreements the Board has received for review and ratification under this initiative. The first group consisted of twenty Agreements, which, after careful examination,⁴ the Board ratified by Final Order dated January 27,

³ See *supra* note 1.

⁴ 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

2006. See Consent Agreements and Proposed Final Orders 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.

After the first group of twenty Agreements, the Board has received additional groups of varying numbers of Agreements for Board ratification. On April 17, 2006, the Board ratified the

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 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.

second group of Agreements, consisting of seven hundred and two Agreements. See Consent Agreements and Proposed Final Orders for Animal Feeding Operations (EAB, Apr. 17, 2006). The third group, consisting of two hundred eighty-six Agreements, was ratified on May 5, 2006. See Consent Agreements and Proposed Final Orders for Animal Feeding Operations (EAB, May 5, 2006). The fourth group, consisting of one thousand two hundred and five Agreements, was ratified by the Board on July 19, 2006. See Consent Agreements and Proposed Final Orders for Animal Feeding Operations (EAB, July 19, 2006). The fifth group, consisting of three hundred and fifty-three Agreements, was ratified on August 7, 2006. See Consent Agreements and Proposed Final Orders for Animal Feeding Operations (EAB, Aug. 7, 2006). Finally, as previously noted, the Board issued an order ratifying the Agreement between OECA and Foster Brothers Farm Inc. on August 17, 2006. See Consent Agreement and Proposed Final Order for Animal Feeding Operations - Foster Brothers Farm, Inc. (EAB, Aug. 17, 2006). Thus the Board has ratified a total of two thousand five hundred and sixty-seven Agreements. The discussion and findings in these earlier orders apply with equal force to the Seaboard Foods LP Agreement as well.

In its transmittal memorandum, OECA represents that with the one exception discussed below, the Seaboard Foods LP Agreement

is identical to the agreements previously ratified by the Board, the model agreement published in the January 31, 2005 Federal Register notice, and the sample Agreement attached to its transmittal memorandum.⁵ The transmittal memorandum further states that each penalty assessed by the Seaboard Foods LP Agreement is in accordance with the formula established in Paragraph 48 of the model agreement.⁶

The one unique feature of this Agreement arises from the fact that, unlike other cases, EPA had previously issued an administrative order under the Resource Conservation and Recovery Act ("RCRA") and a Clean Air Act information request to the Respondent involving its facilities. OECA notes that "OECA and Seaboard have recently reached an agreement in principle on the primary elements of a settlement of these claims, including both civil penalty and injunctive relief."⁷ OECA further states that

⁵ Memorandum on Consent Agreements and Proposed Final Orders for Animal Feeding Operations from Granta Y. Nakayama to Environmental Appeals Board (August 15, 2006) at 4.

⁶ *Id.* at 4-5. 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. See Consent Agreements and Proposed Final Orders for Animal Feeding Operations (EAB, Jan. 27, 2006) at 25-34.

⁷ Memorandum on Consent Agreements and Proposed Final Orders for Animal Feeding Operations from Granta Y. Nakayama to Environmental Appeals Board (August 15, 2006) at 2.

it plans to lodge one or more Consent Decrees resolving these matters in federal district court(s) by September 15, 2006.⁸

OECA indicates that it "has been clear with the company that [it] would not seek approval of Seaboard's application unless and until the company resolved all pending enforcement matters against the company."⁹ Therefore, the Seaboard Agreement contains an amendment to the standard agreement that states that "The Agreement shall be null and void in its entirety on September 16, 2006, unless, prior to that date, the United States lodges in federal district court one or more proposed Consent Decrees that alone, or in combination, resolve alleged violations of RCRA, Clean Air Act, Clean Water Act, CERCLA, and EPCRA at Respondent's Farms." Amendment to the Consent Agreement and Final Order (establishing a new paragraph 45a).¹⁰

Upon review, the Board hereby issues the following order.

⁸ *Id.* at 3.

⁹ *Id.*

¹⁰ Attachment E to Memorandum on Consent Agreements and Proposed Final Orders for Animal Feeding Operations from Granta Y. Nakayama to Environmental Appeals Board (August 15, 2006). Attachment E also contains an amendment to paragraph 49 relative to the timing of the payment of the assessed penalty.

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 Respondent. 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:

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 pay the assessed penalty by October 15, 2006 or by 30 calendar days from the date an executed copy of this Agreement is received by Respondent, whichever is later. Respondent shall 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, N.W.
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;

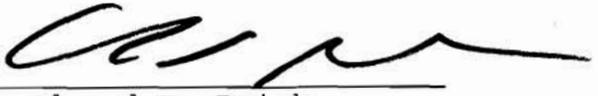
7. Consistent with Paragraph 45a of the Agreement, the Agreement shall be null and void in its entirety on September 16, 2006, unless, prior to that date, the United States lodges in federal district court one or more proposed Consent Decrees that alone, or in combination, resolve alleged violations of RCRA, Clean Air Act, Clean Water Act, CERCLA, and EPCRA at Respondent's Farms;

8. Complainant is ordered to serve Respondent with a copy of this Order. Complainant shall submit to the Board a certificate of service confirming that such service has been made.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: *August 21, 2006*

By: 
Edward E. Reich
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Final Order in the matter of Consent Agreement and Proposed Final Order for Animal Feeding Operations - Seaboard Farms LP, was sent to the following person 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

FAX: (202) 564-0010

Dated: **AUG 21 2006**


Annette Duncan
Secretary