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

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

RESPONDENTS' REPLY TO THE BRIEF OF ASSOCIATION OF IRRITATED RESIDENTS, *ET AL.*, IN OPPOSITION TO THE CONSENT AGREEMENTS AND PROPOSED FINAL ORDERS FOR ANIMAL FEEDING OPERATIONS

Pursuant to the Board's December 15, 2005 Order, Respondents Center Fresh Egg Farm, LLP, E&S Swine, Inc., Fairway Farms, Greg B. Nelson, Roe Farm, Inc., and James A. Zoltenko ("the Farms") respectfully submit this response to the brief filed in this matter by non-parties Association of Irritated Residents, *et al.* ("AIR"). AIR opposes Board approval of the twenty Consent Agreements and Proposed Final Orders for Animal Feeding Operations ("Agreements") now pending before the Board. The Board should reject AIR's arguments and ratify the Agreements.

I. CLEAN AIR ACT SECTION 114 ACTIONS ARE NOT A PRACTICAL ALTERNATIVE TO THE AGREEMENTS

AIR maintains that EPA should handle AFO air emission issues through Clean Air Act ("CAA") section 114 actions, but AIR's discussion selectively omits statutory language that controls EPA's authority under that section. Section 114 information requests must be "reasonably require[d]" to develop standards,

determine "whether any person is in violation" of a CAA standard or plan, or carry out a provision of the CAA. 42 U.S.C. § 7414(a).

The type of data that could be used to estimate emissions for farms nationwide will cost roughly $750,000 per farm (for barns), and $360,000 per lagoon under the air emissions study that would be funded pursuant to these Agreements. Even a fraction of this cost would financially overwhelm an individual farm, which would almost certainly argue that it would not be a "reasonable" exercise of section 114 authority for EPA to require it to spend hundreds of thousands of dollars each to obtain data to establish air emission estimates for hundreds (or thousands) of *other* farms. Thus an attempt by EPA to hand-select certain farms to individually fund expensive monitoring activities of the sort required by the Agreement would be vigorously challenged as not "reasonably require[d]" of the individual farm under section 114.

As explained at oral argument, CAA section 114 actions against animal feeding operations ("AFOs") are time-consuming and expensive for both the agency and the AFO. Because of the high monitoring costs, AFOs will readily contest section 114 demands from EPA. If an AFO did monitor in response to EPA's demand, it would pay for only enough data to show whether its emissions exceeded regulatory thresholds. This Section 114 process is unlikely to produce data that could be used to estimate AFO emissions elsewhere, much less nationwide.

Moreover, section 114 actions would not produce data significantly more quickly (if more quickly at all) than will the Agreements. Upon receipt of a section

114 letter from EPA, the farm would talk to a lawyer and a consultant. They would do their own investigations to produce an answer to EPA's demand. The consultant would likely be starting from scratch (in light of the limited scientific data available, as reported by the National Academy of Sciences), so there is no reason to believe that the result would be produced quickly. Moreover, EPA might not have full confidence in the consultant, who would have been selected by the farm. The expense of individual farm monitoring, likely to be hundreds of thousands of dollars, would motivate the farm to contest EPA's request and minimize the scope of any monitoring. These factors would combine to create a drawn-out, difficult, and expensive procedure for both EPA and the target farm.

The Agreements will produce more useful data at lower overall cost for all concerned. The monitoring study will produce nationally applicable data in about the same time frame as the running of one section 114 action for one farm, but without the delay of legal challenges and litigation over the scope of EPA's section 114 authority. As the U.S. District Court noted in *United States v. Chevron U.S.A., Inc.*, 380 F. Supp. 2d 1104, 1118 (N.D. Cal. 2005), in deciding whether to approve a consent decree between EPA and Chevron U.S.A. under the Clean Air Act, "because of the complexity of Clean Air Act litigation, it was reasonable for EPA to conclude that even a due date eight years after the signing of the Consent Decree may create environmental benefits earlier than litigating." AIR ignores these sorts of realities.

II. THE AGREEMENTS DO NOT VIOLATE THE CROP, BUT OFFER SUFFICIENT SPECIFICITY AND ARE CONSISTENT WITH OTHER EPA INDUSTRY-WIDE ENFORCEMENT EFFORTS

A. The Agreements Satisfy The CROP's Requirement For Specific Reference to Statutes And Regulations

AIR mischaracterizes the most basic element of the Agreements – the scope of covered federal provisions. AIR states (at 4) that the Agreements "seek to resolve liability for *every possible* federally-enforceable duty related to air emissions . . . ." (emphasis added). However, the Agreements clearly and carefully provide (at paragraphs 26 and 27) which federally-enforceable air emission requirements are covered by the Agreements *and which are not.* In addition, paragraph 43 specifically preserves EPA's ability to take action against a farm's air emissions to protect against imminent and substantial endangerment to public health, welfare or the environment. The release provided by the Agreements is much narrower than AIR has represented.

AIR claims that the references in the Agreements to federally-enforceable State Implementation Plan ("SIP") requirements are inadequate, and that EPA should have provided a detailed regulation-by-regulation list of all CAA requirements incorporated into the Agreements. To understand the practical effect of AIR's suggestion, we invite the Board to peruse Part 52 ("Approval and Promulgation of Implementation Plans") of 40 C.F.R., which fills two volumes and roughly 1,300 pages. (Forcing someone to read these volumes and add the relevant

provisions to the text of the Agreements would violate the third clause of the Eighth Amendment to the U.S. Constitution.)

Even under less onerous conditions, settling parties typically do not depend on their ability to list each and every statutory section and regulatory provision that is released. Instead, they do what the parties did here: they define the scope of applicable statutes and regulations that are covered. AIR's contrary approach – which no prudent litigant would take – should not be a condition of Board approval.

In the Agreements, the obligations and relief match – just as they do in most settlements. OECA's carefully pled statements of alleged liability are matched by the scope of the relief offered to the Farms. Specifically, the release and covenant not to sue match both the scope of the monitoring study and of the compliance obligations that are conditions to the release and covenant. This structure is typical of an administrative (or any civil) settlement: it provides the parties with appropriate notice of the applicable statutory and regulatory requirements that are alleged, released, and must be complied with to retain the release. The CROP requires no more, and neither does the Clean Air Act. In *Chevron*, the U.S. District Court approved a consent decree that resolved a *broader* scope of liability than was pled in the complaint. *Chevron, supra*, 380 F. Supp. At 1110.

B. The Agreements Satisfy The CROP's Requirement For A Statement Of Factual Basis

In claiming that the Agreements violate the CROP's requirements for factual specificity, AIR does not mention Attachment A. As explained in our earlier brief and at oral argument, Attachment A specifies the farms' facilities covered by the

Agreements and the number of animals. The Agreements, including Attachment A, precisely identify the air emissions that are covered. For E&S Swine, for example, EPA alleges that based on the size of its lagoon and its number of animals, the farm *may* be emitting sufficient quantities of volatile organic compounds, hydrogen sulfide, ammonia, and/or particulate matter to trigger potential liabilities under the CAA, CERCLA, and/or EPCRA. E&S Swine sought to resolve that potential liability through a settlement with EPA and therefore submitted a signed Agreement. There is ample factual specificity in E&S Swine's Attachment A and Agreement to satisfy the CROP's requirements for the factual basis for settlements.

C. The Agreements Are Analogous To The Recent *Chevron* Settlement

By comparison, the civil settlement recently approved in *United States v. Chevron U.S.A., Inc.*, 380 F. Supp. 2d 1104 (N.D. Cal. 2005), illustrates several analogous principles that support ratification of the Agreements and rebut AIR's contentions.

First, the *Chevron* settlement was one of many in an industry-wide enforcement strategy in which EPA rejected traditional enforcement options due to the high risks and costs, just as EPA did here:

> Beginning in 1996, EPA identified the need to address widespread environmental law noncompliance problems in the petroleum refining industry through a nationwide strategy. In developing the strategy, EPA states that the traditional method of enforcing environmental laws – through investigation, identification of violations, further investigation, and finally litigation and/or settlement – was viewed as costly and time-consuming. Therefore, alternative strategies were pursued.

Id. at 1106.

Second, EPA developed a "template" for the settlements through actual negotiations (like the draft Agreement published in the Federal Register). EPA explained that the template struck "the appropriate balance between remedying the perceived scope of non-compliance in the industry and applying settlement criteria that are economically and technologically feasible for the [industry]." *Id.* at 1107.

Third, in the *Chevron* settlement – unlike the Agreements – the liability releases were *broader* than the allegations. *Id.* at 1110. The court held that even such a broad grant of relief was not inappropriate. *Id.*

And finally, it was apparent in the *Chevron* settlement that "a considerable amount of time and resources was invested by both sides in order to come to a settlement that satisfactorily met each party's objectives. These efforts are consistent with an *adversarial and non-collusive process.*" *Id.* at 1112 (emphasis added). The text of the Agreements also reveals the give-and-take of an adversarial negotiation process that, as explained in our initial brief, was stimulated by enforcement proceedings that demonstrated the potential benefits of settlement to both sides.

III. EPA PROPERLY DETERMINED THAT ECONOMIC BENEFIT WAS IMPOSSIBLE TO CALCULATE

In its objections to EPA's civil penalty determination, AIR claims that EPA could have calculated the economic benefit of the Agreements by looking to cost information from EPA's AgStar Program on anaerobic digestion systems. As described in the attached Declaration of John Thorne ("Thorne Decl.") (Tab A), cost

information on anaerobic digestion systems does not provide a reliable measure of economic benefit. Thorne Decl. ¶ 4. Not only does anaerobic digestion pose serious technological challenges and is not widely used in animal agriculture, but it is unknown whether anaerobic digestion is an effective control technology for air emissions at AFOs. Thorne Decl. ¶¶ 4-6. It is not reasonable to expect EPA to calculate economic benefit based on costs of an unproven technology in air emission reduction.

AIR also maintains that EPA should have considered the $2,500 per farm contribution to the air study as "monitoring costs" to determine the economic benefit to an individual AFO. In fact, the monitoring costs at individual farms bear no relationship to this $2,500 contribution. Thorne Decl. ¶ 7. It would not have been reasonable to require EPA to consider those individual contributions as evidence of economic benefit.

IV. AIR'S REQUEST FOR DECLARATORY RELIEF SHOULD BE DENIED

In somewhat throw-away fashion at the end of its brief, without providing any supporting authority, AIR asks the Board (at 18), as it did at oral argument, "to declare that the Agreements shall not affect the ability of citizens or states to enforce federally-enforceable requirements applicable to Respondents." The Board should reject AIR's request.

Such a statement would venture beyond both the intent of the parties and the Board's authority, which does not include modifying the meaning of a bargain through the Board's independent interpretation of its effect on third parties. The

CROP at 40 C.F.R. § 22.4 provides that the Board is empowered to "approve[ ] settlements of proceedings under [the CROP]." This authority is reflected in EPA's preamble to the Agreements at 70 Fed. Reg. 4962 (Agreements to be forwarded to the Board "for final approval"), as well as the text of the Agreements at paragraph 68 (the Agreements are "not binding and without legal effect unless and until approved" by the Board). Thus, the Board is empowered to approve or reject the Agreements – not change them.

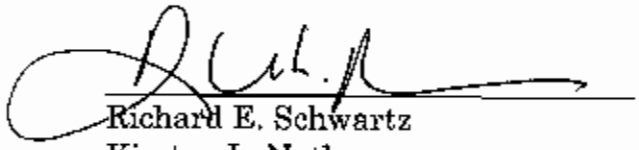
In fact, AIR is seeking to have the Board modify the terms of the settlement after the Farms have given their consent to the negotiated terms. Any statement by the Board intended to affect the meaning of the Agreements would vitiate the Farms' consent and might trigger widespread withdrawals by these and other Respondents.

In short, the issue of the effect of the Agreements on third party actions is outside the scope of the Board's review and should be left to the state and federal courts that will hear any future state or citizen enforcement actions regarding claims settled in the Agreements.

CONCLUSION

The Farms respectfully request that the Board dismiss AIR's objections and ratify the Agreements as submitted.

Respectfully submitted,



Richard E. Schwartz
Kirsten L. Nathanson
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500

Counsel for Respondents Center Fresh Egg Farm, LLP, E&S Swine, Inc., Fairway Farms, Greg B. Nelson, Roe Farm, Inc., and James A. Zoltenko

January 6, 2006

CERTIFICATE OF SERVICE

I hereby certify that on this, the 6th of January, 2006, a copy of the foregoing Respondents' Reply To The Brief Of Association Of Irritated Residents, *et al.*, In Opposition To The Consent Agreements And Proposed Final Orders For Animal Feeding Operations was sent by first class mail, postage prepaid, on the following:

Robert A. Kaplan
Bruce Fergusson
Special Litigation & Projects Division
Office of Civil Enforcement (2248-A)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Lee Poeppe
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 Road
Ft. Recovery, Ohio 45846

Steven C. Badgett
Badgett Enterprises LTD
743 Mercer Darke County Line Road
Ft. Recovery, Ohio 45846

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

Terry Finnerty
10347 W. SR 26
Dunkirk, IN 47336

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

Kenneth Carroll
C & C Farms
4201 Hayes Mill Road
Godwin, NC 28344

Williamson Swine Farms
1325 Lisbon Street
Clinton, NC 28328

Kober Farms LLC
8990 Peach Ridge
Sparta, MI 49345

Kirsten L. Nathanson

DCIWDMS: 2690329_1

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DECLARATION OF DR. JOHN THORNE

I, John Thorne, declare as follows:

1. I am over the age of 18 and have personal knowledge of the information contained herein.

2. I currently serve as Executive Director of the Agricultural Air Research Council ("AARC"), the "nonprofit entity" referred to in paragraph 54(a) of the Animal Feeding Operation Consent Agreements and Proposed Final Orders ("Agreements"). I have M.S. and Ph.D. degrees from Purdue University's Agronomy Department in crop growth and related physiological and biochemical processes.

3. I have reviewed the brief filed with the Board by the Association of Irritated Residents, *et al.* ("AIR"), in which AIR claims (at 13 and n.10) that EPA should have considered the cost information from EPA's Agstar program on anaerobic digestion systems in calculating the economic benefit of the Agreements in determining the civil penalty amounts.

4. Contrary to AIR's assertion, this information does not provide a reliable measure of economic benefit. Whether anaerobic digestion effectively controls air emissions is unknown. We do know that it poses technological challenges, and is not widely used in animal agriculture.
5. Anaerobic digestion is a waste treatment process that occurs below a man-made cover that converts animal waste solids principally into methane. Anaerobic digesters are generally newly-constructed facilities placed in-line between the animal production barns and the waste storage lagoons, which then contain large volumes of effluent and precipitation for months. Despite the presence of an up-stream anaerobic digester, the down-stream waste storage lagoon generates continuous emissions of ammonia, hydrogen sulfide and volatile organic compounds. The precise amount of these lagoon emissions following anaerobic digestion is not known at the present time, (although relevant data may be generated during the Agreements' upcoming air monitoring study). As a result, it is not known currently (and it was not known when EPA performed its civil penalty analysis) whether anaerobic digestion is an effective technology control for air emissions.
6. The size and cost of the digester is tied to the number of animals present and the volume of waste to be treated, and the man-made cover must be properly engineered, installed, and maintained to withstand wind sheer, rain and snow, and internal biogas pressure. Failures are known to occur due to these stresses. The methane poses an explosion hazard. Fencing to keep people and animals

away is mandatory. These and other obstacles hamper the ability to use anaerobic digestion on a wide scale in animal agriculture.

7. AIR also maintains that EPA should have considered the $2,500 per farm contribution to the air study as "monitoring costs" to determine and recover economic benefit in the civil penalty. In fact, the monitoring costs at individual farms bear no relationship to this $2,500 contribution. For example, monitoring a poultry operation with two side-by-side barns for all pollutants for two years will cost $793,000.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 5, 2006.

John Thorne

John Thorne

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