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December 19, 2005

Via Federal Express

Eurika Durr, Clerk
U.S. Environmental Protection Agency
Environmental Appeals Board
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Re: Consent Agreements and Proposed Final Orders for Animal Feeding Operations Order Numbers: CAA -HQ-2005-xx; CERCLA-HQ-2005-xx; EPCRA-HQ-2005-xx

Dear Ms. Durr:

Enclosed are an original and five copies of the Brief of Association of Irritated Residents, et al. in Opposition to the Consent Agreements and Proposed Final Orders for Animal Feeding Operations. Please endorse the enclosed copy and return in the postage paid envelope. Please contact me with any questions. Thank you for your time and courtesy.

Sincerely,

Brent Newell

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

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

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

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INTRODUCTION

The Consent Agreements and Proposed Final Orders ("Agreements" or "Air Compliance Agreement") violate the statutory and regulatory requirements that govern EPA's enforcement authority. The Agreements disregard specific provisions of the Consolidated Rules of Practice, the Clean Air Act, and applicable civil penalty policies. In total, these deficiencies expose the Agreements as a rulemaking disguised as enforcement.

The Office of Air Quality Planning and Standards and the Office of Enforcement and Compliance Assurance (collectively "OAQPS")[1] seek to insulate the Agreements from Environmental Appeals Board review by arguing that the Board lacks jurisdiction to review anything but the penalty component of the Agreements. If accepted, OAQPS's policy-making-by-enforcement approach would usher in a new era of unchecked agency action, and prevent the Board from exercising its now-existing authority under the Consolidated Rules of Practice.

The Association of Irritated Residents, Clean Water Action Alliance of Minnesota, Community Association for Restoration of the Environment, Environmental Integrity Project, Iowa Citizens for Community Improvement, and Sierra Club (collectively "AIR") respectfully request that the Board decline to ratify the Agreements.

BACKGROUND

EPA has existing authority under the Clean Air Act to require any person who owns or operates an emissions source to (1) install and maintain monitoring equipment; (2) sample emissions; (3) submit compliance certifications; and (4) provide any other information the agency may reasonably require. 42 U.S.C. § 7414(a)(1)(C)-(G). Here, OAQPS ignores this authority and instead seeks to use the Agreements to obtain the same information that OAQPS

can require under 42 U.S.C. § 7414(a)(1), and yet gives any participating operation immunity from prosecution in exchange for cooperation in monitoring and identifying violations, and payment of a small fine. See 70 Fed. Reg. 4958, 4958-4960 (Jan. 31, 2005).

Confined livestock operations, or animal feeding operations (AFOs) as they are technically known, emit several air pollutants regulated by the Clean Air Act, 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, 4959 (Jan. 31, 2005). Ammonia and hydrogen sulfide emissions trigger an obligation to report toxic releases under section 103 of CERCLA, 42 U.S.C. § 9603, and section 304 of EPCRA, 42 U.S.C. § 11004. Emissions of volatile organic compounds, particulate matter, hydrogen sulfide, and nitrogen oxides trigger permitting requirements under the Clean Air Act. See 42 U.S.C. § 7475 (permit requirements for attainment areas), § 7502(c)(5) (new source review permits required), § 7511a (new source review permit thresholds for ozone nonattainment areas), § 7513a (new source review permit thresholds for particulate matter nonattainment areas), § 7661a (Title V permit programs).[2]

Several citizen suits have been brought to enforce these requirements. See, e.g., Sierra Club v. Seabord Farms, Inc., 387 F.3d 1167 (10th Cir. 2004) (CERCLA and EPCRA citizen suit); Sierra Club v. Tyson Foods, Inc., 299 F. Supp. 2d 693 (W.D. Ky. 2003) (CERCLA and

[1] Office of Air Quality Planning and Standards and the Office of Enforcement and Compliance Assurance jointly created this policy. See 70 Fed. Reg. 4958, 4962 (Jan. 31, 2005); 70 Fed. Reg. 40016, 40022 (July 22, 2005)

[2] The Clean Air Act designates areas that meet the federal health based standards, including ozone (smog) and particulate matter, as "attainment areas," while the statute designates those that do not as "nonattainment areas."

EPCRA citizen suit); Association of Irritated Residents v. Fred Schakel Dairy, *et al.*, Civ. No. 05-00707 (E.D. Cal.) (Clean Air Act new source review citizen suit).

Prior to OAQPS's publication of the Air Compliance Agreement in the Federal Register, AIR learned that OAQPS had been negotiating with AFO industry representatives since 2002 to shield animal feeding operations from liability under the Clean Air Act, CERCLA, and EPCRA. Contrary to OAQPS's claims,[3] relevant stakeholders, such as the concerned public and residents living near polluting livestock facilities, were not allowed to participate in the development of the Air Compliance Agreement. Interested members of the public were forced to file a lawsuit under the Freedom of Information Act to compel OAQPS to disclose the documents stemming from meetings between OAQPS and the AFO industry, including an early draft of the Agreement.[4]

On January 31, 2005, EPA published a notice of consent agreement and final order in the Federal Register, requested public comment, and established a 90-day period for AFOs to sign up for the Air Compliance Agreement. 70 Fed. Reg. 4958 (Jan. 31, 2005). EPA published three subsequent Federal Register notices on March 30, 2005, July 12, 2005, and August 3, 2005, extending the sign-up and public comment period, responding to comments, and again extending the sign-up period, respectively. See 70 Fed. Reg. 16266 (March 30, 2005); 70 Fed. Reg. 40016 (July 12, 2005); 70 Fed. Reg. 44631 (August 3, 2005).

[3] OAQPS notes in the Federal Register notice that it "worked with numerous stakeholders for 3 years to develop the Agreement." 70 Fed. Reg. 40016, 40017 (July 12, 2005).

[4] See Andrew Martin, Livestock Industry Finds Friends in EPA, Chicago Tribune, May 16, 2004, attached as Exhibit 1 (noting that "[i]nternal EPA documents show that the proposed program to monitor air pollution at livestock farms—a contentious topic in rural America—was largely conceived and heavily influenced by lobbyists for the livestock industry").

The notice and comment process was largely a futile exercise since OAQPS had foreclosed any opportunities to modify the Air Compliance Agreement in response to comments by allowing AFOs to sign up for the agreement during the comment period. See 70 Fed. Reg. 4958 (explaining that "[t]he sign-up period for eligible AFOs to sign the Agreement will run for 90 days from the date of this notice"). The sign-up period has now closed, and AFO industry estimates indicate that "[m]ore than 13,000 farms are involved."[5]

AIR has filed petitions for review in the D.C. Circuit Court of Appeals under the Clean Air Act, the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), and the Administrative Procedure Act to challenge the Agreement. See Association of Irritated Residents, et al. v. EPA, No. 05-117 (D.C. Circuit) (filed May 27, 2005); Association of Irritated Residents, et al. v. EPA, No. 05-1337 (D.C. Circuit) (filed August 22, 2005); Clean Water Action Alliance of Minnesota v. EPA, No. 05-1336 (D.C. Circuit) (filed August 22, 2005).

On November 9, 2005, OAQPS forwarded the first twenty executed agreements to the Board for approval. The Board ordered supplemental briefing, granted AIR the opportunity to file this non-party brief, and held a hearing on December 13, 2005.

ARGUMENT

OAQPS and Animal Feeding Operation industry representatives crafted the Air Compliance Agreement as a policy tool intending to give OAQPS air emission monitoring data and the industry safe harbor. OAQPS chose to use the Air Compliance Agreement, not its existing Clean Air Act section 114 authority, to "bring the entire AFO industry into compliance

[5] Air Consent Agreement & Emissions Monitoring Study, Power Point Presentation delivered by John Thorne, Executive Director of the Agricultural Air Research Council, attached as Exhibit 2.

with the CAA, section 103 of CERCLA, and section 304 of EPCRA." 70 Fed. Reg. 4958, 4961 (Jan. 31, 2005).

OAQPS crafted the Air Compliance Agreement in a manner that violates specific requirements of the Consolidated Rules of Practice, the Clean Air Act, and the standards for establishing civil penalties. These deficiencies include resolving liability without alleging air pollutant emissions in excess of applicable thresholds, delaying compliance beyond the one-year limit, and failing to apply penalty policies. OAQPS's brief and argument at the December 13, 2005 hearing did not resolve these fundamental deficiencies.

Apparently recognizing the Agreements' vulnerability, OAQPS also argues that the Board lacks jurisdiction to review anything but the civil penalty component of the agreement. This argument has no merit, as the Board has clear jurisdiction to ratify the entire agreement under the Consolidated Rules of Practice. 40 C.F.R. §§ 22.18(b)(2), (3). To accept OAQPS's argument would effectively render the Board a bystander, and lead to more instances of law-making by enforcement.

I. THE AGREEMENTS VIOLATE THE CONSOLIDATED RULES OF PRACTICE

The Agreements lack specific allegations and concise factual statements supporting the allegations. The Agreements seek to resolve liability for every possible federally-enforceable duty related to air emissions without a single factual allegation that emissions levels at the twenty Respondent AFOs exceed applicable thresholds. That factual cornerstone will not exist until several years after the Board issues these orders.

Section 22.18(b)(2) of Title 40 of the Code of Federal Regulations requires that, when EPA proceeds with a consent agreement pursuant to section 22.13(b), "the consent agreement shall also contain the elements described at § 22.14(a)(1)-(3) and (8)." 40 C.F.R. § 22.18(b)(2).

Under section 22.14(a), a consent agreement and final order must contain, *inter alia*, a "specific reference" to each provision of law which EPA alleges an operation violated and a "concise statement of the factual basis for each violation alleged." See 40 C.F.R. § 22.14(a)(2)-(3). In other words, the regulations require OAQPS to plead specific violations supported by facts. Instead, OAQPS has only pled general violations of State Implementation Plan requirements and does not allege any emissions sufficient to trigger liability.

A. The Agreements Fail to Allege Specific State Implementation Plan Requirements that AFOs Violate.

The Agreements, however, fail to make specific allegations based upon violations of particular statutory sections. The Agreements allege violations of the Clean Air Act permit programs, emissions reporting requirements in CERCLA and EPCRA, and "any other federally enforceable State Implementation Plan requirements for major or minor sources based on quantity rates, or concentrations of air emissions." Air Compliance Agreement ¶ 26(A), 70 Fed. Reg. 4963. The general reference to the fifty-five State Implementation Plans approved by EPA fails to satisfy the requirement that the Agreements include "specific reference" to each applicable provision of law. See 40 C.F.R. § 22.14(a)(2). Thousands of EPA actions that approve various rules, plans, and plan amendments collectively comprise the fifty-five State Implementation Plans incorporated by reference in the Part 52 of the Code of Federal Regulations. See 40 C.F.R. part 52, Subparts B – FFF. Alleging violations of "any other requirements" found in these plans lacks the specificity mandated by the Consolidated Rules of Practice and fails to provide a clear public record of the enforcement proceeding. 40 C.F.R. § 22.14(a)(2); 63 Fed. Reg. 9464, 9471 (Feb. 25, 1998).

B. The Agreements Fail to Allege Emissions to Establish Liability.

Instead of alleging particularized facts that establish violations of specific requirements, the Agreement purports to resolve "civil liability for certain potential violations . . . identified and quantified by applying the Emissions-Estimating Methodologies developed using data from the national air emissions monitoring study." Air Compliance Agreement, ¶ 4 (70 Fed. Reg. 4958, 4962) (emphasis added). OAQPS acknowledges that it lacks a factual basis to support individual violations, noting that "[t]he monitoring study will lead to the development of methodologies for estimating emissions from AFOs and will help AFOs to determine and comply with their regulatory responsibilities 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)." 70 Fed. Reg. 4958.

The Air Compliance Agreement does not allege that emissions at a participating facility exceed various thresholds that trigger permit obligations or reporting requirements.[6] Indeed, only after OAQPS develops emission estimating methodologies will a participating facility be required to submit required permit applications and emissions reports or self-certify the inapplicability of the Clean Air Act, CERCLA, or EPCRA. Air Compliance Agreement, ¶ 28(C) (70 Fed. Reg. 4964). If all goes as OAQPS plans, more than three years will pass between

[6] For example, a source must get a permit required by Part C of Title I when the potential to emit exceeds 250 tons per year of any pollutant. 42 U.S.C. § 7479(a). Permits required by Part D of Title I have various thresholds based on the pollutant and the severity of the air pollution problem in the area. See 42 U.S.C. § 7511a(c) (threshold of 50 tons per year in a serious ozone nonattainment area); § 7511a(d) (threshold of 25 tons per year in a severe ozone nonattainment area); § 7511a(e) (threshold of 10 tons per year in a extreme ozone nonattainment area); § 7513a(b)(3) (threshold of 70 tons per year in a serious PM10 nonattainment area). Since OAQPS does not specifically allege State Implementation Plan requirements, emissions thresholds for those generally pled allegations are not known.

execution of the Agreement and facts showing that the law has been violated. See 70 Fed. Reg. 4959, 4964.

C. OAQPS Fails to Justify the Use of Potential Violations.

OAQPS contradicts itself by arguing the need for the Agreement and the sufficiency of allegations. On one hand, OAQPS claims that the "allegations support civil liability presently, and do not depend on the results of the national emissions monitoring study, in that each Respondent currently owns or operates a source or facility that emits regulated pollutants in amounts that may exceed the regulatory thresholds[.]" OAQPS Supplemental Brief at 14 (emphasis added). On the other hand, OAQPS crafted the Agreement as "the most effective means for EPA to respond to the crucial data needs identified by the [National Academy of Sciences], and to determine the compliance status of thousands of AFOs." Id. at 3. The Consolidated Rules of Practice do not allow OAQPS to proceed with an enforcement action based on potential violations; absent from the language of sections 22.14(a)(2) and (a)(3) is the term "potential" when referring to "violation."

Without any support form the Consolidated Rules of Practice, OAQPS cites two Board decisions for the proposition that "potential" violations may properly be pled in a Consent Agreement. See In the Matter of Advance Auto Parts, Inc., Advance Stores Company, Western Auto Supply Company, Discount Auto Parts, Inc., Docket No. HQ-2004-6001 (EAB, Aug. 5, 2004), 2004 EPA App. LEXIS 46; In the Matter of ADT Security Services, Inc., Docket No. CWA-HQ-2002-6000, EPCRA-HQ-2002-6000 (EAB, Oct. 18, 2002). These cases both approve consent agreements EPA issued for violations disclosed pursuant to the "Audit Policy" and do not support EPA's attempt to create a "potential" violation doctrine here.

EPA crafted the Audit Policy to encourage the self-disclosure and correction of environmental violations in exchange for reduced penalties. See generally 60 Fed. Reg. 66706 (Dec. 22, 1995). The Audit Policy waives gravity-based penalties for violations as a result of voluntary audits and reduces penalties that are voluntarily disclosed when not found through an audit. In order to come within the policy, the regulated entity must (1) discover violations through an environmental audit or due diligence; (2) voluntarily disclose violations; (3) disclose violations within 10 days of discovery, or less if required by law; (4) discover violations independent of government or third party; (5) expeditiously correct and remedy harm caused by the violation; (6) agree to prevent recurrence; (7) not have previously violated the requirement at issue; (8) demonstrate that conduct does not result in serious actual harm or present an imminent and substantial endangerment to public health or the environment; and (9) cooperate with EPA. See 60 Fed. Reg. 66706, 66711-66712 (Dec. 22, 1994).

In Advance Auto Parts, the Board resolved liability for violations that the respondents identified and corrected before the Board issued the order. Advance Auto Parts at 5. Here, the AFOs do not identify the emissions of pollutants that would trigger liability under the Clean Air Act, CERCLA, EPCRA, or applicable State Implementation Plan requirements in their respective states.[7] Nor will the AFOs correct violations before the Board issues this order; the AFOs will correct violations, if any, years in the future. Thus, Advance Auto Parts does not support EPA's authority to resolve "potential" violations alleged in these Agreements.

In addition, EPA's public notices of the Advance Auto Parts and ADT Security Services consent agreements describe only actual violations. A close review of each Federal Register

notice reveals that EPA provided public notice of numerous violations, not potential violations, disclosed under the Audit Policy. 69 Fed. Reg. 22797 (Apr. 27, 2004); 67 Fed. Reg. 76754 (Dec. 13, 2002).

The Agreements do not comport with other components of the Audit Policy, including a demonstration that the violations do not result in an imminent and substantial endangerment to public health, rendering Advance Auto Parts and ADT Security Services inapposite to the Agreements at issue here.

OAQPS also argues that the purpose of the allegations required for a consent agreement and final order is to create a "clear public record" and that OAQPS has done so here. OAQPS Supplemental Brief at 17. To the contrary, OAQPS has thwarted the goal of providing public disclosure: the agency has brokered a deal that resolves violations without allegations of emissions levels, concentrations, or rates to establish liability. The Agreements do not comport with the goals of the Consolidated Rules of Practice because there is no public record of the factual basis underlying alleged violations of emissions-based requirements.

The Agreements lack the specific legal allegations supported by site-specific facts necessary for an enforcement action under the Consolidated Rules of Practice, and instead seek to resolve a prospectively broad policy question by "bring[ing] the entire AFO industry into compliance with the CAA, section 103 of CERCLA, and section 304 of EPCRA." 70 Fed. Reg. 4961.

[7] Specific applicable SIPs include California, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, New York, North Carolina, and Ohio. See 40 C.F.R. part 52, Subparts F,

II. THE AGREEMENTS VIOLATE THE CLEAN AIR ACT

Whether the Board views the Agreements as Administrative Penalty Orders or Administrative Compliance Orders, the Agreements violate the Clean Air Act by exceeding the 12-month penalty period in section 113(d)(1) and the one-year compliance deadline in section 113(a)(4), 42 U.S.C. §§ 7413(a)(4) and (d)(1).

The Agreements violate the civil penalty limits of section 113(d)(1) of the Clean Air Act. Unless EPA obtains consent from the Attorney General, it may not issue civil penalties for a period greater than 12 months.

> The Administrator's authority under this paragraph shall be limited to matters where the total penalty sought does not exceed $200,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action.

42 U.S.C. § 7413(d)(1). Here, the Agreements fail to allege the dates on which the Respondent AFOs began the so-called potential violations or establish the period for which civil penalties have been assessed. Based on an unspecified and unknown duration of past violations, followed by a two-year monitoring period and OAQPS's eighteen month development of the Emission-Estimating Methodologies, the Agreements apparently assess civil penalties for several years' worth of past and future violations. Despite this, there has been no determination by the Attorney General that the penalties should be assessed for more than 12 months.

The Agreements also violate the compliance deadline in section 113(a)(4) of the Clean Air Act. An Administrative Compliance Order must require "the person to whom it [is] issued to comply with the requirement as expeditiously as practicable, but in no event longer than one year

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P, Q, R, S, X, Y, CC, HH, II, and KK.

after the date the order [is] issued." 42 U.S.C. § 7413(a)(4). Provided the subsequent application of the Emissions-Estimating Methodologies reveals violations, then Respondent AFOs must report emissions under CERCLA and EPCRA, apply for permits, and/or install pollution control technology. Air Compliance Agreement ¶ 28. Under this scheme, three to four years will pass between the issuance of these proposed orders and the determination of emissions levels. Because compliance will not occur within one year of any order, the Agreements violate section 113(a)(4).

III. THE AGREEMENTS VIOLATE STATUTORY PENALTY REQUIREMENTS AND DO NOT COMPORT WITH EPA'S PENALTY POLICIES

Penalties under the Agreements – which range from $200 to $1,000 depending on the size of the AFO – violate the Clean Air Act, CERCLA, and EPCRA penalty provisions as well as applicable administrative penalty policies.[8] The Clean Air Act requires consideration of "the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation ..., payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation" in assessing penalties. 42 U.S.C. § 7413(e)(1). Similarly, CERCLA and EPCRA require that the penalty amount take into account "the nature, circumstances, extent and gravity of the violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." 42 U.S.C. § 9609(a)(3) (CERCLA); 42 U.S.C. § 11045(b)(1)(C) (EPCRA).

[8] See Air Compliance Agreement, ¶48 (imposing penalties from $200 to $1000 according to the size of the AFO, and capping penalties at $10,000 to $100,000 according to the number of AFOs per respondent).

EPA developed penalty policies to implement these statutory criteria and ensure consistent assessments of penalties. The Clean Air Act Stationary Source Civil Penalty Policy ("Clean Air Act Penalty Policy") and the Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right to Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA/EPCRA Penalty Policy") set forth the procedures for assessing penalties under these statutes. Both penalty policies provide methods for calculating a base penalty, and then allow for certain modifications (additions and/or deductions) to be made to the base penalty according to specified factors. For example, under the Clean Air Act penalty policy, the penalty amount is determined by combining the economic benefit of the noncompliance with the seriousness of the violation and adjusting the combined amount based upon identified factors. See Clean Air Act Penalty Policy, Sect. I.

A. The Penalties Fail to Recoup Economic Benefit.

In assessing penalties under the Agreements, OAQPS essentially ignored the statutory penalty assessment criteria and EPA's penalty policies. Most glaringly, the Air Compliance Agreement fails to recoup any of the economic benefit associated with noncompliance. Recovery of economic benefit is central to the penalty determination, and the Clean Air Act and CERCLA/EPCRA penalty policies demand that the penalty assessed at least equal the economic benefit gained through noncompliance. See Clean Air Act Penalty Policy, Sect. II (noting that "any penalty should, at a minimum, remove any significant economic benefit resulting from noncompliance"); CERCLA/EPCRA Penalty Policy (explaining that "[w]henever there is an economic incentive to violate the law, it encourages noncompliance and thus weakens EPA's

ability to implement the Acts and protect human health and the environment. The violator should not benefit from its violative acts").

Instead of structuring the Air Compliance Agreement penalties to recoup the economic benefit, OAQPS arbitrarily assumed an economic benefit of zero. See OAQPS Supplemental Brief at 4 (stating that "[b]ecause control technologies are currently in development, the delayed or avoided costs of the alleged violations are not possible to calculate"). Thus, OAQPS violated the penalty policies and ignored readily available information on the cost of compliance. For example, the CERCLA/EPCRA penalty policy provides a total cost of compliance for CERCLA and EPCRA reporting of $703 for each violation of the statutory reporting requirements. See CERCLA/EPCRA Penalty Policy at 29, Table III. OAQPS should have at least recovered a minimum of $1,406 from each participating AFO to reflect this cost savings associated with the violations of the CERCLA and EPCRA reporting requirements.

In addition, the Air Compliance Agreement fails to recovery economic benefit associated with delayed monitoring costs and failure to install appropriate pollution controls. The Clean Air Act Penalty Policy recognizes that delaying monitoring and installation of pollution controls generates an economic benefit, and requires that the penalty imposed reflect these savings. See Clean Air Act Penalty Policy, Sect. II.A (noting the economic benefit associated with delayed monitoring and failure to install pollution controls). Inexcusably, OECA ignored readily available information approximating these costs, such as the cost of the proposed monitoring program[9] as well as EPA's AgStar program[10], and blithely assumed the economic benefit to be

[9] See Air Compliance Agreement, ¶ 53(a) (requiring payment of $2,500 per farm or the respondents pro rata share).
[10] See EPA's AgStar Program, http://www.epa.gov/agstar (providing cost information on anaerobic digestion systems for AFOs).

zero. OAQPS's assumption is untenable, especially in light of the penalty policies' requirement that "the economic benefit of noncompliance ... should be calculated under this penalty policy using the most aggressive assumptions supportable."[11] Clean Air Act Penalty Policy, Sect. I.

B. The Penalties are Inconsistent with EPA's Penalty Policies.

Moreover, even a superficial application of the penalty policies reveals the gross inadequacy of the penalties imposed by the Air Compliance Agreement. The Clean Air Act Penalty Policy provides for a minimum penalty of $15,000 for failure to obtain an operating permit, install and operate control equipment, or install required monitoring equipment. See Clean Air Act Penalty Policy, Sect. II.B.2. In addition, the CERCLA/EPCRA Penalty Policy requires a minimum penalty of $6,251 for failure to report releases under CERCLA § 103 and EPCRA § 304. See CERCLA/EPCRA Penalty Policy at 19, Table I. Therefore, the combined minimum penalty for each day of violation is $21,251, almost forty-three times the average total $500 penalty assessed for the unknown number of years of past and future violations covered by the Agreements.[12]

EPA does have the authority to adjust the penalties based upon various factors, including ability to pay and litigation risk, but it is required to document its rationale for the deviation from the penalty policy. See Clean Air Act Penalty Policy, Sect. III.-IV., CERCLA/EPCRA Penalty Policy at 24. OAQPS argues here, without any prior documentation, that the penalties imposed are appropriate given the ability of AFOs to pay, litigation risks, and other factors as justice may

[11] OECA appears not to have taken even the first step in determining economic benefit, applying "BEN," an EPA computer model designed to determine economic benefit.

[12] This minimum penalty does not even take into account the economic benefit of noncompliance as well as the other relevant criteria such as the level of violation, toxicity of the pollutant, sensitivity of the environment, length of time of violation, or size of the violator. See Clean Air Act Penalty Policy, Sect. II.B.

require. See OAQPS Supplemental Brief at 19-24. OAQPS's *post hoc* rationalizations, however, do not justify its extreme deviation from the statutory penalty provisions and applicable penalty policies.[13]

The Clean Air Act and CERCLA/EPCRA penalty policies require fact-specific, case-by-case, written justifications for any deviations from the penalty policies. See Clean Air Act Penalty Policy, Sect.II.B.4 (stating that "[t]he litigation team is required to base any adjustment of the gravity component on the factors mentioned and to carefully document the reasons justifying its application in the particular case"); CERCLA/EPCRA Penalty Policy at 3, n. 2 (noting that "[a]ny deviation from this Policy should be documented in the case file"). OAQPS made no such effort to provide the necessary justifications, and in fact, foreclosed such findings by establishing a penalty structure before any individual AFOs had signed up for the deal. For example, the CERCLA/EPCRA penalty policies requires the respondent to demonstrate its inability to pay by providing supporting information, including tax returns, financial audits, loan applications, and annual or quarterly reports. See CERCLA/EPCRA Penalty Policy at 24-25; see also Clean Air Act Penalty Policy, Sect. IV (noting that "[i]f the violator fails to provide sufficient information [supporting its inability to pay], then the litigation team should disregard this factor in adjusting the penalty" and instructing to "[c]onsider straight penalty reductions as a last recourse"). But since OAQPS had established the penalty schedule before any individual

[13] AIR notes that OAQPS seems to misunderstand the compliance history aspects of the penalty policies when it argues that lack of prior violations supports a penalty reduction. See OAQPS Supplemental Memorandum at 20-21. The Clean Air Act Penalty Policy makes clear that compliance history "may be used only to raise a penalty." Clean Air Act Penalty Policy, Sect.II.B.4.c.

party had signed up for the agreement, it could not possibly have had the case-specific information needed to justify any deviation based upon ability to pay.[14]

As the Board noted in oral argument, the "Bakery Partnership Agreement" was an industry-wide enforcement action brought under the Audit Policy that imposed penalties according to a fixed structure and thus shares some common elements with the Agreements.[15] While the Agreements here applied penalties to unknown participants based solely on facility size, the Bakery Partnership Agreement made a good faith effort to apply the penalty policies. Most importantly, the Bakery Partnership Agreement took into account facility-specific differences by imposing "per pound penalties" based upon case-by-case evaluations of specific facilities, and varying penalty amounts according to the quantities released. See 67 Fed. Reg. 5586, 5589 (February 6, 2002). Unlike the Air Compliance Agreement which imposes $200, $500, or $1,000 penalties based upon nothing more than arbitrary facility sizes derived from regulations implementing the Clean Water Act, the Bakery Partnership Agreement sought to capture penalties that tracked more closely the particulars of each facility.[16]

OAQPS argues that the penalties are appropriate given the risk of proceeding with litigation. However, as OAQPS itself makes clear in its supplemental memorandum, "[f]ederal courts have also acknowledged that the CAA, CERCLA, and EPCRA are applicable to AFOs if their emissions exceed the statutory thresholds." OAQPS Supplemental Brief at 15-16 citing

[14] OAQPS appears not to have applied "ABEL," an EPA computer model designed to determine ability to pay.

[15] See Equipment Containing Ozone Depleting Substances at Industrial Bakeries, 67 Fed. Reg. 5586 (February 6, 2002).

[16] In addition, AIR is unaware of the contents of the administrative record underlying the Bakery Partnership Agreement, and notes that it is entirely possible that EPA made specific findings regarding the penalty amounts. In this case, OAQPS has not provided any specific justifications,

Idaho Conservation League v. Adrian Boer, dba K&W Dairy, 362 F.Supp.2d 1211, 1216 (D. Idaho 2004); Sierra Club v. Tyson Foods, Inc., 299 F.Supp.2d 693, 706-11 (W.D. Ky. 2003); Sierra Club v. Seaboard Farms, Inc., 387 F.2d 1167, 1171-72 (10th Cir. 2004). Instead, OAQPS argues that there is a high litigation risk because "precise proof in support of civil liability is not currently possible." OAQPS Supplemental Memorandum at 16. While evidentiary risk may justify a penalty reduction, "[m]itigation based on the concerns should consider the specific facts, equities, evidentiary issues or legal problems pertaining to a particular case." Clean Air Act Penalty Policy, Sect. III (emphasis added). OAQPS has made no such case-by-case determination, and has instead reduced penalties for an entire industry sector by at least 98% based upon a general assumption that the cases will be difficult to prove.[17]

In conclusion, the inadequacy of the penalties is perhaps best summarized by the following fact: Tyson Foods, Inc., a multinational company that enjoyed $26.4 billion in sales and realized $1.9 billion in gross profits in 2004,[18] is required to pay no more than $100,000 in penalties under the Air Compliance Agreement for regularly occurring violations at hundreds, if not thousands, of facilities that lie at the heart of its business.[19] Given its paltry penalty amount, failure to recover any economic benefit, and marked departure from the statutory penalty provisions and administrative penalty policies, the Board should not allow the Air Compliance Agreement to stand.

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other than its post hoc litigation rationalizations, to support penalty amounts under the Air Compliance Agreement.

[17] A comparison of the average total penalty amount ($500) to the minimum amount under the penalty policies ($21,251) reveals an overall penalty reduction of at least 98%.

[18] See Tyson Foods Annual Report, http://media.corporate-ir.net/media_files/irol/65/65476/reports/ar04.pdf.

[19] The Air Compliance Agreement caps the total penalty paid by any respondent at $100,000. See Air Compliance Agreement, ¶ 48(C).

IV. THE BOARD HAS JURISDICTION TO REVIEW THE ENTIRE AGREEMENT

In its supplemental brief and at oral argument, OAQPS takes the position that the Board only has jurisdiction to review the penalty component of the Agreements. Under the Consolidated Rules of Practice, the Board has a broad grant of jurisdiction to review the entire consent agreement. Section 22.18(b)(3) provides that no "consent agreement shall dispose of any proceeding under these Consolidated Rules of Practice without a final order from the . . . Environmental Appeals Board, ratifying the parties' consent agreement." Therefore, the Board's role in this process involves an order that will either ratify or not ratify the Agreements.

OAQPS's position that the consent agreement may contain elements beyond the Board's reach runs counter to the Consolidated Rules of Practice, which mandates that all terms be recorded in a consent agreement subject to Board ratification. "Any and all terms and conditions of a settlement agreement shall be recorded in a written consent agreement[.]" 40 C.F.R. § 22.18(b)(2) (stating mandatory elements of a consent agreement). Because the Consolidated Rules of Practice define the content of a consent agreement and provide the Board with jurisdiction to ratify consent agreements, OAQPS cannot push the Board aside with clever draftsmanship. The Board has jurisdiction over "any and all terms" through its ratification power. 40 C.F.R. §§ 22.18(b)(2), (3).

CONCLUSION

For the reasons set forth above, AIR respectfully requests that the Board decline to ratify the Agreements. In the event the Board ratifies the Agreements, AIR requests that the Board declare that the Agreements shall not affect the ability of citizens or states to enforce federally-enforceable requirements applicable to Respondents.

Respectfully submitted this 19th day of December, 2005.

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CERTIFICATE OF SERVICE

I, Brent Newell, am a resident of the state of California, over the age of eighteen years, and not a party to this action. My business address is 450 Geary Street, Suite 500, San Francisco, CA 94102.

On December 19, 2005, I served the BRIEF OF ASSOCIATION OF IRRITATED RESIDENTS, et al. IN OPPOSITION TO THE CONSENT AGREEMENTS AND PROPOSED FINAL ORDERS FOR ANIMAL FEEDING OPERATIONS on the following persons by placing it in a sealed, postage-paid envelope to be sent through the U.S. mails in the regular course of business:

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I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 19th day of December 2005, in San Francisco.

Brent Newell

Livestock industry finds friends in EPA

Documents detail lobbyists' impact on air-quality plan

By Andrew Martin
Washington Bureau

May 16, 2004

WASHINGTON -- When Environmental Protection Agency officials addressed the National Pork Producers Council last year about a proposed farm-pollution monitoring program, they brought along a slide show to explain and promote the new rules.

Although the audience had no way of knowing it, the slide show was prepared not just by EPA staff but largely by the meat industry, which backed the new rules over the objections of environmentalists.

Internal EPA documents show that the proposed program to monitor air pollution at livestock farms--a contentious topic in rural America--was largely conceived and heavily influenced by lobbyists for the livestock industry. The program is to be officially unveiled in coming months.

The documents also show a relationship between some EPA officials and industry lobbyists that was so close that one EPA official working on farm issues quit in frustration, and state and local government representatives walked out of negotiations.

"To save you some time, I've taken the liberty of drafting a few PowerPoint slides that you might use in that presentation," livestock industry lobbyist John Thorne wrote in a Feb. 15, 2003, e-mail to then-EPA attorney Timothy Jones.

In an e-mail on Feb. 18, 2003, Thorne sent a second set of slides to be used by EPA Associate Administrator Karen Flournoy that concludes, "The public will benefit from all of this."

Other documents show that Jones incorporated some of Thorne's slides into his presentation, while Flournoy used essentially the whole thing.

The e-mail messages are contained in hundreds of pages of documents obtained by the Sierra Club under the Freedom of Information Act and provided to the Tribune.

Some of the messages show regulators and the regulated essentially working hand in hand. For instance, in a Feb. 19, 2003, e-mail, Randy Waite of the EPA's Office of Air Quality Planning and Standards praised Thorne's slides and offered strategic suggestions to help the industry make its case.

"With good information, we can solve problems," Waite wrote. "With no information, we leave the door open to outside scare tactics."

Critics of the Bush administration contend that this is just the latest example of the Bush EPA becoming overly close with industry.

EPA officials do not dispute their close working relationship with the meat industry. But they maintain they have jointly created the first-ever program to monitor air pollution from farms, paid for by the livestock industry.

"It's true that we've been talking to the industry," said Bob Kaplan, the EPA's director of special litigation and projects. "But we've also been talking to environmental groups and anyone else who wants to say anything to us."

Plan offers protection

Still, critics call the air emissions program a sweetheart deal that indefinitely delays cleanup of noxious emissions from large-scale farms and disregards neighbors who live downwind.

Under the proposed deal, farms that sign up for a two-year monitoring program will be exempt from federal air pollution enforcement during that time. Past violations of federal air pollution laws also would be forgiven.

Industry officials hope the program also would shield participating farms from lawsuits brought by states and citizen groups.

In exchange, the farms would contribute up to $3,500 to cover the cost of the program. Only about 30 farms would be selected for monitoring, documents show.

The idea is that after two years, the EPA would have sufficient data to establish permanent air emissions standards.

The EPA is preparing the program at a time when the stench and noxious gases from large-scale livestock farms, often called "factory farms," are tearing apart some rural communities and prompting lawsuits by neighbors and environmental groups.

The furor has been fueled by rapid consolidation in the livestock industry that has vastly reduced the number of farms but greatly increased the size of those that remain. Some of the largest pig farms, for instance, have more than 100,000 hogs.

While the primary complaint is foul odors, some neighbors and scientists maintain that gases such as ammonia and hydrogen sulfide--emitted from manure--from livestock farms have caused health problems similar to those caused by industrial emissions.

To environmental groups, the monitoring plan, as proposed, is simply amnesty for polluters.

Everyone let `off the hook'

"They let everyone off the hook," said Barclay Rogers, an attorney with the Sierra Club. "Everyone who signs up gets protection. It's a `get out of jail free' card."

Asked about the slide show prepared by Thorne and presented by EPA officials, Rogers said: "That is being co-opted to the greatest extent the government can be. They are putting words in their mouth."

The EPA's Waite countered that the slides summarized talks

he had with Thorne and that he edited them for accuracy.

Eric Schaeffer, a former EPA enforcement official who now is director of the Environmental Integrity Project, a Washington-based watchdog group, said the agreement was simply a stalling tactic by the livestock industry.

"Industry lobbyists in Washington understand they can't defeat emission controls outright, especially where the public's health is at stake," Schaeffer said. "But they understand that time is money, so their strategy is to postpone the day of reckoning."

But Kaplan, the EPA's director of special litigation and projects, said the agency is "between a rock and a hard place" because the current laws and protocols for measuring pollution are difficult to apply to farms. The main point of the monitoring program, he said, is to establish emissions standards with which farms would have to comply.

"We are trying to do this in a faster, more judicious way," he said.

Jones, the then-EPA lawyer who received one of Thorne's e-mail messages and now works for Tyson Foods, declined to comment. Neither Flournoy nor Thorne returned calls seeking comment.

Richard Schwartz, a lobbyist for a consortium of livestock companies called the Ag Air Group, said the livestock industry did not have too much influence on the process, adding the most recent draft is much tougher on farms than the original proposal.

"Essentially the idea of the industry paying to do a study to determine its own emissions is absolutely unique," Schwartz said. "It's tremendously advantageous to the agency."

To date, the EPA's focus when it comes to factory farms has mostly been water pollution. During the Clinton administration, the EPA pursued its first air pollution cases, against Premium Standard Farms in Missouri and Buckeye Egg Farm in Ohio.

In December 2001, a month after Premium Standard Farms was ordered to install a wastewater treatment facility, the meat industry came to the EPA to pitch the idea for a two-tiered "safe harbor" agreement.

Under that proposal, the EPA would have imposed a moratorium on enforcing the Clean Air Act and other air pollution laws as long as the large livestock farms signed up for a program to monitor emissions. Smaller farms would be exempt from regulation altogether.

EPA officials initially rejected the idea.

"We felt that what they were trying to do was keep us from enforcing the law," said Sylvia Lowrance, who at the time was the deputy administrator for enforcement.

But Lowrance said the tone in EPA enforcement changed in the course the Bush administration took toward not supporting enforcement of environmental laws. Lowrance said she was told that her office could not pursue any more air pollution cases against farms unless senior political appointees in the EPA approved it.

"That's unprecedented in EPA," said Lowrance, who left the agency in 2002.

Michele Merkel, who worked in EPA enforcement, said she also quit in 2002 because she believed the livestock industry had too much influence on federal oversight of farms.

The meat industry's "safe harbor" proposal picked up steam within the EPA in 2002.

"Based on what we've learned so far, my feeling is the EPA still wants to move forward with this and probably will," Schwartz wrote to fellow lobbyist Thorne on March 15, 2002.

Two organizations representing state and local officials--the State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials--were invited to participate in meetings of the EPA and industry officials that summer. But by the end of the year, the organizations walked out.

"It appeared to us that the EPA staff was giving in far too much to the industry, and the direction was coming from somewhere in the administration to seal the deal," said Bill Becker, executive director of both organizations.

By the time EPA officials were invited to address the National Pork Producers Council--in meetings in Kansas City, Mo., and Washington, D.C., in early 2003--the livestock industry had provided a "consent agreement and final order" that included legal language for the monitoring program.

Signs of partnership

In some of the documents, government officials sound as though they consider themselves essentially partners with industry representatives--arrayed against, for example, citizens who want to file lawsuits.

In one e-mail, Waite of the EPA's Office of Air Quality Planning and Standards wrote, "We need to start getting across the idea that farms are going to continue to be vulnerable to citizen suits and this data will go a long way in helping us, in partnership, to find solutions to some of those issues, making them less vulnerable in the long run."

In an interview, Waite said protection from lawsuits is crucial to get farmers to participate in the program.

"There's got to be something in it for both sides," he said.

Air Consent Agreement & Emissions Monitoring Study

John Thorne
Executive Director
Agricultural Air Research Council
Washington DC

Current Status

- More than 13,000 farms are involved:
  - 540 dairy farms
  - 4,000 swine farms
  - 600 egg farms
  - 8,000 broiler hen farms
- EPA has requested EAB approval
- Study preparations have begun in earnest
- Official start date determined by EAB/EPA
- Measurements will be made from 2006 – 2008
- EPA will publish new policy 2010 – 2011
- Legal protections extend through that date

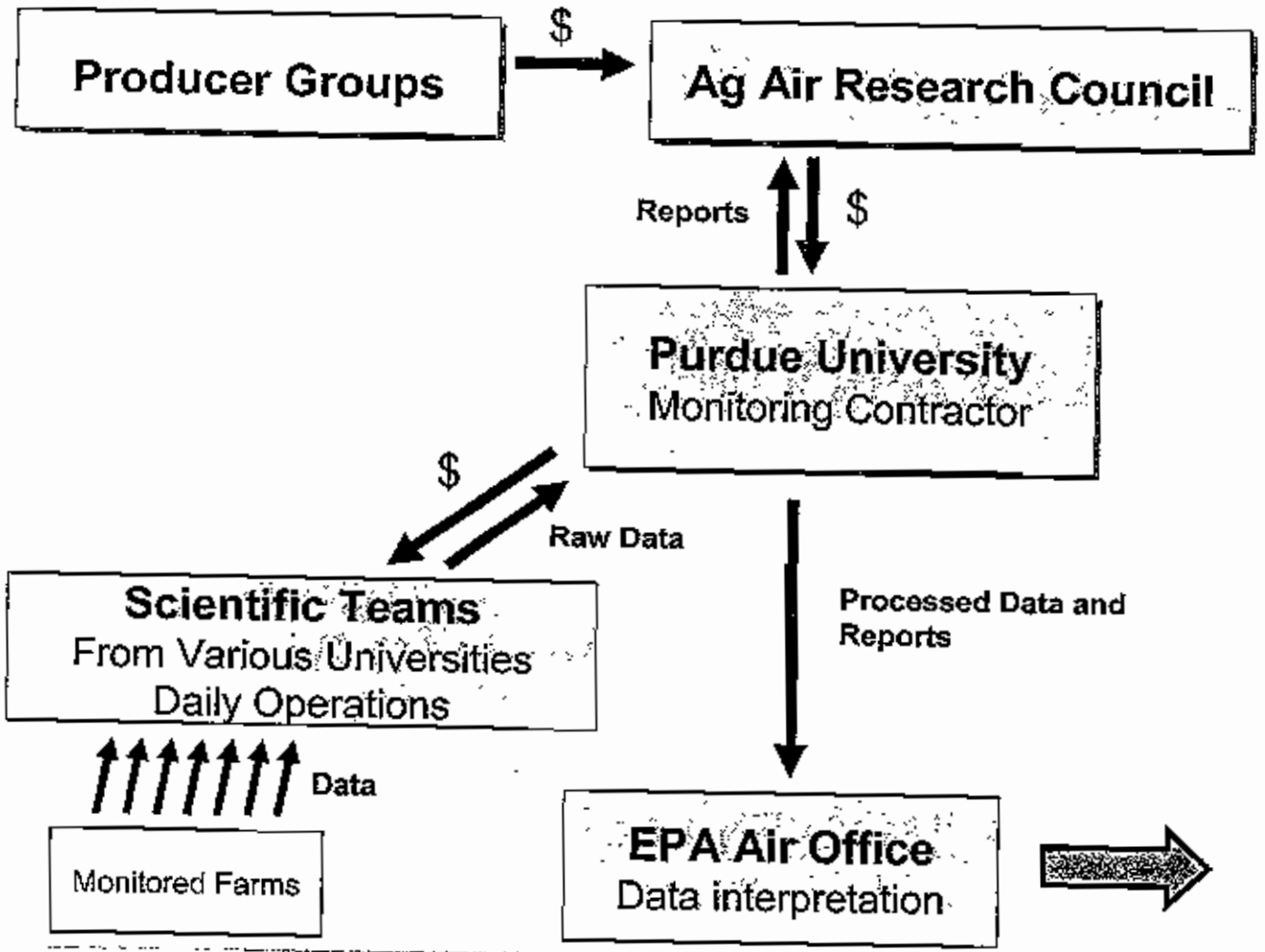
Funding the Study

- Each species funds its own study portion
  - Pork = $6 million (check off funds)
  - Dairy = $5 million (check off funds)
  - Eggs = $2.8 million (check off funds)
  - Broilers = $1.8 million (industry leaders' funds)
- Contingency funds are built into each budget
- Insurance protects against loss, liability
- Purdue's business office manages accounts
- Multiple layers of accounting, oversight, approvals, independent audits & reports to EPA, USDA, AARC and others

Study Measurements

- Regulated pollutants measured: VOCs, NH_3, H_2S, TSP, Particulate Matter (PM_{10}, $PM_{2.5}$)
- Meta data collected: various climate variables, management & animal data, QA/QC data
- All sites: SOPs will be followed by all teams
- Portable equipment will monitor lagoon emissions & open-sided dairy barns;
- Stationary field labs will monitor barns
- Study designs represent major regions, farm sizes, production methods for each species

Conduct of the Study



AARC administers funds and transfers to Purdue according to approved budgets. Board of directors represents each industry sector. AARC is legal entity before EPA, holds titles to mobile labs, lets contracts, audits expenses and budgets, and coordinates equipment use for later studies.

Participants are Protected, Past – 2010:

- Released by EPA from all past Preconstruction requirements in Title 1 of the Clean Air Act
  - Part C -- Prevention of Significant Deterioration (PSD)
  - Part D -- New Source Review (NSR)
- Released from Past Operating Permit requirements in Title V of Clean Air Act
- Released from State SIPs
- Released from past CERCLA section 103 and EPCRA section 304 reporting requirements