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	)	CAA-HQ-2005– xx
Animal Feeding Operations	)	CERCLA-HQ-2005-xx
	)	EPCRA-HQ-2005-xx
	)	

COMPLAINANT'S BRIEF IN RESPONSE TO THE NON-PARTY BRIEF FILED ON DECEMBER 20, 2005 BY THE ASSOCIATION OF IRRITATED RESIDENTS, ET AL.

On December 8, 2005, the Environmental Appeals Board ("Board") issued an order allowing 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 the Sierra Club (collectively referred to hereinafter as "AIR") to file a non-party brief by December 20, 2005, in response to the supplemental memorandum filed by EPA's Office of Enforcement and Compliance Assurance ("OECA") on December 6, 2005. See In re: Consent Agreements and Proposed Final Orders for Animal Feeding Operations, Docket No. CAA-HQ-2005-xx, CERCLA-HQ-2005-xx, EPCRA-HQ-2005-xx (EAB Dec. 8, 2005) (order denying motion for leave to intervene). On December 15, 2005, the Board issued a subsequent order allowing OECA and the Respondents to file a response by January 6, 2006, to any brief filed by AIR.

On December 20, 2005, AIR filed a brief in opposition to the above Consent Agreements and Proposed Final Orders ("Agreements"). OECA files this Brief in response to the brief filed by AIR on December 20, 2005.

Preliminary Statement

OECA has previously addressed most of the issues raised by AIR in OECA's response to public comments on the proposed Agreements, *Animal Feeding Operations Consent Agreement and Final Order (Supplemental notice: response to comments on consent agreement and final order)*, 70 Fed. Reg. 40016 (July 12, 2005), in its November 4, 2005, memorandum to the Board, Memorandum from Assistant Administrator Nakayama to the EAB (Nov. 4, 2005) (Memo from AA Nakayama), in its December 6, 2005 supplemental memorandum, Complainant's Supplemental Memorandum in Support of the Consent Agreements and Proposed Final Orders for Animal Feeding Operations, (Docket No. CAA-HQ-2005-xx, CERCLA-HQ-2005-xx, EPCRA-HQ-2005-xx) (Complainant's Supplemental Memo), and at the hearing held on December 13, 2005. OECA again responds to AIR and offers the following additional comments.[1]

Summary of argument. This Brief further supports approval of the proposed Agreements by the Board. OECA provides the following responses to the relevant issues raised by AIR.

(1) AIR and other environmental and local citizens groups were given a full opportunity to participate in the development of the proposed Agreements, including opportunities to comment on drafts of the Agreements and to participate in the development of the national monitoring study protocol. The notice and comment process provided by OECA on the proposed

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[1]AIR's reference to EPA's Office of Enforcement and Compliance Assurance (OECA) as "OAQPS" throughout their brief is confusing and misleading. As AIR is aware, OECA initiated these enforcement actions, conducted the negotiations with industry and other interested parties, and submitted the proposed Agreements to the Board for approval. Memo from AA Nakayama. EPA's Office of Air Quality Planning and Standards (OAQPS), which is in the Office of Air and Radiation, provided technical support for the enforcement actions. OAQPS has not been delegated the authority to initiate and settle enforcement actions, to issue CAA section 114 monitoring requests in support of enforcement actions, or to represent EPA before the Board in these matters.

Agreements was appropriate and consistent with the process for consent decrees filed in federal district courts.

(2) OECA's prior experiences with using section 114 authority under the Clean Air Act (CAA) to obtain emissions data from AFOs have proven to be difficult and time-consuming, in large part because of the concerns expressed by the National Academy of Sciences (NAS) regarding the lack of standardized emission monitoring methodologies for animal feeding operations (AFOs). OECA has reasonably concluded that the proposed Agreements will obtain widespread compliance by AFOs in a much shorter period of time than using other enforcement authorities.

(3) The proposed Agreements comply with sections 113(d)(1) and 113(a)(4) of the CAA because OECA obtained an appropriate waiver from the Department of Justice and none of the enforceable requirements of the proposed Agreements will extend for more than a year from the issuance of the order.

(4) As required by the Consolidated Rules of Practice (CROP), the proposed Agreements appropriately reference the statutes and regulations allegedly violated and set forth the known factual basis for each violation alleged. Consent agreements under the CROP may settle potential violations. The notice provided in the proposed Agreements of the scope of the settlement and the actions by OECA to provide notice and comment on the Agreements is consistent with the history of the provisions in the Clean Water Act (CWA) and the CAA requiring public notice of administrative consent agreements.

(5) OECA gave a reasoned basis for the proposed penalties and is entitled to deference in its determination that the penalties are appropriate. Economic benefit cannot be determined because of the inability to currently determine which specific requirements each Respondent must comply with and the lack of information on control technologies. The penalties assessed in the proposed Agreements are consistent with Agency precedent.

Participation by AIR and Other Environmental and Local Citizens Groups in the Development of the Proposed Agreements

In its brief, AIR states that, "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." Brief of the Association of Irritated Residents et al. In Opposition to the Consent Agreements and Proposed Final Orders for Animal Feeding Operations, (Docket No. CAA-HQ-2005-xx, CERCLA-HQ-2005-xx, EPCRA-HQ-2005-xx) at 2 (AIR's Brief). This is incorrect. From May of 2003 through the publication in the Federal Register of the proposed Agreement on January 31, 2005, OECA met with environmental groups and/or local residents living near AFOs on at least nine separate occasions about the proposed Agreement. See Ex. 1. OECA also publicly released two earlier drafts of the proposed Agreement and requested that AIR and other environmental and local citizens groups provide specific, line-by-line comments on the draft Agreement. Howland Decl. (#2) Ex. 2 at 2. In addition, Dr. Joe Rudek, a scientist with Environmental Defense, was invited to, and did, participate as a member of a group of 30 experts in AFO air emissions from the U.S. Department of Agriculture, EPA, the AFO industry, and academia who developed the monitoring protocol set forth in Attachment B to the proposed Agreements. *Animal Feeding Operations Consent Agreement and Final Order (Supplemental notice: response to comments on consent agreement and final order)*, 70 Fed. Reg. at 40020; and Howland Decl. (#2) Ex: 2 at 2. For apparent strategic reasons, AIR has chosen to oppose the Agreements in toto. AIR should not now be heard to complain about its own ill-advised decision.

AIR's claim that the public comment process provided by OECA in the January 31, 2005 Federal Register notice was "largely a futile exercise" because OECA allowed AFOs to sign the proposed Agreement during the comment period is also incorrect. See *Animal Feeding Operations Consent Agreement and Final Order*, 70 Fed. Reg. 4958 (Jan. 31. 2005). The

concurrent sign up and comment period is consistent with the process followed by EPA and the Department of Justice under 28 C.F.R. § 50.7 for consent decrees filed in federal district court. Indeed, it was longer and provided more opportunities to comment than the section 50.7 process.

Under section 50.7, a notice requesting public comment on a consent decree is published in the Federal Register after the consent decree is signed by EPA, the Department of Justice, and the defendant. EPA and the Department of Justice reserve the right to withdraw or withhold consent to entry of the consent decree by the district courts if public comments disclose facts or considerations indicating that the consent decree is inappropriate. Similarly, with respect to the proposed Agreements, OECA published a notice in the Federal Register requesting public comment on the proposed Agreements, some of which may have already been signed by Respondents prior to close of the comment period. Unlike civil judicial consent decrees, however, the public comment period on the proposed Agreements closed well before OECA signed them. As with civil judicial consent decrees, OECA stood ready to modify or withdraw the proposed Agreements, even those already signed by a Respondent, if public comment disclosed facts or considerations indicating that the proposed Agreements were inappropriate.

Use of OECA's Enforcement Authority under Section 114 of the Clean Air Act

AIR argues that OECA should use its authority under section 114 of the CAA to require AFOs to install monitoring equipment and to monitor their emissions to determine their air emission compliance obligations. AIR's Brief at 0. Section 114 of the CAA authorizes the Administrator to require any person who owns or operates an emission source to install monitoring equipment and to sample its emissions. 42 U.S.C. §§ 7414(a)(1)(C) & (D).

The proposed Agreements will obtain the data faster, more accurately, and more efficiently than issuing section 114 monitoring requests to AFOs across the United States. As reiterated by counsel for the Respondents at the December 13, 2005, hearing, installation of monitoring equipment and emission monitoring at AFOs is expensive and has been vigorously

resisted by AFOs who have received section 114 monitoring requests from EPA. Their legal arguments against conducting monitoring have been bolstered by the concerns expressed by the NAS regarding the lack of standardized emission monitoring methodologies for AFOs. Final Report, Air Emissions from Animal Feeding Operations: Current Knowledge, Future Needs, National Research Council of the National Academies, Feb. 2003, at 7-8 & App. A at 197 (NAS Study). Not surprisingly, prior efforts by OECA to use the authority under section 114 to require monitoring at AFOs have proven to be difficult and time-consuming. Howland Decl. (#1) Ex. 3 at 2 ("EPA in the past has entered into long and arduous enforcement proceedings to enforce testing required under 114 against AFOs."). Moreover, even when EPA has been successful in obtaining emission data using section 114, the AFO still may not be in compliance with the applicable air emission requirements, and OECA will have to use additional enforcement authorities, and expend additional time and resources, to obtain compliance.

Given that there are many thousands of AFOs in the United States, OECA has reasonably concluded that the proposed Agreements will achieve the result of obtaining the crucial monitoring data identified by the NAS and of obtaining widespread compliance by AFOs in a much shorter period of time than using other enforcement authorities, such as section 114 of the CAA. See Heckler v. Chaney, 470 U.S. 821, 832 (1985) ("...[W]e think the presumption is that judicial review is not available" when the situation concerns an agency's refusal to take enforcement steps). See also United States v. Chevron USA, Inc., 380 F.Supp.2d 1104, 1118 (N.D. Cal. 2005) ("However, because of the complexity of Clean Air litigation, it was reasonable for EPA to conclude that even a due date [for installation of emission control equipment] eight years after the signing of the Consent Decree may create environmental benefits earlier than litigating.").

Compliance with Section 113(a)(4) and (d)(1) of the Clean Air Act

Compliance with section 113(d)(1). AIR argues that the proposed Agreements violate section 113(d)(1) of the CAA, which limits the Administrator's authority to assess civil penalties to matters where the first date of violation occurred 12 months or less from the start of the administrative action, except where EPA and the Attorney General jointly determine that a matter involving a longer period of violation is appropriate for administrative penalty action.

The proposed Agreements are in compliance with section 113(d)(1). The proposed Agreements assess civil penalties for violations that may have occurred more than 12 months prior to the start of the administrative action. As stated in the memorandum from the Assistant Administrator of OECA to the Board dated November 4, 2005, OECA obtained the appropriate waiver from the Department of Justice for bringing an administrative action for violations occurring more than one year prior to the commencement of this action.[2] Memo from AA Nakayama at 5.

Compliance with section 113(a)(4). AIR also argues that the proposed Agreements violate section 113(a)(4) of the CAA, which states that all requirements of administrative orders be met within one year of the order's issuance. Because the proposed Agreements are administrative penalty orders, the only enforceable requirement is the requirement to pay the assessed civil penalty within 30 days of the receipt by Respondents of an executed copy of the Agreement.[3] See para. 50. The proposed Agreements therefore meet the requirements of section

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[2]The waiver is Attachment LL to the November 4, 2005 memo (Memo from AA Nakayama). For convenience, the waiver is included as Ex. 4 to this brief.

[3]In its brief, AIR mischaracterizes OECA's statement in the December 6, 2005 supplemental memorandum and at the oral hearing on December 13, 2005, that the Board should review the proposed Agreements as administrative penalty orders. AIR states that OECA argued because the proposed Agreements are administrative penalty orders, the Board lacked jurisdiction to review anything but the penalty component of the Agreements. AIR's Brief at 0. On the

113(a)(4). Even if the Agreements are viewed as containing enforceable compliance requirements, all requirements, such as the requirement to pay into the monitoring fund (para. 53), will occur well within one year of the issuance of the order.[4]

Moreover, it is important to note that there are no forward-looking releases and covenants not to sue in the Agreement. CAA permitting violations triggered by a future expansion of a farm covered by a proposed Agreement are not released (para. 27(a)(iii) ("[The releases and covenants not to sue] do not extend to any other requirements including but not limited to:... (iii) Clean Air Act permitting requirements triggered by an expansion of a Farm beyond its design capacity as of the date this Agreement is executed"). CAA, CERCLA, and EPCRA violations also triggered by the expansions of existing Emission Units or the addition of new Emission Units are not released because only the Emission Units described in Attachment A to each proposed Agreement are covered (para. 26). In addition, very large AFOs, who are most likely to

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contrary, OECA stated that the proposed Agreements are administrative penalty orders with a complex release and covenant not to sue that includes the monitoring fund provisions and that the Board therefore has authority to review the proposed Agreements under the CROP. Complainant's Supplemental Memo at 6-7. OECA never stated that the Board lacked authority to review the non-penalty provisions of the Agreement as well. OECA believes it is appropriate for the Board to review the appropriateness of the non-penalty provisions of the Agreement as conditions on the release and covenant not to sue. Id. at 6; see also 42 U.S.C. § 7413(d)(2)(B) ("The Administrator may compromise, modify, or remit, *with or without conditions*, any administrative penalty which may be imposed under this subsection") (emphasis added) and 40 C.F.R. § 22.18(b)(2) (consent agreements shall state that respondent consents "to any conditions specified in the consent agreement.")

[4]The IMC must submit a detailed plan to EPA to conduct the nationwide monitoring study within 60 days of the date an executed copy of the Agreement is received by the Respondent (para. 54). EPA has 30 days to review and approve or disapprove the plan (para. 56). If EPA disapproves the plan, the IMC has 30 days to correct the plan and resubmit it to EPA for approval (Id.). Once the plan is approved by EPA, the monitoring fund money must be transferred to the nonprofit entity within 60 days (para. 57). Consequently, the maximum amount of time that will pass between issuance of the order and the completion of all the required tasks under paragraph 54 for the monitoring study, including payment of the monitoring fund money, is seven months.

currently trigger CERCLA and EPCRA requirements, are required to report their emissions within 120 days after receiving an executed copy of the Agreement (para. 28(A)). Finally, the Agreement does not limit EPA's authority to restrain Respondents or otherwise act to remedy any present or future situation that may present an imminent and substantial endangerment to public health, welfare or the environment (Para. 43).

The Proposed Agreements Do Not Violate the Consolidated Rules of Practice

The proposed Agreements state the specific provisions violated and the factual basis for the violations. As OECA stated in its December 6, 2005 supplemental memorandum and at the hearing on December 13, 2005, OECA referenced potential violations of broad areas of the CAA, state SIPs, CERCLA and EPCRA. Complainant's Supplemental Memo at 13-15. There was no need to parse and refer to each and every specific SIP requirement because they were all included in the broad references in the proposed Agreements. See para. 26(A). AIR may not like the breadth of the settlement, but there is no doubt that it clearly sets forth what is being settled.[5] No more is required by the CROP.

The proposed Agreements are also consistent with the CROP's requirement to provide "a concise statement of the factual basis for each violation alleged." The relevant facts known to OECA in support of the alleged violations are included in each proposed Agreement, including the number of farms, number and type of animals, and number and type of emission units. See Attachment A to each proposed Agreement. Specific emission rates for each Respondent are not alleged in the proposed Agreements because of the lack of accepted emission-estimating methodologies and emission data from each Respondent. Complainant's Supplemental Memo at 16-17. Allegations of specific emission rates for each Respondent are not required because the

[5]The broad release and covenant not to sue is appropriately matched with a broad remedy to determine each Respondent's emissions and comply with all applicable federal air emission laws. Para. 28.

CROP favors settlement at any time during an administrative enforcement proceeding and not all the facts supporting violations will necessarily be known if settlement is reached early in an enforcement proceeding. 40 C.F.R. § 22.18(b)(1) ("The Agency encourages settlement of a proceeding *at any time* if the settlement is consistent with the provisions and objectives of the Act and applicable regulations.")(emphasis added).

Consent agreements may settle potential violations. The CROP allows for settlement at any time during an enforcement proceeding. 40 C.F.R. § 22.18(b)(1). Almost all settlements that occur prior to a hearing will involve resolution of potential violations because a trier of fact has not decided on the validity of the alleged violations. The CROP recognizes that fact by allowing respondents to neither admit nor deny the specific factual allegations contained in the complaint. 40 C.F.R. § 22.18 (b)(2); see also para. 3 of the proposed Agreements.[6]

The proposed Agreements are closely analogous to the federal civil judicial consent decree with Chevron U.S.A., Inc. (Chevron) recently entered by the Northern District Court of California over the objections of a group of environmental organizations. Chevron, 380 F.Supp.2d 1104. In that consent decree, EPA settled broad potential claims under the CAA, CERCLA and EPCRA at five Chevron refineries as part of the Agency's Petroleum Refinery

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[6]AIR argues in its brief that the two Board decisions cited by OECA in its Dec. 6, 2005 supplemental memorandum to support the conclusion that the CROP allows the allegation of potential violations are not applicable because the prior Board decisions dealt with "Audit Policy" cases, and the proposed Agreements are not Audit Policy cases. AIR's Brief at 7. See In the Matter of Advance Auto Parts, Inc., Docket No. HQ-2004-6001 (EAB, Aug. 5, 2004); In the Matter of ADT Security Services, Inc., Docket No. CWA-HQ-2002-6000, EPCRA-HQ-2002-6000 (EAB, Oct. 18, 2002). See also *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*, 65 Fed. Reg. 19618 (Apr. 11, 2000). OECA agrees that the proposed Agreements were never intended to be Audit Policy cases. Advance Auto Parts and ADT Securities were cited in OECA's supplemental memorandum and at the hearing on Dec. 13, 2005, as prior examples of consent agreements that included allegations of potential violations that were approved by the Board. See Advance Auto Parts at para. IV. G; and ADT Securities at para. IV. H.

Initiative. Id. at 1108. In its decision entering the consent decree, the court acknowledged that EPA conducted a minimal investigation at a single Chevron refinery and did not conduct any investigation of the other four refineries and that, "[EPA's] understanding of Chevron's liability was based on weakly-supported assumptions." Id. at 1112. Nevertheless, the court granted the motion to enter the decree, in part, because the negotiations leading up to the agreement were extensive, adversarial, and at arms-length. The court stated:

> The Court is bound to show substantial deference to EPA and the Department of Justice where, as here, the government has presented evidence that the negotiations leading up to entry of the Decree were adversarial and non-collusive. It also appears that EPA's choice to avoid litigation in favor of a broad-based settlement strategy may have the potential to win greater environmental benefits in the long run.

Id. at 1121.

As in Chevron, the proposed Agreements are the result of extensive, adversarial, and non-collusive negotiations. Howland Decl. (#2) Ex. 2 at 1-2. In addition, while the allegations in the proposed Agreements are based on minimal investigation and on assumptions that lack complete evidentiary support, OECA's strategy of favoring a broad-based settlement over litigation will win greater environmental benefits and is reasonable.

The legislative history of statutory public notice provisions supports the public notice provided with the proposed Agreements. At the hearing on December 13, 2005, the Board asked OECA to brief the Board on the legislative history and the policy underlying providing public notice of violations and administrative penalties under the CWA and the CAA.

The CWA public notice provision was enacted as part of the CWA's 1987 amendments. CWA Section 309(g)(4)(A), 33 U.S.C. § 1319(g)(4)(A), states that "[b]efore issuing an order assessing civil penalties under this subsection the Administrator or Secretary [of the Army], as the case may be, shall provide for public notice of and reasonable opportunity to comment on the

proposed issuance of such order." The CWA's legislative history indicates the provision is intended to apprise interested citizens of the proceeding and prevent abuse of administrative penalty authority. S. Rep. No. 99-50, at 27 (1985), *reprinted in* Vol. II Senate Committee on Environment and Public Works, A Legislative History of the Water Quality Act of 1987, at 1448 (1988).

The underlying policy of keeping the public apprised of the Administrator's penalty assessments and settlement proposals is echoed in the CROP's regulatory history. In response to public comments regarding the scope of resolutions and settlements, EPA highlights the interest in "assuring a clear public record of the Agency's administrative enforcement proceedings. This is particularly important where statutes require public notice of a proposal to assess penalties for specific violations." *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits*, 64 Fed. Reg. 40138, 40157 (July 23, 1999).

The CAA's notice provision, section 113(g), which does not apply to administrative penalty orders, states:

> At least 30 days before a consent order or settlement agreement of any kind under this chapter to which the United States is a party (other than enforcement actions under this section, section 7420 of this title, or subchapter II of this chapter, whether or not involving civil or criminal penalties, or judgments subject to Department of Justice policy on public participation) is final or filed with a court, the Administrator shall provide a reasonable opportunity by notice in the Federal Register to persons who are not named as parties or intervenors to the action or matter to comment in writing. The Administrator or the Attorney General, as appropriate, shall promptly consider any such written comments and may withdraw or withhold his consent to the proposed order or agreement if the comments disclose facts or considerations which indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of this chapter. Nothing in this subsection shall apply to civil or criminal penalties under this chapter.

42 U.S.C. § 7413(g).[7]

The 1990 CAA amendments were modeled after the 1987 CWA amendments.[8] However, we could find no explanation in the legislative history of the CAA as to why that statute did not incorporate the CWA's requirement for public notice of the resolution of administrative penalty orders. Nevertheless, OECA's actions with respect to the proposed Agreements would comply with the CWA provision for public notice because we published a notice requesting public comment in the Federal Register of the proposed penalty assessment. See *Animal Feeding Operations Consent Agreement and Final Order*, 70 Fed. Reg. 4958.

The Proposed Agreements Are Consistent with the Statutory Penalty Requirements and the Applicable Agency Penalty Policies.

OECA gave a reasoned basis for the proposed penalties and is entitled to great deference in its determination that the penalties are appropriate. As previously set forth by OECA in prior filings with the Board and at the hearing on December 13, 2005, OECA fully considered the statutory penalty criteria found in the CAA, CERCLA, and EPCRA and the

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[7]The CAA amendments' legislative history states that "[Section 113(g)] requires the Administrator to provide for prior notice and public comment upon proposed settlement agreements in cases other than enforcement actions under section 113, section 120, or title II, and authorizes the Administrator to withhold consent to such settlements based upon such comments." S. Debate on Conf. Rep. (1990), *reprinted in* Vol. I Committee on Environment and Public Works U.S. Senate, A Legislative History of the Clean Air Act Amendments of 1990, at 943 (1993) (emphasis added).

[8] The 1990 CAA amendments' legislative history indicates that the administrative penalty provisions are modeled "after a successful administrative penalty provision in the Clean Water Act." See S. Debate (Mar. 20, 1990), *reprinted in* Vol. IV Committee on Environment and Public Works U.S. Senate, A Legislative History of the Clean Air Act Amendments of 1990 at 5812 (1993). See also H. Debate on H.R. 3030 (May 21, 1990), *reprinted in* Vol. II Committee on Environment and Public Works U.S. Senate, A Legislative History of the Clean Air Act Amendments of 1990 at 2568 (1993) ("As originally introduced, H.R. 3030's enforcement provisions are intended to incorporate into the Clean Air Act some of the flexible enforcement authorities that are contained in other, more recently amended environmental statutes.").

applicable Agency penalty policies. See Memo from AA Nakayama at 6-7; Complainant's Suppl. Mem. at 20-23. OECA was not able to determine economic benefit because of the inability to currently determine which specific requirements each Respondent must comply with and the lack of information on control technologies. See Memo from AA Nakayama at 6-7; Complainant's Suppl. Mem. at 22. For the same reasons, OECA reasonably deviated from applying the specific penalty tables and matrixes in the applicable Agency penalty policies. See Memo from AA Nakayama at 6; Complainant's Suppl. Mem. at 23. The penalties assessed in the proposed Agreements were reduced primarily based on the litigation risks associated with the lack of accepted emission-estimating methodologies or practical protocols for measuring emissions as recognized by the NAS. See Memo from AA Nakayama at 7; Complainant's Suppl. Mem. at 23; see also NAS Study at 7-8.

OECA has brought prior enforcement actions against AFOs for allegedly failing to comply with federal environmental laws pertaining to air emissions. OECA has expertise in valuing violations of federal environmental laws and evaluating litigation risk with respect to air emissions from AFOs. Based on our experience and expertise, OECA reasonably determined that the penalty amounts set forth in the proposed Agreements are appropriate. OECA is entitled to deference in that determination. See Sam Fox Publ'g Co. v. United States, 366 U.S. 683, 689 (1961) ("Sound policy would strongly lead us to decline... to assess the wisdom of the Government's judgment in negotiating and accepting the... Consent Decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting."); United States v. Comunidades Unidas Contra La Contaminacion, 204 F.3d 275, 281 (1st Cir. 2000) ("In environmental cases, EPA's expertise must be given the benefit of the doubt when weighing substantive fairness.") (internal quotations omitted); Chevron 380 F.Supp.2d at 1111 ("This deference is particularly strong where the decree has been negotiated by the Department of

Justice on behalf of an agency like the EPA which is an expert in the field.") citing United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1436 (6th Cir. 1991).

Economic benefit cannot be determined. AIR argues that economic benefit can be determined and references the unit costs for release notifications set forth in the CERCLA/EPCRA Enforcement Response Policy (CERCLA/EPCRA Penalty Policy), the estimated costs for the nationwide monitoring study that will take place under the proposed Agreements, and the costs provided by EPA's AgStar program for various agricultural control technologies.

The unit cost table in the CERCLA/EPCRA Penalty Policy suggests an economic benefit of $694 for the first unit and $290 for each subsequent unit.[9] *Final Enforcement Response Policy for Sections 304, 311, and 312 of EPCRA and Section 103 of CERCLA* at 29 (Sept. 30, 1999). The CERCLA/EPCRA Penalty Policy gives EPA the discretion to waive assessment of a civil penalty for economic benefit where the economic benefit is less than $5,000. Id. at 28. Given the relatively small cost of complying with these CERCLA and EPCRA requirements, the delayed cost of compliance for most of the Respondents who submitted signed proposed Agreements to OECA will be less than the $5,000 discretionary limit. For those few Respondents with enough farms such that the delayed cost of compliance exceeds the $5,000 discretionary limit, the per farm penalty assessment of $500 set forth in the proposed Agreements

[9]AIR misapplied the unit cost table in the CERCLA/EPCRA Penalty Policy, claiming that the table set forth an economic benefit of $1,406 for each failure to report a release, by improperly including the costs associated with notifying a 911 operator of transportation-related releases and by doubling the unit cost for EPCRA and CERCLA compliance for a violation that requires notification under both EPCRA and CERCLA. Proper application of Table III of the CERCLA/EPCRA Penalty Policy indicates a per unit cost of $694 for the first unit. Additional units would only be $290 per unit because the $404 in costs for reading and understanding the applicable regulations would not apply again.

exceeds the $290 per unit compliance cost and will more than recover any economic benefit of delayed noncompliance with CERCLA and EPCRA.

With respect to potential CAA violations, AIR argues that OECA should have recovered the economic benefit associated with delayed monitoring costs and failure to install appropriate pollution controls. AIR's Brief at 13. More specifically, AIR suggests that EPA should have used the monitoring fund payment of up to $2,500 per farm as a basis for calculating the delayed cost of monitoring and the costs for anaerobic digestion systems provided by EPA's AgStar program as a basis for determining the delayed cost of failing to install appropriate pollution controls. Id. The delayed cost of monitoring is not applicable, however, because none of the Respondents has been issued a section 114 monitoring request and is under no legal obligation to either install monitoring equipment or to monitor its emissions.

The delayed cost of compliance for major sources that have to install best available control technology (BACT), in attainment areas, or technology meeting the lowest achievable emission rate (LAER), in nonattainment areas, could be greater than the discretionary limit of $5,000 that EPA is allowed to waive under the CAA Penalty Policy. See *Clean Air Act Stationary Source Civil Penalty Policy* at 7 (Oct. 25, 1991). However, OECA cannot currently determine which Respondents are major sources because of the lack of accepted emission-estimating methodologies and specific emission data for each Respondent.

Moreover, assuming that some AFOs will ultimately be found to be major sources as a result of the nationwide monitoring study, there are no control technologies that have been identified by either EPA or a state as meeting BACT or LAER for AFOs on which we could base an economic benefit determination. Blaszczak Decl. Ex. 5 at 2. Nor could OECA even make a reasonable assumption on what might eventually be considered BACT or LAER for AFOs. EPA guidance requires the permitting authority to evaluate the expected emission reductions from

potential control technologies when making a BACT or LAER determination. *New Source Review Workshop Manual* at B.8 (Draft, Oct. 1990). However, sufficient information on expected emission reductions from control technologies for AFOs is lacking. NAS Study at 6 ("There is a general paucity of credible scientific data on the effects of mitigation technologies on concentrations, rates, and fates of air emissions from AFOs."). As a result, contrary to AIR's assertions, there are no technologies on which to make a reasonable assumption about the delayed cost of compliance for those AFOs that may be major sources and subject to control requirements.

AIR argues that OECA should consider the cost of control technologies for AFOs identified by EPA's AgStar program, such as anaerobic digestion systems, for the purposes of determining economic benefit. AIR's suggested reliance on the AgStar program is wholly misplaced. The AgStar Program is a voluntary effort jointly sponsored by EPA, USDA, and DOE to encourage reduction of methane emissions at AFOs. The Program provides information on suggested methane emission controls that are in use or currently being developed. It makes no claims that these mitigation technologies are proven to work, and offers no data to support their effectiveness. See EPA, The AgSTAR Program, Documents, Tools and Resources, AgSTAR Handbook and Software, *Handbook Table of Contents: From the Editors, Introduction, Ch.1*, (2005), http://www.epa.gov/agstar/resources/handbook.html. Further, methane is not a regulated pollutant under the Clean Air Act.

Consistency with Agency penalty policies. AIR argues that the penalties assessed in the proposed Agreements fail to recover even the minimum gravity component found in the applicable Agency penalty policies. AIR's Brief at 14. AIR concedes that OECA has the authority to reduce penalties based on various factors, including litigation risk, but that OECA failed to document its rationale for deviating from the Agency penalty policies. Id. The rationale

for deviating from the Agency penalty policies and reducing the penalties based on litigation risk and other factors as justice may require was set forth in the Federal Register notices regarding the proposed Agreements, the memorandums that OECA filed with the Board, and at the oral hearing on December 13, 2005. See *Animal Feeding Operations Consent Agreement and Final Order*, 70 Fed. Reg. 4958; *Animal Feeding Operations Consent Agreement and Final Order (Supplemental notice: response to comments on consent agreement and final order)*, 70 Fed. Reg. 40016; Memo from AA Nakayama; Complainant's Suppl. Mem.

AIR argues that the assessed penalties in the proposed Agreements are not based on a fact-specific, case-by-case determination as required by the applicable Agency penalty policies because they were pre-determined prior to any Respondent having signed an Agreement. AIR's Brief at 15. Curiously, AIR cites the "Bakery Partnership Agreement" (Bakery Agreement) as an example of an enforcement initiative that appropriately assessed penalties to unknown participants. AIR Brief at 16; see also *Equipment Containing Ozone Depleting Substances at Industrial Bakeries*, 66 Fed. Reg. 63696 (Dec. 10, 2001); and *Equipment Containing Ozone Depleting Substances at Industrial Bakeries*, 67 Fed. Reg. 5586 (Feb. 6, 2002). As the Board pointed out at the December 13, 2005 hearing and as AIR acknowledges in its brief, however, the Bakery Agreement assesses penalties based on the number of appliances and per pounds of CFC released. *Equipment Containing Ozone Depleting Substances at Industrial Bakeries*, 66 Fed. Reg. at 63698. There is no analytical difference between per appliance and per pound penalties under the Bakery Agreements and penalties based on the number of farms and number of animals under the proposed Agreements.

Conclusion

AIR has failed to set forth any basis for the Board to disapprove the proposed Agreements. For all the foregoing reasons and those set forth in prior filings and at the December 13, 2005, hearing by OECA with the Board, OECA respectfully requests that the Board approve and ratify the proposed Agreements.

Respectfully submitted,

Dated: January 6, 2006

Robert A. Kaplan
E. Bruce Fergusson
Special Litigation and Projects Division (2248A)
Office of Civil Enforcement
Office of Enforcement
and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Counsel for Complainant
Office of Enforcement
and Compliance Assurance
U.S. Environmental Protection Agency

EXHIBITS 1-5

1. EPA Contact with Nongovernmental Environmental and Citizen Groups during the Development of the AFO-CAFO

2. Declaration of Sanda S. Howland (#2)

3. Declaration of Sanda S. Howland (#1)

4. DOJ Waiver Letter

5. Declaration of Robert J. Blaszczak

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Complainant's Brief in Response to the Non-Party Brief Filed on December 20, 2005 by the Association of Irritated Residents, Et Al, in the matter of Consent Agreements and Proposed Final Orders for Animal Feeding Operations (CAA-HQ-xx, CERCLA-HQ-xx, EPCRA-HQ-xx), were sent to the following persons in the manner indicated:

By Hand Delivery:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

By U.S. First Class Mail:

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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
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Woodridge, NY 12789

Henningsen Foods, Inc.
Shell Egg Division
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David City, NE 68632

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Ft. Recovery, Ohio 45846

Center Fresh Egg Farm, LLP
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Oskaloosa, Iowa 52577

Steven C. Badgett
Badgett Enterprises LTD
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Ft. Recovery, OH 45846

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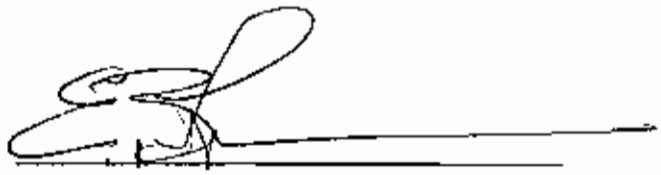
Dated: January 6, 2006



Bruce Fergusson
Special Litigation and Projects Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency

EXHIBIT 1

See the file
for this exhibit.

EXHIBIT 2

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

In Re:	)	
	)	Declaration of Sanda S. Howland (#2)
Consent Agreements and	)	
Proposed Final Orders for	)	CAA-HQ-2005-xx
Animal Feeding Operations	)	CERCLA-2005-xx
	)	EPCRA-2005-xx
	)	

I, Sanda S. Howland, declare the following to be true and correct:

1. I am employed by the United States Environmental Protection Agency (U.S. EPA) as an Environmental Protection Specialist with the Office of Civil Enforcement, Special Litigation and Projects Division, at U.S. EPA Headquarters in Washington, D.C. I have been so employed since June of 2001, and serve as a case development officer for many statutes, including the Clean Air Act, CERCLA, and EPCRA. I have performed case development activities for the Agency across various media since 1985.

2. This declaration is based upon my personal knowledge and experience gained from my professional work at U.S. EPA, and my involvement in the negotiations with representatives from the animal feeding operation (AFO) industry that led to the AFO Air Compliance Agreement (the Agreement).

3. For the past three years I have served on the OECA team that negotiated the Agreement, as well as specific case teams for other AFO enforcement actions involving possible noncompliance with federal air emissions laws.

4. Negotiations with AFO industry representatives on a consent agreement to address

possible widespread noncompliance with federal air emissions laws began in late 2001 and lasted until January of 2005, when the Agreement was published in the Federal Register.

5. The negotiations with AFO industry representatives were lengthy and frequently contentious, as both sides strongly advocated their respective positions. Both sides were represented by counsel and supported by staff with technical knowledge of the AFO industry.

6. The resulting Agreement was the result of this arms-length negotiation and represents compromises on both sides.

7. Beginning in May of 2003, OECA met on numerous occasions with representatives from various environmental organizations and citizens groups, including the Association of Irritated Residents, Environmental Integrity Project, Iowa Citizens for Community Improvement, and the Sierra Club, to discuss the consent agreement that was being negotiated between OECA and representatives from the AFO industry and to hear their concerns.

8. Dr. Joe Rudek, a representative from Environmental Defense, was invited to participate in the workgroup of 30 industry, Agency, and academic scientists that developed the "National Air Emissions Monitoring Study Protocol" (Attachment B to the Agreement). Dr. Rudek fully participated in that workgroup.

9. OECA publicly released two drafts of the consent agreement on October 9, 2003, and December 10, 2003, and specifically asked for line-by-line comments on the drafts from various environmental organizations and citizens groups, including the ones cited above. All of the relevant concerns raised by these groups were fully considered by EPA, and changes were made to the final Agreement to address their concerns where appropriate.

I declare under penalty of perjury under the laws of the District of Columbia and the United States that the foregoing is true and correct and that I executed this declaration on the 5th day of January, 2006

Sanda S. Howland
Environmental Protection Specialist, U.S. EPA.

EXHIBIT 3

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

In Re:	)	
	)	Declaration of Sanda S. Howland (#1)
Consent Agreements and	)	
Proposed Final Orders for	)	CAA-HQ-2005-xx
Animal Feeding Operations	)	CERCLA-2005-xx
	)	EPCRA-2005-xx
	)	

I, Sanda S. Howland, declare the following to be true and correct:

1. I am employed by the United States Environmental Protection Agency (U.S. EPA) as an Environmental Protection Specialist with the Office of Civil Enforcement, Special Litigation and Projects Division, at U.S. EPA Headquarters in Washington, D.C. I have been so employed since June of 2001, and serve as a case development officer for many statutes, including the Clean Air Act (CAA), CERCLA, and EPCRA. I have performed case development activities for the Agency across various media, since 1985.

2. This declaration is based upon my personal knowledge and experience gained from my professional work at U.S. EPA, and my development of penalty calculations, review of records, data, and other information pertaining to the application of CERCLA, the CAA, and EPCRA to animal feeding operations (AFOs).

3. For the past three years I have served on the EPA team that developed the Air Compliance Agreement, as well as specific case teams for other AFO cases.

4. In this capacity, I have encountered many obstacles in pursuing enforcement

actions against these entities. Specifically, the lack of industry-wide, recognized emission factors has made determining the compliance status for AFOs difficult. The pursuit of enforcement actions taken against AFOs for Clean Air Act, CERCLA and EPCRA violations is a recent phenomenon. Competing research studies, as illustrated by the National of Academy of Sciences report, illustrate the need for extensive air emissions testing to be conducted over a wide variety of facilities and locations, in order to have a more widely accepted standard of determination.

5. Calculating penalties once violations have been confirmed is problematic. For the Clean Air Act, a lack of standardized control technologies renders case development officers unable to make a defensible determination in determining avoided costs/and or economic benefit for failure to implement controls for this industry. At this time, development of effective control technologies are in the nascent stage, and are still undergoing field trials and testing.

6. Regarding reporting violations under EPCRA and CERCLA, existing scientific literature describes a significant range of ammonia and hydrogen sulfide emissions estimates for the same livestock species. There often is a dispute between the Agency and the AFO, on what air monitoring methods, protocol(s), and calculations the AFO should use as a basis for its estimates, and over what period of time.

7. One of EPA's primary enforcement tools to compel AFOs to conduct their own monitoring is the CAA Section 114 Information Request. EPA in the past has entered into long and arduous enforcement proceedings to enforce testing required under 114 against AFOs.

8. For the past few years, I have assisted the EPA Region V team in enforcing the CAA requirements against Buckeye Egg. This case commenced in July of 2000 with EPA inspections of Buckeye's 3 egg-laying facilities in Ohio, and continues to this day. Based on its

inspection results and a published research study from Northern Europe, Region V determined that Buckeye may be in violation of the PSD and Title V provisions of the CAA.

9. The Region issued its first Section 114 information request and Notice of Violation to Buckeye on January 19, 2001, requiring emissions testing. Buckeye refused to do the testing, citing a different published research study based on air emissions from a barn in Pennsylvania to prove that their emissions would not trigger Clean Air Act requirements. Buckeye also cited financial inability, claiming the full study would cost upwards of $700,000.00 to complete. Buckeye agreed to perform short-term testing in June of 2001 and September of 2003, but failed to fulfill the requirement to conduct several months of air testing required to confirm their yearly emission amounts.

10. Based on tests conducted under close EPA supervision, Buckeye was found to exceed the 250 tons per year PSD threshold and the 100 tons per year Title V Clean Air Act trigger requirements. Buckeye also exceeded the Reportable Quantity for ammonia under CERCLA, and had previously reported to the National Response Center and EPA. Nevertheless, Buckeye still refused to comply with the multi-month testing order, and EPA issued a Unilateral Administrative Order (UAO) in 2002, followed by a judicial complaint in November of 2003 for failure to comply with the UAO. The State of Ohio shut Buckeye down in October of 2003 for failure to comply with State Orders. In late December of 2003, Buckeye was sold to its new and current owner, Ohio Fresh Eggs (OFE). On December 30, 2003, a Writ of Attachment against Buckeye was filed by the Department of Justice on the proceeds of the sale.

11. The Buckeye case finally settled in February of 2004, with the new owner, Ohio Fresh Eggs, agreeing to investigate, install and test a PM control device and implement ammonia

reduction technology. OFE is currently in the process of testing PM control technologies and ammonia reduction technologies in an effort to identify an effective and satisfactory control technology scheme for its facilities.

12. The Consent Decree provided Buckeye, and then later Ohio Fresh Eggs the opportunity to field trial different PM and ammonia emission control methods, since BACT for this industry has not yet been developed.

13. The first attempt at testing proposed technology at Ohio Fresh Eggs, which included a particulate control device for PM emissions, was met with limited success. Initial results indicated that, while it did reduce PM emissions somewhat, the particulate impaction curtain was not durable or efficient enough to withstand continued use. The initial ammonia reduction control approach, which entailed using a surfactant on the manure to control emissions, also did not succeed. The second and current approach, which includes a form of electrostatic precipitation (for PM control) and ammonium sulfate (for ammonia control) has been more promising, but several more months of continuous emissions measurement is needed to determine its effectiveness. Therefore, this enforcement action, initiated in July of 2000, is not concluded, 5 years later. The appropriate controls and economic benefit are not yet known.

I declare under penalty of perjury under the laws of the District of Columbia and the United States that the foregoing is true and correct and that I executed this declaration on the 5th day of January, 2006.

Sanda S. Howland
Environmental Protection Specialist, U.S. EPA.

EXHIBIT 4

U.S. Department of Justice

Environment and Natural Resources Division

Environmental Enforcement Section
P.O. Box 7611
Ben Franklin Station
Washington, DC 20044-7611

Telephone (202) 514-4624
Facsimile (202) 353-0296
Facsimile (202) 514-0097

January 27, 2005

Robert Kaplan, Director
Special Litigation and Projects Division
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Request for Waiver of on EPA Authority to Initiate Administrative Cases Under the Clean Air Act Section with regard to Animal Feeding Operations

Dear Mr. Kaplan:

This is in response to your memorandum of October 5, 2004, requesting a waiver of the time limitation set forth in Section 113(d) of the Clean Air Act (CAA), 42 U.S.C. § 7413(d), for bringing administrative actions, in order to allow EPA to pursue certain administrative enforcement actions for potential violations of Title I, Parts C and D, and Title V of the Clean Air Act regarding emissions of certain pollutants from animal feeding operations ("AFOs"). Your memorandum is written in connection with the Animal Feeding Operations Consent Agreement and Final Order ("AFO/CAFO") referenced in your memorandum, which EPA intends to offer to eligible owners and operators of AFOs.

This waiver is approved subject to the following conditions. First, the waiver will expire one year from the date of this letter. Second, the AFO/CAFO offered to each Respondent must be in substantially the form set forth in the version of the AFO/CAFO generic agreement which EPA made public on January 21, 2005. Third, this waiver is not intended to and shall not preclude EPA from referring a proposed civil judicial enforcement action for any violations addressed or covered by this waiver, but not included in the AFO/CAFO program. For example, EPA might determine that egregious conduct or unusual circumstances warrant judicial enforcement. Finally, EPA shall send to the Environmental Enforcement Section a report on the one year anniversary of this waiver identifying each administrative case or proceeding for which EPA invokes the use of this waiver.

If you have any questions, please call me at (202) 514-4624, or Karen Dworkin at (202) 514-4084.

Sincerely,

Bruce S. Gelber
Chief
Environmental Enforcement Section

EXHIBIT 5

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

In Re:	Declaration of Robert J. Blaszczak
Consent Agreements and Proposed Final Orders for Animal Feeding Operations	CAA-HQ-2005-xx CERCLA-HQ-2005-xx EPCRA-HQ-2005-xx

I, Robert J. Blaszczak, declare as follows:

1. I make this declaration based on my own personal experience.

2. I am currently employed by the Environmental Protection Agency as an Environmental Engineer. I have been an Environmental Engineer with the EPA since June 1971. I have been the Clean Air Technology Center (CATC) and RACT/BACT /LAER Clearinghouse (RBLC) team leader in the Office of Air Quality Planning and Standards, Office of Air and Radiation, U.S. EPA since January 1989.

3. My current duties include overall responsibility for the operation and maintenance of the RBLC. As leader of a 5-member RBLC team, I coordinate with EPA regional offices to identify permitting actions that need to be in the RBLC and I work with state and local permitting agencies to acquire permit data for the Clearinghouse. The team is also responsible for reviewing the permit data acquired by the RBLC to assure that it is as complete as possible, understandable, and that the technology required is consistent with basic air pollution prevention and control principles.

4. The RBLC database contains case-specific information on the "Best Available" air pollution technologies that have been required to reduce the emission of air pollutants from stationary sources (e.g., power plants, steel mills, chemical plants, etc.). This information has been provided by state and local permitting agencies. Based on a comparison of permitting actions reported by EPA Regional Offices and actual permitting data in the RBLC, I have concluded that approximately 80% of the major permits issued in the U.S. within the past 5 years are represented in the RBLC.

5. I have reviewed the RBLC and have found no entries that directly address AFOs or emissions from AFOs. Therefore, there are no AFO controls listed in the RBLC.

I declare under penalty of perjury under the laws of the State of North Carolina and the United States that the foregoing is true and correct and that I executed this declaration on the 5th day of January, 2006.

Robert J. Blaszczak