UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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ENVIR. APPEALS BOARD

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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Consent Agreements and Proposed Final Orders for Animal Feeding Operations

FROM: Granta Y. Nakayama
Assistant Administrator

TO: Environmental Appeals Board

On January 27, 2006, the Environmental Appeals Board (EAB) approved Consent Agreements and Final Orders (the approved Agreements) for twenty animal feeding operations (AFOs).[1] 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[2] (EAB Jan. 27, 2006) (Final Order). The approved Agreements are part of a larger group of proposed Consent Agreements and Final Orders that the EPA has received in response to its offer to the animal feeding industry to sign a consent agreement to resolve potential liabilities stemming from air emissions and to contribute to funding a nationwide emissions monitoring study, as described more fully below.

EPA's Office of Enforcement and Compliance Assurance (OECA) seeks the Environmental Appeals Board's approval of an additional 702 Consent Agreements and Final Orders (hereinafter the proposed Agreements) entered into between EPA and the Respondent owners and operators of egg-laying and swine AFOs. These 702 proposed Agreements contain 48 non-confidential business information (CBI) proposed Agreements for egg-laying operations

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[1]Animal feeding operations are defined under the regulations for the Clean Water Act as, "a lot or facility (other than an aquatic animal production facility) where the following conditions are met: (i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12 month period, and (ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility." 40 C.F.R. § 122.23(b)(1) (2005).

[2]The "xx" in this docket number is a place holder. Attachment A to this Memorandum contains the 702 Respondents' docket numbers.

(333 farms) and 654 non-CBI proposed Agreements for swine operations (2,143 farms). A list of these 702 Respondents is included as Attachment A to this memorandum.

The Board has requested that OECA only submit one signed proposed Agreement as a sample[3] because the proposed Agreements are identical with the exception of the information filled in by the Respondent in Attachment A to the proposed Agreement. Attachment B to this memorandum summarizes all of the information from each Respondent's Attachment A to the proposed Agreement. Should the Board wish to view any of the Respondents' signed proposed Agreements, OECA would be happy to make the proposed Agreement(s) available upon request. Following this submission of 702 proposed Agreements, approximately 1700 proposed Agreements will remain for EAB submission over the coming months. OECA will next submit approximately 280 non-CBI proposed Agreements for diary operations.

The proposed Agreements are issued pursuant to Section 113 of the Clean Air Act (CAA), 42 U.S.C. § 7413; Section 325 of the Emergency Planning and Community Right to Know Act (EPCRA), 42 U.S.C. § 11045; and Sections 103 and 109 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9603 and 9609; and settle specified claims under these statutes against the Respondents. With the exception of the specific farm and emission unit information contained in Attachment A to each proposed Agreement, the proposed Agreements are identical to the twenty Agreements previously approved by the Board, the model Agreement published in the January 31, 2005 Federal Register notice, and to the sample proposed Agreement that is attached to this memorandum (Attachment C). Each penalty assessed by the proposed Agreements is in accordance with the formula established in Paragraph 48 of the model Agreement in the January 31, 2005 Federal Register notice. See *Animal Feeding Operations Consent Agreement and Final Order*, 70 Fed. Reg. 4958, 4966 (Jan. 31, 2005); see also Attachment A (Penalty Calculation Table for 702 Respondents) and Attachment B (Emission Unit Table for 702 Respondents (Layer Operations and Swine Operations)).

Because EPA and the Respondents have agreed to settle claims under the CAA, CERCLA, and EPCRA before the filing of a complaint, this proceeding will be simultaneously commenced and concluded by the issuance of these Consent Agreements and Final Orders as provided by EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. §§ 22.13 and 22.18(b)(2) & (3). The proposed Agreements have been signed by a representative of the AFOs listed in Attachment A, and Robert A. Kaplan, Director of the Special Litigation and Projects Division (SLPD), in the Office of Civil Enforcement (OCE), within OECA.

This memorandum is provided in accordance with the Environmental Appeals Board's Consent Order Review Procedures (Jan. 5, 1993). I have reviewed ten of the proposed Agreements as a sample and have determined that they are consistent with EPA's *Clean Air Act*

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[3]The sample signed Consent Agreement is Attachment D to this memorandum.

Stationary Source Civil Penalty Policy (Oct. 25, 1991) and the *Final Enforcement Response Policy for Sections 304, 311, and 312 of EPCRA, and Section 103 of CERCLA* (Sept. 30, 1999). Accordingly, I submit the attached proposed Agreement (Attachment D) as a sample of the Agreements submitted by these 702 Respondents for the EAB's review and approval.

I. Background

In late 2001, EPA began discussions with representatives from the AFO industry on the concept of a voluntary enforcement agreement that would address possible non-compliance with federal laws pertaining to air emissions. In addition to bringing the industry into compliance, the conceptual agreement would address data problems and the lack of reliable emissions factors for AFOs that make it difficult for individual AFOs to determine their level of emissions and what laws and regulations apply to their facilities.

In December of 2001, EPA and the U.S. Department of Agriculture asked the National Academy of Sciences (NAS) to review and evaluate the scientific basis for estimating emissions of various air pollutants from AFOs. The NAS issued a final report in February 2003 concluding that scientifically sound and practical protocols for measuring air emissions from AFOs needed to be developed. The NAS also found that existing methodologies for estimating air emissions from AFOs are generally inadequate because of the limited data on which they are based. Final Report, Air Emissions from Animal Feeding Operations: Current Knowledge, Future Needs, National Research Council of the National Academies, Feb. 2003, at 6-7, & App. A at 168 ("Statement of Task"). The NAS's findings regarding the uncertainties in measuring and estimating emissions had the immediate practical effect of making enforcement of the laws pertaining to air emissions at AFOs more difficult. The NAS also underscored the need for the Agency to develop reliable emission-estimating methodologies, which would enable EPA to more effectively enforce the CAA and other federal laws pertaining to air emissions from AFOs.

Thereafter, EPA began revising the conceptual enforcement agreement to specifically address the data and emission-estimating methodology needs cited by the NAS, while bringing a large segment of the AFO industry into compliance with the CAA, CERCLA, and EPCRA. Over the next two years, EPA sought input and comment on drafts of the enforcement agreement from many groups, including state officials, representatives from the agricultural industry, environmental organizations, and local citizen groups.

On January 31, 2005, EPA published a notice in the Federal Register offering animal feeding operations an opportunity to sign a voluntary Consent Agreement and Final Order.[4]

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[4] *Animal Feeding Operations Consent Agreement and Final Order*, 70 Fed. Reg. 4958 (Jan. 31, 2005). The original Federal Register notice and all subsequent notices regarding the proposed Agreement including extensions of the sign-up period were included as Attachments X, Y, Z, and AA in the November 4, 2005 Memorandum from Assistant Administrator Nakayama

Under the proposed Agreements, which are administrative penalty orders, the Respondents are required to pay an assessed penalty to resolve potential civil liability. Respondents also participate in funding an extensive, national AFO air monitoring study by contributing up to $2,500 per farm into an EPA-approved monitoring program. The monitoring study will lead to the development of methodologies for estimating emissions from AFOs and will allow Respondents to determine and comply with their regulatory responsibilities under the CAA, CERCLA, and EPCRA. Once applicable emission-estimating methodologies have been made available by EPA, the liability release in the proposed Agreement is contingent on the Respondent certifying that it is in compliance with all relevant requirements of the CAA, CERCLA, and EPCRA. In return, Respondents receive a release and covenant not to sue for the specific violations identified by applying the relevant emissions-estimating methodologies. Although the proposed Agreement is voluntary, AFOs that choose not to participate do not receive a liability release and covenant not to sue and may be subject to enforcement.

The deadline to sign the proposed Agreement was August 12, 2005. Approximately 2,700 proposed Agreements have been submitted to EPA, covering over 6,500 pork, poultry, and dairy farms. In its January 31, 2005 notice, EPA also requested public comment on the proposed Air Compliance Agreement. The public comment process and EPA's response to public comments is discussed in Section IX below.

The proposed Agreements are the most efficient means to obtain the data needed to determine whether the Respondents are in compliance with federal environmental laws applicable to air emissions from their operations. Because data and methodologies are currently limited, it is difficult for AFOs to determine their emissions and consequently their regulatory responsibilities. The proposed AFO Air Compliance Agreements will allow settling AFOs to pool their resources to conduct monitoring at numerous sites across the United States. The data generated from this EPA-approved nationwide monitoring study will be crucial to developing accurate emission-estimating methodologies for large segments of the AFO industry. These emission-estimating methodologies will then be used by thousands of AFOs to determine their level of emissions and to come into compliance with applicable laws, and by EPA to bring enforcement actions against AFOs that fail to comply.

II. Statement of Facts and Violations

The Respondents listed in Attachment A, like all AFOs, house animals in a confined space, usually a barn-type structure. Many of the hog farms listed in Attachment A also have one or more lagoons where animal wastes are stored and/or treated. (See Attachment B for information on each farm's emission unit(s)). Air emissions can come from several areas at an AFO, including barns, lagoons, and fields where manure is applied on crops. AFOs typically

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to the EAB (Docket No. CAA-HQ-2005-xx, CERCLA-HQ-2005-xx, EPCRA-HQ-2005-xx) (hereinafter November 4, 2005 Memorandum).

emit several air pollutants, including volatile organic compounds (VOCs), hydrogen sulfide (H_2S), particulate matter (TSP, PM10 and PM2.5), and ammonia (NH3). Hydrogen sulfide, particulate matter, and VOCs are regulated under the CAA and implementing federal and state regulations. Ammonia and hydrogen sulfide are hazardous substances under CERCLA and EPCRA, and their release from a facility may need to be reported under those statutes.

A. CAA Violations

The proposed Agreements allege potential violations of CAA Title I, Parts C (Prevention of Significant Deterioration of Air Quality) and D (Plan Requirements for Nonattainment Areas), and Title V, as well as the federally-enforceable state implementation plan (SIP) requirements. These CAA provisions and SIP requirements generally require facilities to apply for permits from the relevant permitting authority if their emissions of any regulated pollutant, including VOCs, hydrogen sulfide, and particulate matter, exceed regulatory thresholds or are identified as contributing to an area's nonattainment status.

B. CERCLA and EPCRA Violations

The proposed Agreements allege potential violations of CERCLA Section 103 and EPCRA Section 304. These statutory provisions require facilities to report a release of a hazardous substance if it is released in amounts that meet or exceed the reportable quantity (referred to as the "RQ") for that substance. AFOs routinely emit two hazardous substances that are regulated under CERCLA and EPCRA – ammonia and hydrogen sulfide. The RQ for both ammonia and hydrogen sulfide is one hundred (100) pounds in any 24-hour period. Consequently, CERCLA Section 103 and EPCRA Section 304 may require Respondents to report releases of ammonia and hydrogen sulfide depending on whether Respondents' facilities emit 100 pounds of either substance in any 24-hour period.

III. Statement of How the Settlement Addresses the Violations Identified

CAA Compliance

The release and covenant not to sue in the proposed Agreements are contingent on the Respondent submitting all applicable CAA permit applications within 120 days after EPA has published emission-estimating methodologies applicable to a Respondent's source. For a source whose emissions exceed the major source threshold in Title I, Part C or D, which vary based on the area's attainment status (e.g., in an attainment area, more than 250 tons per year of PM), Respondent must either obtain a permit limiting its emissions to less than the applicable major source threshold, or install Best Available Control Technology (BACT) in an attainment area, or technology meeting the Lowest Achievable Emission Rate (LAER) if the source is located in a nonattainment area.

If the applicable emission-estimating methodologies establish that no CAA requirements apply to a Respondent's source, then the Respondent must certify to EPA within 60 days after EPA makes emission-estimating methodologies applicable to the Respondent's source available that no CAA requirements or state SIP requirements apply to that source.

EPA has obtained a 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. This waiver was renewed by the Department of Justice for an additional year on February 3, 2006. The waiver of the time limitation was issued pursuant to Section 113(d) of the CAA, 42 U.S.C. § 7413(d)). See Attachment E (Letter from B. Gelber, Chief, Env. Enf. Sect., DOJ, to R. Kaplan, Director, Special Lit. & Proj. Div., EPA (Feb. 3, 2006)).

CERCLA and EPCRA Compliance

The release and covenant not to sue in the proposed Agreements are contingent on the Respondent reporting all qualifying releases of ammonia and hydrogen sulfide as required under Section 103 of CERCLA and Section 304 of EPCRA within 120 days after EPA has published emission-estimating methodologies applicable to a Respondent's facility. If the applicable emission-estimating methodologies establish that no CERCLA or EPCRA requirements apply to Respondent's facility, then the Respondent must certify to EPA within 60 days that no CERCLA or EPCRA hazardous release reporting requirements apply to that facility.

IV. Consistency with the Applicable Penalty Policy Guidance

Pursuant to Paragraph 48 of the proposed Agreement, each Respondent must pay a civil penalty ranging from $200 to $100,000, depending on the size of the farm and the number of farms covered by the Respondent's proposed Agreement.[5] If the Respondent's proposed Agreement covers only a single farm that is smaller than the Large Concentrated Animal Feeding Operation threshold found at 40 C.F.R. § 122.23(b)(4) (e.g., a hog farm with less than 2,500 animals), the civil penalty is $200. If the Respondent's proposed Agreement covers more than one farm and/or its farm is larger than the Large Concentrated Animal Feeding Operation threshold, but less than 10 times that threshold, the civil penalty is $500 per farm. If the Respondent's farm is more than 10 times the Large Concentrated Animal Feeding Operation threshold (e.g., a hog farm with more than 25,000 animals), then the civil penalty is $1000 per farm. Total civil penalties are capped at $100,000, regardless of the size and number of farms covered by the Respondent's proposed Agreement.

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[5]A "Farm" is defined in Paragraph 14 of the proposed Agreement as, "the production area(s) of an animal feeding operation, adjacent and under common ownership, where animals are confined, including animal lots, houses or barns; and Agricultural Waste handling and storage facilities."

In determining the appropriate penalty amount to be assessed for these proposed Agreements, EPA considered both the statutory penalty factors found in the CAA, CERCLA, and EPCRA, *Animal Feeding Operations Consent Agreement and Final Order*, 70 Fed. Reg. 4958 (Jan. 31, 2005) and *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), and the *Clean Air Act Stationary Source Civil Penalty Policy* (Oct. 25, 1991) and the *Final Enforcement Response Policy for Sections 304, 311, and 312 of EPCRA, and Section 103 of CERCLA* (Sept. 30, 1999). See Attachments X, Z, V, and W from the November 4, 2005 Memorandum.

Statutory Factors. The Clean Air Act provides that the Administrator:

> shall take into consideration (in addition to other factors as justice may require) 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 as established by any credible evidence . . . , payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

42 U.S.C. § 7413(e)(1). The maximum amount of any penalty under the CAA is $32,500 per day per violation. See 42 U.S.C. § 7413(b) (as adjusted by the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. § 19.4). The statutory penalty criteria for CERCLA and EPCRA are similar to the CAA and include:

> the nature, circumstances, extent and gravity of the violation or 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) and 11045(b)(1)(c). The maximum amount of any penalty under CERCLA for a violation of section 103 and under EPCRA for a violation of section 304 is $32,500 per day per violation for a first time violation and $97,500 per day per violation for a second or subsequent violation. 42 U.S.C. §§ 9609(a)(1) & (b) and 11045(b)(1) & (2) (as adjusted by the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. § 19.4).

The penalty amounts in the proposed Agreements follow the statutory penalty criteria. They are scaled according to both the size of farm and number of farms covered by each Agreement. See Attachment C (Sample Proposed Agreement) at para. 48. These characteristics relate to the statutory penalty criteria for size of business, economic impact, and ability to pay. The scaled penalties also relate to the penalty criteria regarding the seriousness or gravity of the violation: larger farms, as well as Respondents operating more farms, are more likely to exceed

various regulatory thresholds – and by larger amounts. Finally, the compliance history factor was considered but determined not to be relevant under these facts. In general, the application of CAA, CERCLA, and EPCRA authorities to AFOs is a recent phenomena. As the NAS notes, despite the effects of farming on the environment, agriculture has been "one of the last uncharted frontiers of environmental regulation." NAS Study at 108 (quotations and citations omitted). There have been few air permit enforcement cases against AFO's – indeed, OECA is unaware of a single major source CAA permit issued to an AFO.[6] Consistent with this history, a search of enforcement databases revealed that none of the Respondents has a history of violations related to air emissions from their farms.

The penalty amounts are below the maximum amounts allowed under the statute. The reduced penalty amounts are appropriate, however, in consideration of other factors "as justice may require." With respect to current enforcement actions, the Agency has recognized the difficulty facing Respondents in determining their emission levels and compliance requirements in the absence of emission-estimating methodologies or practical protocols for measuring emissions. See NAS Study at 6 -7. The NAS study conclusions, together with EPA's assessment of the emissions estimates, create significant litigation risk in bringing these enforcement actions. Against this background, the prospect of obtaining substantial penalty awards in court appears unlikely in most cases.

Finally, it is difficult based on current information to determine the economic benefit of the potential violations. Not only is it problematic to determine the compliance status of individual farms, but the control technologies are almost completely unknown. As the NAS concluded: "[t]here is a general paucity of credible scientific information on the effects of mitigation technology on concentrations, rates, and fates of air emissions from AFOs." NAS Study at 5. Calculation of economic benefit depends on identification of a delayed or avoided cost. Here, mitigation technologies for this industry are just now being developed and tested. The efficacy and cost of many control technologies is unclear. Without such information, it is understandable that Best Available Control Technology (required for major sources in attainment areas) or the Lowest Achievable Emissions Rate (required for major sources in nonattainment areas) have not been established for AFOs.

Penalty Policies. The CAA, CERCLA, and EPCRA penalty policies use the same penalty criteria found in the underlying statutes to determine the amount of the penalty: size of violator, ability to pay, gravity or extent of violation, economic benefit, history of

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[6]Until recently, a number of states exempted agricultural sources from State Implementation Plan (SIP) permitting requirements. For example, California only repealed such an exemption in 2002, and is currently in the process of determining the compliance status of many of its sources. *Partial Withdrawal of Approval of 34 Clean Air Act Part 70 Operating Permit Programs in California; Announcement of a Part 71 Federal Operating Permits*, 67 Fed. Reg. 63551 (Oct. 15, 2002).

noncompliance, and other factors as justice may require.[7] As with the statutory penalty criteria, the scaled penalty amounts in the proposed Agreements for size of farm and number of farms covered by each proposed Agreement generally reflect the penalty factors found in the applicable penalty policies with respect to size of violation, gravity and extent of violation, economic benefit, and history of violation. The reduction in penalty amounts also generally reflect the mitigation factors found in the penalty policies, such as ability to pay and litigation risk.

We deviated from the applicable penalty policies, however, in not using the specific penalty tables and matrixes found in the policies because of the lack of current information regarding the specifics of the potential violations. For example, the gravity component matrix in the enforcement response policy for CERCLA Section 103 and EPCRA Section 304 violations requires a determination of the amount by which the release exceeds the RQ. Because there are currently no accepted emission-estimating methodologies, that determination could not be made, and the penalty matrix found in the policy could not be applied.

For the reasons stated above, EPA believes that the range in penalties it has chosen represents a fair assessment for the potential violations.

V. Description of the National Air Monitoring Study

As a condition of the release and covenant not to sue granted by the proposed Agreements, Respondents have a shared responsibility for funding and implementing an EPA-approved national air emissions monitoring study. This state-of-the-art study will take place over a two-year period, and will likely include over two dozen farms selected as representative of various geographic regions and operating methods. See Attachment X to the November 4, 2005 Memorandum (*Attachment B–National Air Emissions Monitoring Study Protocol: Overview and Summary*, 70 Fed. Reg. 4968 (Jan. 31, 2005)). Emissions of VOCs, hydrogen sulfide, particulate matter, and ammonia will be monitored at animal housing structures and animal waste storage and treatment areas. All data collected during the study will be publicly available.

The monitoring study is estimated to cost in excess of $14 million. Each Respondent is responsible for paying its pro rata share of the study, up to $2,500 per farm covered by the Respondent's proposed Agreement.[8] The monitoring study monies will be held by a nonprofit entity set up by the Respondents with a fully executed and approved Agreement. The nonprofit

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[7]See *Clean Air Act Stationary Source Civil Penalty Policy* (Oct. 25, 1991) and *Final Enforcement Response Policy for Sections 304, 311, and 312 of EPCRA, and Section 103 of CERCLA* (Sept. 30, 1999). Attachments V and W to the November 4, 2005 Memorandum.

[8]The pro rata share is equal to the number of farms covered by the Respondent's proposed Agreement divided by the total number of discrete farms of the same species that share responsibility for funding the national study, multiplied by the cost of the study for that species.

entity will contract with an independent monitoring contractor (the IMC) to manage the monitoring study. The IMC will submit a detailed plan to EPA, consistent with Attachment B to the proposed Agreement, to implement the study. The plan will include proposed monitoring sites. Per the Agreement, EPA will review and approve or disapprove the plan.

No later than eighteen months from the conclusion of the monitoring study, EPA will evaluate all data submitted and expects to make emissions-estimating methodologies for AFOs available on a rolling basis. The available emissions-estimating methodologies will allow AFOs to estimate their emissions and comply with federal regulatory requirements.

VI. Human Health and Environmental Concerns

As previously discussed, AFOs may emit particulate matter, VOCs, hydrogen sulfide, and ammonia. EPA has developed National Ambient Air Quality Standards (NAAQS) for particulate matter. VOCs are regulated as precursors to ozone, which has an applicable NAAQS.[9] Hydrogen Sulfide and reduced sulfur compounds are regulated as designated pollutants pursuant to the New Source Performance Standards (NSPS) for certain industries.

Depending on the outcome of the nationwide monitoring program, emissions from the Respondents' facilities may impact the ability of an area to comply with the NAAQS. To the extent that the Respondents' facilities are determined to be significant sources of air pollutants, Respondents are required under the proposed Agreement to come into compliance with all applicable CAA requirements, including installing required emission controls.

Hydrogen sulfide and ammonia are hazardous substances that can endanger public health and welfare at high ambient air concentrations. CERCLA and EPCRA require facilities to report releases of hydrogen sulfide and ammonia if they meet or exceed the RQ. Although EPA acknowledges the public health risk posed by ammonia and hydrogen sulfide, these proposed Agreements are intended to determine who must report under CERCLA and EPCRA, and not to determine whether emissions from specific AFOs are endangering public health. The proposed Agreements do not limit in any way EPA's authority under those statutes to restrain a Respondent or otherwise act in any situation that may present an imminent and substantial endangerment to public health, welfare, or the environment. To the extent that an individual AFO is endangering public health, welfare, or the environment, EPA can and will use its authorities outside of the proposed Agreements to remedy that particular situation.

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[9]The NAAQS are maximum ambient air concentration levels for pollutants set by EPA that are intended to protect public health, welfare, and the environment.

VII. Past or Pending Actions

EPA is not aware of any past or pending federal or state enforcement actions involving the Respondents' facilities arising out of the same facts.

VIII. Public Interest

As a result of these proposed Agreements, many thousands of AFOs will be able to determine their compliance status quickly and inexpensively. The result will be improved compliance with the regulatory schemes, with the installation of appropriate controls, if necessary. The comprehensive approach presented by these proposed Agreements will achieve the goal of widespread compliance much faster than any other enforcement mechanism. This settlement is therefore in the public interest.

IX. Public Comment on the Proposed Agreement

In its January 31, 2005 notice, EPA requested public comment on the proposed Air Compliance Agreement. EPA extended the comment period in a March 30, 2005 Federal Register notice. By the close of the comment period, EPA had received 657 unique comments on the proposed Agreement. EPA identified a number of common concerns, including the applicability of CERCLA and EPCRA to agricultural facilities, the impact of the proposed Agreement on state actions, and the amount of the civil penalty. On July 12, 2005, EPA published in the Federal Register its response to some of the public comments. See Attachment Z to the November 4, 2005 Memorandum. Most of the comments received during the public comment period had been previously expressed to EPA, and had been considered during the extensive three-year process of developing the proposed Agreement. EPA determined that no changes were needed to the proposed Agreement in response to the public comments received.

X. Petitions for Review Filed in the U.S. Court of Appeals for the D.C. Circuit

On May 27, 2005, the Association of Irritated Residents, the Environmental Integrity Project, the Iowa Citizens for Community Improvement, and the Sierra Club (collectively referred to as AIR) filed a Petition for Review of EPA's January 31, 2005 Federal Register notice ("Notice of Consent Agreement and Final Order, and Request for Public Comment") and the March 30, 2005 Federal Register notice ("Supplemental Notice to Extend Sign-Up Period for Consent Agreement and Final Order, and Reopening Public Comment") with the D.C. Circuit.

Association of Irritated Residents, et al. v. EPA, No. 05-1177 (D.C. Cir. May 27, 2005).[10] The petition characterized those Federal Register notices as a "final rule."

On June 24, 2005, the National Pork Producers Council (NPPC) filed a Motion for Leave to Intervene in the above case. On July 11, 2005, the Association of Irritated Residents, et al. filed an opposition to the NPPC's Motion for Leave to Intervene and a Motion to Hold the Case in Abeyance. On August 3, 2005, the Court granted the Petitioners' unopposed request to hold the case in abeyance pending their filing of a second petition related to later EPA statements on the proposed Agreement. At the same time, the Court ordered the parties to file a Motion to Govern Further Proceedings by September 22, 2005. By that same order, the Court also deferred ruling on the NPPC's Motion for Leave to Intervene.

On August 22, 2005, AIR filed an additional Petition for Review of EPA's July 12, 2005 Federal Register notice ("Supplemental Notice: Response to Comments on Consent Agreement and Final Order") and the August 3, 2005 Federal Register notice ("Supplemental Notice: Reopen Sign-up Period for Consent Agreement and Final Order"). Association of Irritated Residents, et al. v. EPA, No. 05-1337 (D.C. Cir. Aug. 22, 2005). Also on August 22, 2005, the Clean Water Action Alliance of Minnesota filed a separate, but almost identical Petition for Review of the January and March Federal Register notices. Clean Water Action Alliance of MN v. EPA, No. 05-1336 (D.C. Cir. Aug. 22, 2005).

On September 22, 2005, EPA and all of the petitioners filed a joint Motion to Consolidate all the cases. On October 19, 2005, the court granted the parties' request to consolidate the cases and further ordered the parties to submit a docketing statement and statement of issues by November 18, 2005. On November 3, 2005, the Department of Justice (DOJ), on behalf of EPA, filed a Motion to Dismiss challenges to the Federal Register notices because the challenges were not properly before the court. AIR filed their Opposition to the Motion to Dismiss on December 2, 2005. Following the January 27, 2006 approval of the first twenty Agreements, AIR filed a Motion to Strike that part of DOJ's Motion to Dismiss that argued that the Federal Register notices were not final Agency action because only EAB-approved Orders would be final Agency action. AIR then filed Petitions for Review of the EAB-approved Orders and additionally filed a Motion to Consolidate the existing case with the newly-filed challenges to the EAB-approved Orders. On February 8, 2006, the Court ordered EPA's Motion to Dismiss and AIR's Motion to Strike be referred to the merits panel for briefing on the issues presented in the motions. Thereafter, Intervenor-Respondents, the NPPC, filed a response opposing AIR's motion to consolidate and DOJ filed a response which did not oppose AIR's motion to consolidate. On March 8, 2006, Roe Farm, Inc., one of the first 20 EAB-approved Respondents to the Agreement, and the NPPC filed a Motion for Leave to Intervene in AIR's Petition for Review of the EAB-approved Orders.

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[10]The court filings after November 3, 2005, associated with these petitions are included as Attachments F, G, H, I, J, K, L, M, N, and O.

RECOMMENDATION: For the reasons presented herein, OECA recommends that the EAB ratify the 702 proposed Agreements.

Please address any questions concerning this memorandum or the attached documents to Robert Kaplan at (202) 564-1110, Bruce Fergusson at (202) 564-1261, or Sanda Howland at (202) 564-5022.

ATTACHMENTS A - O

OECA hereby incorporates by reference, Attachments V, W, X, Y, Z, AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, and KK from the November 4, 2005 Memorandum from Assistant Administrator Nakayama to the EAB (Docket No. CAA-HQ-2005-xx, CERCLA-HQ-2005-xx, EPCRA-HQ-2005-xx).

A:	Penalty Calculation Table for 702 Respondents[11]
B:	Emission Unit Table for 702 Respondents (Layer Operations and Swine Operations)
C:	Sample Proposed Agreement
D:	Signed Proposed Consent Agreement (Sample of 702 Respondents' Agreements)
E:	DOJ Waiver Letter (dated February 3, 2006)
F - O:	Citizen Petitions for Review and Subsequent Filings in the D.C. Circuit (dated after November 3, 2005)

[11]This Attachment includes the Respondents' docket numbers.