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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

U.S. ENVIRONMENTAL APPEALS BOARD

In the matter of:		
Consent Agreements and Proposed Final Orders for Animal Feeding Operations.	:	Docket No. CAA-HQ-2005-xx CERCLA-HQ-2005-xx EPCRA-HQ-2005-xx
Respondents.	:	

Tuesday, December 13, 2005

EPA
1201 Constitution Avenue, NW
Washington, D.C.

The hearing in the above-entitled matter convened, pursuant to notice, at 10:00 a.m.

BEFORE:

HONORABLE ANNA L. WOLGAST
HONORABLE EDWARD E. REICH
HONORABLE KATHIE A. STEIN

APPEARANCES:

On Behalf of the Office of Compliance and Assurance:

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C O N T E N T S

P R O C E E D I N G S

THE CLERK: All rise. The Environmental Appeals Board of the United States Environmental Protection Agency is now in session for hearing, in re: Consent Agreements and Proposed Final Orders for Animal Feeding Operations; Consent Agreement and Final Order, CAA-Headquarters-2005, CERCLA-Headquarters-2005, EPCRA-Headquarters-2005; Honorable Judges Anna Wolgast, Ed Reich, Kathie Stein, presiding.

Please be seated.

JUDGE REICH: Good morning. As the Clerk just noted, we will be hearing discussion this morning based on the submission to the Board from Grant and Nakayalma (ph) that was dated November 4, 2005, and filed with the Board on November 9, 2005. That memorandum transmitted 20 CAFOs, which we understand to be the leading edge of a slew of additional CAFOs.

Pursuant to the Board's order of November 18, 2005, we, among other things, scheduled this hearing and on December 8th we issued an order

allocating time for this hearing.

We have three participants in this hearing. The first is EPA's Office of Compliance and Assurance. The second are counsel from Crowell & Moring, who I understand represents six of the 20 named respondents. And as the hearing goes on, they may just refer to that group collectively as the respondents, recognizing that it's actually only a subset of the 20 respondents.

And then finally, we have received a letter and a request to participate from a group of community environmental groups that refer to themselves, collectively, as AIR. And while we denied intervention, we did approve their participation in this hearing as well as their request to submit a brief responding to the brief that we had just received from the Agency. So those are the participants this morning.

In accordance with the December 8 order, we're going to proceed slightly differently than we normally would were this an oral argument. I assure you that this is going to be harder on us

than it is on you because it's going to require us to exercise a certain amount of uncommon self-restraint during your presentations.

Rather than do what we normally do in an oral argument where we allocate time that's really combined time for both argument and questions--as you probably know really means the first time you stopped to take a breath we're jumping in questions and that's the end of your presentation--we're actually going to give you a period of time to make a brief presentation, as outlined in the order without interruption, and we will have, basically, an off-the-clock period for the Board to ask whatever questions the Board feels would be useful to it, and that's how we'll proceed.

The order of proceeding would be OECA first, and then counsel for respondents, and then counsel for AIR. And as we noted, OECA can take up to five minutes at the end for rebuttal. They don't have to reserve time for rebuttal where the Board may, on its own initiative, ask OECA to respond to additional questions based on what

evolves during the course of the hearing.

So with that by way of background, let me ask counsel for OECA to come to the podium, identify themselves for the record, and then they may proceed.

MR. KAPLAN: May it please the Board, my name is Robert Kaplan. I am the Director of the Special Litigation and Projects Division in the Office of Compliance and Assurance. With me at counsel's table is Bruce Ferguson of the same division.

We seek the Board's approval for 20 animal feeding operations settlement filed with the Board on November 9th. The Board has asked us three main questions. Our answers to these questions made clear the Board has authority to approve the settlements. I will address the scope of the Board's review as well as one additional point: the allegations against the respondents.

If the Board pleases, Mr. Ferguson will address the penalty aspects in the time that's remaining.

Let me first say these arguments and agreements achieve outstanding results for the environment. We are here faced with an entire industry that has for a number of reasons not applied for and obtained clean air permits, and for the most part has not reported their emissions pursuant to CERCLA and EPCRA. If approved by the Board, these agreements, the first will a slew referenced by the Board, some 2700 companies representing some 600--or 6,800 farms across the country, will put these farms on the road to compliance. This will occur quickly and efficiently representing a win for the environment and a level playing field for all participants.

The most important part of the agreements is a nationwide monitoring study that will take place, carried out pursuant to EPA protocols by the best scientists in the field. This will occur far faster and more certainly than any other means available to OECA.

I now turn to the questions asked of us by the Board, and I will touch on the first two

questions asked by the Board and try not to repeat what we said in the brief and instead provide some further examples of why this is both approvable by the Board and also satisfy the requisites of Part 22.

The first is a straightforward construction of what we submitted. We contend that these are administrative penalty orders--and these administrative penalty orders are APOs, as I'll refer to them--contained within them conditions. And the conditions are all part of a very large and elaborate complex covenant not to sue. So again, an APO with conditions. There is clear authority for putting conditions on an APO, and that's found in Section 113(d) of the Clean Air Act. And if I might just read one key provision, it says:

"The administrator may compromise, modify, or emit, with or without conditions any administrative penalty which may be imposed under this subsection." So the authority exists to condition APOs.

We advance also two alternative arguments

in addition to that APO argument. This is either an ACO, administrative compliance order, pursuant to Section 113(a) of the Clean Air Act that the Board may approve pursuant to its delegations and the crop; or again, the alternative, the Director of the Special Litigation and Project Division, has authority delegated down from the administrator to the AA for Enforcement to the division director level, as it made clear in our briefs. So this may be considered an APO with an ACO that has been effectuated-issued by the division director.

Let me now turn to Part 22 and just very quickly recap their argument. In the usual settlements, parties agree to compromise claims before they are fully developed, and that's exactly what we've done here. We are leveraging our scarce enforcement resources into a much larger and global settlement against not entire industry a large component of the industry that have come to us as individuals and signed consent agreements.

Section 22.18(B)(2) imports provisions and incorporates, by reference, provisions of 22.14,

and we've satisfied each of those conditions in 22.14. Paragraph 3 makes clear the sections authorizing what we've done. We've also set out specific references to each provision in paragraph 4, which alleges certain potential violations read together with the covenant not to sue. And paragraph 26 makes clear that we have set out five allegations.

We've also set out a factual basis for the allegations, and the factual basis is contained in the attachment A of the agreement set out by each of the respondents.

With the remaining time, let me turn it over to Bruce Ferguson, who will discuss some--(inaudible)--aspects. Thank you.

MR. FERGUSON: Thank you. The penalties set forth in the proposed agreements follow the statutory penalty criteria and are generally consistent with the APO agency penalty policies. We did deviate from those policies in not applying the specific penalty tables and matrices but did so for compelling reasons.

Penalties are assessed per farm. The amount that is assessed for each farm goes up, depending on the number of animals housed at the farm. Consequently, respondents who own larger farms or more farms pay more than respondents who own smaller farms or fewer farms.

The scale penalties are based on the statutory criteria set forth in the Clean Air Act, CERCLA and EPCRA, and in the applicable penalty policies. These criteria are almost identical for each statute and the corresponding agency penalty policies. They include size of violator, ability to pay, gravity or extent of violation, history of noncompliance, economic benefit and other factors as justice may require, which under the applicable penalty policies include litigation, risk, degree of cooperation, and other factors--other mitigating factors.

The scale of penalty is based on the size of the farm and the number of farms owned, directly related to the size of the violator and the ability to pay. They also relate to the gravity and extent

of the violation in that larger farms and respondents owning more farms are more likely to exceed applicable regulatory thresholds and by larger amounts.

With respect to history of noncompliance, none of the 20 respondents has been cited before by EPA or state providing laws pertaining the air emissions.

Finally, it is not possible to determine economic benefit because of the problems in determining the exact compliance status of individual farms and because the controlled technologies are unknown at this time. The penalties were appropriately mitigated, based on mitigating factors found in the statute and penalty policies, in particular litigation risk and fairness. It is unrealistic to expect that we would be able to obtain significant penalty awards from the courts, given the current state of knowledge, or rather lack of knowledge regarding AFO emissions.

Moreover, for the same reasons that we

were struggle (sic) in pursuing litigation, these respondents have been historically unable to determine their compliance status. It would be unfair to expect these respondents to pay large penalties when it is currently practically impossible for the vast majority of them to determine whether they're in compliance with the Clean Air Act, CERCLA or EPCRA.

With respect to the AFO penalty policies, we applied the penalty criteria set forth in those policies. We were not able to apply the specific penalties policies, matrices and tables in those policies because of the lack of information regarding the emissions coming from these facilities. The crop allows, and the Board has consistently found, that we may deviate from applicable penalty policies if we state the reasons for doing so and those reasons are compelling.

Thank you for allowing me and Bob to present OECA's views on the penalties set forth in the proposed agreement. Mr. Kaplan and I would be happy to respond to any questions from the Board on

the matters we address today or any other matters related to the proposed agreements.

JUDGE REICH: Thank you. I have a few questions. I'm sure the other judges do as well. Many of my questions may be in the area that Mr. Kaplan would want to cover. He may want to come to the podium, and whichever--both stay and whichever one is appropriate, go ahead and answer.

The first couple of questions I have really go to understanding what you're saying about the nature of what's being presented to us as an APO. You make the point in your brief with us that in your view the agreements don't contain enforceable compliance aspects had anything that relates to compliance is a condition of the covenant not to sue, as opposed to a, quote, "enforceable," unquote, part of the order.

I'm a little puzzled why the order, then, contains all of this language that's not an enforceable part of the order, and why the monitoring program which seems to go to the heart of the covenant not to sue is actually in the

section that starts "Final Order." So if anything, I mean appearance-wise, it seems like it's clearly part of the order, per se.

So can you help me out understanding really what you think is an enforceable part of the order that you're asking us to address?

MR. KAPLAN: Yes, Your Honor. I'd say the enforceable aspects under our argument that this is an APO with conditions are just the penalty provisions. The penalty provisions are found in paragraph 48 of the agreement, and made effective, really, by paragraph 51 of the agreement.

Paragraph 51 of the agreement contains all the aspects that are enforceable. We can proceed by civil action if there's a failure to pay under paragraph 48. That's in contrast to paragraph--can you turn the monitors on, or is the monitor on?--okay--that's in contrast to paragraph 37. Paragraph 37 makes clear.

(Comments about the monitor.) Let me continue on, and we'll see if we can get that up later.

Paragraph 37 which you have before you makes clear that anything else contained in the order, any nonpenalty provisions, are specifically just provisions contained within the covenant not to sue. So the penalty, if you will, the enforcement mechanism for ensuring compliance with the agreement is not stipulated penalties, is not an action to enforce the court but rather are the unwinding of the covenant not to sue if anyone fails to comply. And that's the basis of our argument that there are penalty aspects that are enforceable and every other aspects that are nonenforceable.

Let me address your concern.

JUDGE REICH: Let me just--before you do that, it sounds like what you are saying as you basically got the nucleus of what you consider to be, quote, "enforceable," unquote, which is about, you know, a page long. And you have all of this additional stuff within the context of what's called a CAFO that not intended to be enforceable.

I'm wondering why we're structured that

way.
Was there not some separate document apart from a CAFO that you could not have used for things that aren't intended to be enforced?

MR. KAPLAN: Let me apologize if the document was unclear in anyway. As far as the structure goes, we, in our brief to the Board, their supplemental brief, stated that OECA would be pleased to provide a formal order that divides the two. So if there is some unclarity in the way we've structured it, the covering or blanket order that the Board would enter would make clear which parts are intended to be enforceable as ACO, which parts are intended to be enforceable as APO.

Let me also just add that there are alternative arguments as well that would include the ACO aspects, and we could divide those out as well.

JUDGE REICH: Very well. Okay. Let me ask another question, and I'll see if the other judges have questions before I continue.

Going back to what you said about

22.18(B)(2), and you made a reference there to the fact of in settlements a case may not be fully developed or something along those lines. It seems to me that, typically, the Agency is at least at a point where it believes it can allege a violation. The other party may not agree with it. You may not get to the point where anybody has to put on proof because you're settling it, but at least the premise is the Agency sort of alleges a violation, and that's what 22.14 contemplates.

Here, for the reasons that you've fully explained, it does not appear that the Agency has a high enough confidence level to be able to allege a violation. At best, you can allege, essentially, a potential violation, and you give in the submission that we recently received an explanation for why, what should be looked for in the context of the settlement is different than what you would expect in an adversarial situation where the party has to file an answer, and the issue is going to be litigated.

But my question is, where do we find that

in Part 22? In 22.18(B)(2), which clearly relates to settlement, when it refers back to 22.14, it doesn't make the distinction that you're making. It doesn't say, you know, follow 22.14 except that, you know, you don't have to relate the violation; you can identify a potential violation. So how do I get past the language in 22.14 which seems to require more than just identification of a potential violation, or do you feel that identifying a potential violation is an allegation of a violation that satisfies 22.14?

MR. KAPLAN: As far as 22.14 goes, we believe that we have alleged facts and law sufficient to satisfy the conditions imported in 22.18(B)(2). And the crucial link here is a number of studies that conclude, based on our familiarity with the industry, our knowledge of the industry, that we have enough to say that the respondents have exceeded thresholds, potentially. We don't have enough to pin it down with precision, with absolute accuracy, and that's what we usually find

in a settlement. The claims are not sa developed.

And I would there reference the recent Chevron decision in the Northern District of California where EPA did some investigation of benzinichabs at a single refinery, and included within the settlement all refineries for both crackers and heaters and boilers, things that had not been investigated by EPA. And the court there found that that was a reasonable way to proceed.

And I would submit that it's often the case that OECA has enough quantum of proof to allege a potential violation at a certain location--and that's certainly what we've done here--without being able to prove it to a certainty, or find it with accuracy and precision that one would find if we did have emissions factors.

So the first answer is I think we have alleged the quantum of proof required by 22.14.

Second, I think it's very, very important to go back to the principles underlying the incorporation by reference in 22.14, and that's to create a clear public record. It's not to apprise

the defendant of--or respondent, I should say--of enough of the allegations such that they can formulate an answer pursuant to 22.15; instead the policy considerations here are that we create the record.

And here we've created a very, very clear public record in every instance. 50.7, 28 CFR 50.7 is the Department of Justice's regulation that is followed when you file a consent decree. That's sort of the benchmark for Clean Water Act/Clean Air Act actions that provide injunctive relief. Here we've not only met that standard as far as putting the brief in that--or putting the proposed agreement in The Federal Register, but we've also taken comment, extended the comment period and released the document that we intended to propose twice, long before The Federal Register publication. So I think we've met and exceeded the standard by which public records are judged.

JUDGE REICH: Let me see if my colleagues have any questions.

JUDGE WOLGAST: Just a follow-up on that.

Are there other instances--and maybe you would say the Chevron, Northern California's such an instance--where you're relying solely on potential--I mean--it seems to me this is a different instance where you have a concrete alleged violation, and then there are many other things that could have been alleged that are then subsumed within a covenant not to sue. And I'm wondering, are there other instances where you're looking solely to potential violations?

MR. KAPLAN: You're asking if there's a predicate for--

JUDGE WOLGAST: Yes.

MR. KAPLAN: --what we've done? And I would say in the audit policy context, the audit policy CAPOs, we have alleged potential violations. We have sought and the Board has approved CAPOs that impose conditions as components of the covenant not to sue. And we cited a number of those cases in the brief. I think we've got Advanced Auto Parts as an example of that type.

And I will concede that this is much more

elaborate conditions imposed than any of those cases where there you had a condition subsequent. You have to do, say, an EMS, Environmental Management System, where you have to do an audit, but those are just smaller instances of the same thing we seek to do here.

JUDGE WOLGAST: On the covenant not to sue--and I'm not sure who this should be addressed to--it covers violations and potential violations up to what time or what day, as of when?

MR. KAPLAN: The covenant not to sue reaches back to past violations and follows all the way during the compliance schedule, essentially. So two years of monitoring and then 18 months the EPA has to formulate emissions estimating methodologies, then two things happen: The respondents certify that they're in compliance and they have no further obligations, at which point their covenant not to sue dissolves so that it terminates for those folks that are in compliance, or farms that find themselves out of compliance and need to submit a permit application, the covenant

not to sue follows the permit application, and there's a provision that says that the covenant not to sue can last no longer than two years and after the permit application. So if the permit is delayed for some reason, it unwinds after two years. That traces the length of it.

JUDGE WOLGAST: Isn't that unusual in the sense that I understand that there may be conditions on the covenant not to sue, and some of those are conditions predicated on future events. But--you can correct me if I'm wrong--typically, you would have a covenant that is as of the date of the finalization of this order, and if there are other compliance requirements, then they become a condition of the covenant not to sue as opposed to addressing any violations that may occur during the compliance period.

I hear you saying that the covenant, in essence, protects that AFOs from any violations that occur post order and during the compliance period.

MR. KAPLAN: That is correct, and we, of

course, would have no reason to pursue somebody who's on the road to compliance. I think we've done the same thing, at least in judicial decrees, where we have allowed a compliance period and where we promised not to bring an action based on the same set of facts for the same violation during that compliance period.

And the same is true here. We have--I think the thing that might be a little bit different is we have this two-year period where monitoring takes place as opposed to permanent application. I would include that within the compliance period because it's a really a fundamental premise of our allegations here. We don't have enough right now to pursue these actions based on emissions factors. So the two-year monitoring, I think, should be included within reasonable compliance period for the same violations.

JUDGE REICH: While we're on the fact of the covenant not to sue, one of the things that I know raised in the comment period on the January 31

notice and addressed in your response to comments was language that said, quote, "The agreement will not affect the ability of states or citizens to enforce compliance with nonfederally-enforceable state laws existing, or future that are applicable to AFOs." Unquote. And that certainly has the implication that it is intended to have a preclusive effect as to the ability of states or citizens to enforce federally-enforceable state laws.

And I was wondering, is that, in fact, your interpretation? Do you, in fact, think that you can, administratively, create a document with that preclusive effect, consistent with the Clean Air Act?

MR. KAPLAN: That's a matter for the district courts, and that's not something that EPA has taken any position on. OECA, certainly, has not taken any position on that, and that language was intended to clarify something because--

JUDGE REICH: So you have not represented to the respondents, for example, that part of what

they get from this agreement is reposed from potential citizen suit or state suit for these same requirements?

MR. KAPLAN: We've made no such representation even to any respondents.

JUDGE REICH: Okay.

MR. KAPLAN: If I might, that language was responding to a comment who had concerns, or several commenters, about what the states could do. And I could see why Your Honor would see that it gives rise to that inference, but that inference was not intended to say that this agreement has any preclusive effect. We haven't taken any position on that point.

JUDGE REICH: Okay, thank you.

JUDGE STEIN: I have--

JUDGE WOLGAST: I'm sorry, just to follow up on that. In the agreement as I read it--in paragraph 27 I think it was--talks about instances outside of waste emission units. Any other violations, I take it, are purported to be covered by this agreement or order, and there would be no

question to be the subject of other citizen or other enforcement action.

MR. KAPLAN: Absolutely, that's correct.

JUDGE STEIN: I have a couple of questions relating to the impact of this agreement on companies who may have applied for a permit or reported emissions, or may currently be the subject of an ongoing investigation. While, admittedly, this may be a small universe, I was wondering if you could explain to me whether such companies would be eligible to participate in this agreement or not.

MR. KAPLAN: There is a provision of the agreement that provides EPA has the discretion to foreclose entry for anyone that has an outstanding notice of violation against them. And that's part of the process as reviewing all the applications that we received to see if we want to allow any of those entities in.

In fact, there are some companies within that universe, and we haven't decided yet if we intend to allow any of those farms that have

outstanding investigations against them into the agreement. It's up to you guys' discretion.

JUDGE STEIN: But these would only be investigations for which a forma lNOV has already been issued?

MR. KAPLAN: The way we drafted it, it's an NOV or other investigation. So it could be something more informal than the NOV.

JUDGE STEIN: How is it that you would have sufficient information to develop and proceed with an NOV against, you know, company X or Y with your representing to us that, you know, for the remainder of the universe there's not enough information, and so that this is a reasonable environmental solution to a challenging problem?

MR. KAPLAN: Your Honor raises an excellent point, and what I want to make absolutely clear, we certainly have enough information, if we go out and do the monitoring ourselves, to conclude that a violation has or has not occurred. I'd cite to Your Honor the Buckeye case where we spent months and months doing our own monitoring and

pursuit of 114 in federal court to get the data. And after literally years of investigation, we managed to conclude there was a violation and did manage to pursue that.

So if we do sort of rifle shot one off monitoring, we can conclude there is a violation. What we can't do at this time is, on the basis of emissions factors as would be commonly found in, say, AP 42, conclude that a defendant has exceeded or would not have exceeded thresholds.

JUDGE STEIN: Well, what if, instead of approaching things as you've chosen to proceed, EPA decided this was an area of need, went out and did, you know, used its own funds, did these studies, didn't provide long-term covenants not to sue, left itself open in case there was a particular circumstance that needed to be addressed, why proceed issue you have as opposed to the more typical way that the Agency has proceeded in the past?

MR. KAPLAN: We feel we've gotten the best of both worlds at this point because we have the

agreement with respondents for the monitoring, and respondents are bound by those results. So we've got those people on the road to compliance.

As to everyone else, that whole universe where there might be noncompliance, we retain our crucial enforcement authority, and all those farms remain subject to enforcement. So we can proceed against those farms, anyone that hasn't signed up.

JUDGE STEIN: How big is the "everyone else"? Is it approximately half? Do you have any idea of a number of companies that are not represented by the companies that are participating in this effort?

MR. KAPLAN: It's very difficult to say what that universe is, especially when you consider the size. But it seems to us after preliminary review that we've captured most or a lot of the largest farms. To say with precision isn't possible.

We've heard there have been reports that there are 15,000 CAFOs, perhaps more. We have a universe here of 6,800 farms. That still leaves

many potential enforcement targets.

JUDGE REICH: Can I ask a question about the funding of the monitoring study? Unless the one I read, the CAFO when it talked about respondents being responsible for the payment of funds, what I envisioned is that respondents would actually make payments in addition to the penalty.

But then we got the filing from the respondents, and in it, it says, quote, "Rather than collect $2,500 from each participating AFO, each participating industry sector chose to fund its portion of the study with previously collected industry funds. For example, the swine industry through the National Pork Board has set aside $6 million for the swine portion of the air-monitoring study, and the egglayer industry through the American Egg Board has set aside $2.8 million for the egglayer portion of this study." Let me ask a few kind of connected questions and ask you to address it.

First of all, do I read that as meaning that none of the respondents is actually expected

to pay out additional funds once this agreement is signed?

Secondly, if the money is in fact coming from these industry associations, do you know--and I'll ask respondents the same question--do you know if there's any attempt to correlate where those moneys came from with the particular respondents who have signed this agreement? And, if not, then isn't the nexus between that AFO and the funding of the monitoring study kind of really an illusory one?

MR. FERGUSON: Well, Your Honor, each of the respondents does have a legal obligation to make sure that the money is paid, but you are correct, if, for the vast majority of them, these trade associations will be kicking in the money to pay for it.

JUDGE REICH: And this is not coming from any fund that was specially created for this purpose? This is just out of funds they've collected for other purposes, presumably from farms including respondents and including nonrespondents,

is that correct?

MR. FERGUSON: That's correct, and we did not get into the details with them or the legality of--they're--even come with what they call checkoff funds--

JUDGE REICH: Um-hmm.

MR. FERGUSON: --that's a pot of money, and I think Bruce could probably explain it--

JUDGE REICH: Okay.

MR. FERGUSON: --if you want us to explain that a little better how that all works.

JUDGE REICH: So does that mean that, in essence, a nonrespondent is funding the study to the same degree that a respondent could be funding it?

MR. FERGUSON: I'm going to have to let the environment respondents' counsel answer that question.

JUDGE REICH: Fine.

MR. FERGUSON: I just don't know enough about the checkoff funds to.

JUDGE REICH: Okay, thank you.

All right, the last question I have just sort of goes to the argument about the civil panel thing, and I'm not sure it's one that, ultimately, will make a lot of difference, but it seems to me slightly disingenuous and make a little for to kind of talk about applying the penalty policy and then going on to say, "We applied the penalty policy, but we really couldn't capture economic benefit because we can't quantify it, and we really can't apply the matrices for afflecting (ph) gravity, because we don't have the inputs, because the penalty policies are in those areas relatively formulaic, and you're basically not applying most of what's in there.

So it seems to me that while they may not be conceptually inconsistent with the penalty policy, there's no way to take a penalty policy and derive a number that looks anything like the number you've derived and, therefore, the more important inquiry is whether the penalty accurately reflects application of the statutory factors rather than a penalty policy.

Am I misreading the situation here?

MR. FERGUSON: I don't think so. I'm sorry to disagree with you about the disingenuous part, but the--I think you're correct, we could not do the work sheets that you find at the end of these policies and fill those out. We looked at the statutory penalty criteria that are basically the same in the statute for--(inaudible)--and used those to create the scaled penalties.

We looked at the mitigating factors like litigation risk and fairness under the other matters that, you know, Justice may require.

JUDGE REICH: Um-hmm.

MR. FERGUSON: So I think, generally, yes, we agree with you.

JUDGE REICH: Okay.

JUDGE WOLGAST: I was curious as to why you couldn't address economic benefit in any way. You've made estimations based on the size of operation. As Mr. Kaplan said, you've brought enforcement actions in other instances. I wasn't reading in any air submissions exactly why that

couldn't be estimated in this case.

MR. FERGUSON: Well, the main reason is--well, there's a couple of reasons, Your Honor. It's where you're going to get a lot of economic benefit, it will occur if someone is a major source under the Clean Air Act, and they have to install Bact or Laer type equipment.

And just trying to figure out who falls on, you know, above or below that line, it's just not possible. That's why we're doing the study, to try to figure out, you know, how many, if any, fall above that line or be subject to those sorts of expensive requirements.

Secondly, as I had mentioned in my remarks earlier, we just don't have any handle whatsoever on what's going to turn out to be the appropriate emission control equipment for those major sources.

For example, Bob mentioned the Buckeye case which we pursued. In settlement of that case, they put on what they call "particulate impaction systems," which were cardboard that sits outside the fan, and the particulate gets the cardboard and

drops down instead of being dispersed into the air. Those systems worked well for a little while, and then the cardboard fell apart.

So that's very typical of where we are at this point with emission controls for these types of facilities. There's a lot of good ideas out there; they just haven't been investigated fully. We certainly aren't very far along the road in trying to figure out what are ultimately going to be the Bact and Laer type systems that are determined to be and should be installed on these facilities.

JUDGE STEIN: AIR has argued, at least in the initial papers that it submitted with us, that these really aren't enforcement actions as a practical matter, but this is essentially rulemaking done without proper rulemaking procedures. How do you respond to that argument?

MR. KAPLAN: Well, that's a matter before the D.C. circuit, and I hesitate to weigh in on that question. I would refer Your Honor to our response to comments where we did answer that

question, that these are not affecting an entire industry. This is not an agreement that has a right effects or applies to an entire industry; instead, it's as to individual actors who participate, who sign up, who settle with the government, just like any other settlement.

So again, I leave that for the D.C. circuit, but we did respond to those comments in full on July 12, 2005.

JUDGE STEIN: Doesn't this agreement allow the potential for years to pass before the particular equipment that's appropriate for certain facilities to be known?

MR. KAPLAN: It does, Your Honor, and our response to that is any way you slice it, it's going to turn out to be years before we get this industry into compliance with the Clean Air Act, CERCLA and EPCRA.

We have two ways to do it: We have traditional enforcement, and we have this method. traditional enforcement is not going to get there any faster, and, in fact, we'd say, based on our

experience litigating these cases in Special Litigation and Projects Division, will get there much slower. We've managed to finish two of these cases in five years as opposed to what we're doing here.

Of course, we said in our 114 (ph) respondents have defenses to that 114. And in every case thus far have taken us to court and fought very hard, I guess, the 114 request. We'd have to enforce it, get the monitoring done, then determine compliance. Then and only then will they submit permit applications, and we're back where we are in just two short years here.

I would again refer to the Chevron case where the court considered exactly the same issue. Environmental groups challenged the consent decree saying: Look this is not going--there will be on control put on till 2011, eight years from now.

And the court said: It's, compared to what you get in litigation, eight years is not an unreasonable time period when compared to the complex Clean Air Act litigation.

So my sense is it requires that comparison not to compliance today, which is not achievable versus instead traditional enforcement.

JUDGE REICH: Okay. In the interest of time, unless my colleagues have an urgent question, I'd like to kind of move along, okay?

Okay, thank you. Let me ask counsel for respondents to take the podium and identify themselves for the record, and you have, I believe, sort of five minutes, and then I believe we probably will have some questions based on your submission.

MR. SCHWARTZ: Thank you, Your Honor. My name is Richard Schwartz. I am with the law firm of Crowell & Moring, and I'm representing six respondents, who are indicated in our brief. And the first thing I wanted to do was address the question that had been addressed to Mr. Kaplan. The question was what was EPA's position about the fact of disagreement on state suits or citizen suits? And I wanted to confirm that he is exactly correct: EPA made no promises to us about the

position they would take on that subject.

Two other points should be noted from the decree--rather from the consent agreements. One is that nuisance suits are specifically outside the agreement and, in fact, if a company receives an order to comply with a nuisance suit, that company must comply with that order in order to retain the covenant not to sue.

Second is that imminent and substantial endangerment claims are also outside this agreement, and the bottom line is that if health is being affected, that is not protected by this agreement. What is protected is the sort of administrative requirements that come from thresholds that are derived from emission rates, which is the subject of the agreement.

The second thing I wanted to talk about is something also that came up in questioning, and that's the alternative, see, now, couldn't EPA do better by either bringing lawsuits or issuing administrative enforcement agreements? And the answer from experience is very clearly no. And I

can tell you from personal experience, because I've been on the other side of those actions, and I can tell you what happens when EPA issues a 114 letter to a company.

And to put this in context, the cost of monitoring is so high that there is no company that will simply go ahead and do it without a fight or without, you know, protecting itself in any way it can. In this study the cost of monitoring a single barn is about $750,000. The cost of monitoring a lagoon is roughly $360,000.

Now, these are very, very thorough kinds of monitoring agreements, but you can back off from that, and what a company would have to do, and you still come up with a gigantic amount of money for an individual company or an individual farm to do this monitoring.

Now, you look at what happens when a 114 letter is issued. The first thing that's going to happen is they're going to hire someone like me or maybe somebody smarter than me to read the letter and figure out what they have to do, and then what

they're going to learn that they have to do is hire a consultant. And maybe it's a good consultant and maybe it isn't, because there aren't too many who are really expert in this area.

And the consultant has to figure out what he has to know in order to do an estimate of the emissions from the particular farm, and remember that under Section 114 the obligation is to determine whether the farm is or is not in violation of the Clean Air Act. And so for that kind of letter what the farm will do is produce an answer to that question, will do enough monitoring to provide the answer to that question, but that is not enough monitoring to give the kind of information that the study is producing and not the kind of information that the Agency would need if it wanted to have a much more broad-based understanding of emissions from these farms.

And all of this--and so the end--at the end of the day what the Agency will get will apply to that farm. It will answer the question that the statute requires the company to answer, but it will

not give EPA the kind of information that the Agency would like to have and on top of that, it will take a lot of time.

It took time to devise this study using the best scientists in America. It would take time and will take time for the consultant to figure out what to do to check the data, to get the data, to write a report, and that's after negotiation over the scope because, usually, we believe the agencies ask for too much and so those things are negotiated. And so the time for the simplest kind of information request, which is the Section 114 letter, is not so much different from the time we're talking about here, and at the end of the day the Agency would not get what it wanted. And even in the simplest kind of response, you'd expect the farm to spend roughly $100,000 in doing that, and there are not a lot of farms that can simply afford to do that.

With respect to this agreement by acting collectively, a large farm, a one that's 10 times the size of a CAFO would be paying a $1,000

penalty, which is roughly 1/100th of what they would have to do if things went well under a Section 114 letter. And so the benefits of doing this are obvious both for the farms and for, on an individual basis, because it's--in a sense it is indeed like insurance, but on the other side the Agency is getting information that would be--it would not get any quicker and will be much, much better doing it this way.

With respect to the litigation options, you just multiply all that in terms of the cost. You're talking about $150-to-$300,000, sometimes millions of dollars for the farms to defend these suits, and what you end up with then is a battle of experts. You get the farms' expert on one side, the government's expert on the other side, and the judge picks between them or maybe cuts--splits the difference. So again the value of the information is not the same, and the length of time is probably longer.

I mean you're talking about, easily, two to three years for litigation to run its course,

which is probably longer than this agreement would take as well as the very high costs.

I wanted to just briefly show you the specificity in terms of the violations alleged. The brief in the agreement itself show exactly what provisions are covered. What I wanted to do if I can, if I can make this work--is this--yeah, is put out the Attachment A, if that's showing up on your screen, that identifies the sources.

This is simply a drawing by E&S Swine,, one of the companies I'm representing today, of the emission sources that are covered. And it's a pairing of nurseries, farrowing facilities, gestation and breeding in a swine facility, and this company's swine facility. It simply draws it. Those are the emission sources.

JUDGE REICH: Um-hmm.

MR. SCHWARTZ: Then with respect to the lagoon, for example, there's a specification--and there's one of these sheets for each of the emission sources--that shows the particulars about that particular source that's covered by this

agreement.

And so in terms of knowing which sources are covered, the answer is that, and then for a barn we've got a sheet that shows exactly what the emission points are at that particular barn. And there's one of these for each of the sources as well.

And so that E&S Swine and EPA know exactly what's covered by this agreement when each of them signs it.

JUDGE REICH: Okay, thank you. Let me ask a couple of questions really relating to things that we've already talked about. One, I guess, is less a question now than a comment.

When I went through your submission, I notice you talked about the reason for entering it into the agreement, and it say the agreements protect the farms by providing repose and certainty of obligation. And I gather that that would certainly be true relative to the federal government. Whether it's true to either state suit or citizen suit is less clear, and from what I

understand either you've sort of made that judgment on your own or you're willing to run that risk. And I'm not going to ask you kind of which of those it is.

In terms of the questions that I asked counsel for OECA about the $2,500 per participating AFO, can you address the pot of money that this is coming from and whether there is any connection at all between that money and the respondents to these actions in a way that distinguishes between respondents and parties that do not settle with the Agency?

MR. SCHWARTZ: The answer to the issue about the 25 hundred is that each company that signs the agreement agrees to be personally liable for the cost of the monitoring study up to the 25 hundred. Now, the hope is that they will not have to spend the money, but they understands that they can be called upon to spend $2,500, and that is linked directly to the individual who signs up.

With respect to the pot of money, the question--

JUDGE REICH: Um-hmm.

MR. SCHWARTZ: --the question you answered earlier, the link is not based on the individual farm; the link comes from the fact that these groups made a judgment about their industry and whether this would be beneficial.

JUDGE REICH: Um-hmm.

MR. SCHWARTZ: And they decided that it was. Now, the farms that sign the agreements are represented, generally; their interests are represented by these groups, that's why they're formed is to represent farms like these.

JUDGE REICH: Um-hmm.

MR. SCHWARTZ: So only in that sense is the money coming from them. So the two sources that are coming personally from them is, one is the penalty, and the other is the obligation to spend up to $2,500
for the monitoring study.

JUDGE REICH: So if, in fact, the associations pay as they anticipate paying, then the only direct financial impact on a given

respondent is the amount of the penalty?

MR. SCHWARTZ: That's correct.

JUDGE REICH: Okay. We had asked a week--Judge Stein did--if they knew even roughly what percentage of the various industry sectors had agreed to these CAFOs relative to either the swine or the egglayer industries. Do you have a ball park sense of those numbers?

MR. SCHWARTZ: It's only a ball park sense. The census of these farms is not very precise, but for this--and, in fact, it's really only for the egg industry. I think it's very high for the egg industry. It's like, something like three-quarters.

For the swine industry, I just don't know.

JUDGE REICH: Okay, thank you. Good, thank you so much.

MR. SCHWARTZ: Thank you.

JUDGE REICH: And now we will ask counsel for AIR to identify himself for the record and then proceed.

MR. NEWELL: Good morning, and may it

please the court, my name is Brent Newell. I am counsel for Association of Irritated Residents and Iowa Citizens for Community Improvement. I'm also appearing on behalf of the other four environmental groups that we've identified in our papers.

I've three points this morning. This first goes to a compliance with Part 22 and Section 113 of the Clean Air Act.

The second point relates to the application of the penalty policy, and my third point involves compliance with the Miscellaneous Receipts Act. But as a preliminary matter, I just want to emphasize that our organizations believe that this is a rulemaking disguised as an enforcement action. And all the issues that are coming to light through the questions here show the basis of really what EPS crafted as a square peg and how it's trying to shove it through a round hole.

There are two provisions in the Consolidated Rules of Practice that apply. First is Section 22.14(A)(2), which requires that EPA

make specific allegations as the provisions of law which have been violated. the CAFO violates this section because it says that it alleges violations of any other federally enforceable state implementation plan requirement for major or minor sources based on quantify concentration or rates of emissions.

Basically, what they're saying is: We're incorporating all 50 states' state implementation plan into this agreement, and we're alleging violations of anything that might apply without any specific reference.

They need to be specific about the types of allegations that go into this CAFO. There's one case that EPA cited in its supplementary brief, this Advanced Auto Parts case, and that case shows the kind of specificity that should go into an agreement. That case alleged violations of RCRA. RCRA implements its provisions through the states just like the Clean Air Act does. In those provisions, in that order, there are page upon page of state administrative code requirements that are

alleged to have been violated. There's no such detail here. So with that respect we're violating the Consolidated Rules of Practice.

The other, and more apparent violation that the Board's identified, is the lack of emission rates allegations. All the violations that are supposed to be resolved through the so-called enforcement action are based on emission rates, whether it's a Title 5 emission rate of 250-ton per year, or 100 tons per year; if it's a PSD emission rate; if it's a new source review emission rate based on an honest human area (ph) status. We have all different sorts of thresholds.

For example, an ozone nonattainment area has a serious area of threshold of 50 tons per year of all organic compounds or oxites or nitrogen. If it's severe, it's a 25-ton threshold. If it's an extreme area, it's a 10-ton threshold. These unalleged SIP violations have even more stringent minor source thresholds. For California SIP requires Vesterville (ph) will control technology for an emission unit with two pounds or more per

day.

None of these thresholds exist in this document. They don't exist in Attachment A, and they're not determined until several years down the road. Again, the Advanced Auto Parts case shows why this agreement does not comport with the audit policy. The audit policy requires that the violations be identified and corrected before the order is issued. In that decision the final order said: Here are the violations, and we are finding that violations have been corrected, and we're issuing the order resolving these violations.

The violations haven't been identified here, and they're not being corrected at the time of the order. Mr. Kaplan made reference to the audit policy as an example of why this thing comports with the law. And, quite frankly, when you look at the eight or nine requirements that the audit policy sets forth, this does not meet any of those.

I find it very interesting that EPA says that the paucity of data, the absence of data,

justifies this unique approach; yet they say there's not enough data to make allegations sufficient to justify either enforcement actions outside of this agreement or disagreement itself. That's an internal contradiction that has not been resolved.

I want to go quickly to Section 113 because it lays out some requirements about both administrative penalty orders and administrative compliance orders. EPA contends that this is an administrative penalty order. Section 113(D)(1) limits EPA's authority to assess penalties in an administrative penalty order to a 12-month period. It can go beyond that period if it gets the Attorney General's consent.

Right now this agreement does not specify what period penalties are being assessed. EPA says that penalties are for past and future violations. Well, if we just look at future violations, there's a potential window for three and a half to four years of penalty period. If we're looking at past violations, there's a total of five years--well,

that's the citizen suit statute of limitations. I don't know what the statute of limitations is for the government, but there's a very large window of penalties that are being assessed here, and their authority is for only 12 months. There is no information that says that they've consulted with the Attorney General, and they've consented.

In terms of a compliance order, EPA argues that this doesn't how many (sic) clients' aspects. We disagree. For a compliance order the violations must be corrected within 12 months. Here correction does not occur until three and a half years after they used the emission estimation methodologies, and then there's an additional period where they have to apply for a permit and install technology, if they're in violation of the Clean Air Act. But, clearly, that 12-month period in Section 113 is not being met. That's 113(A)(4), by the way.

The penalty requirements. Again this is a perfect example of why this is a square peg being shoved into a round hole. They say that they've

applied the penalty criteria. That isn't possible. It is impossible for the Agency to have applied the penalty criteria to the 20 respondents here today because they decided what the penalty would be before they signed up for the agreement. EPA had no idea who these respondents would be before they signed the agreement. EPA could not possibly in any realm of reality apply the penalty criteria to these respondents.

Now, there are penalty policies that exist for CERCLA and EPCRA and the Clean Air Act. CERCLA and EPCRA has a minimum penalty policy of $6,251. The Clean Air Act has a minimum penalty policy for failing to get an operating permit or installing best available control technology that's $15,000 per day. What we have here is a penalty of about $500 or $1,000, depending on the size. We don't know how many days these penalties are being assessed.

Clearly, if it's just for one day, we're looking at about two percent of the applicable penalty policy. And as I said earlier, there's no

way that EPA could have applied these criteria to that premium standard farms contract grower whose Attachment A was put on the monitor.

My final point goes to the Miscellaneous Receipts Act, and the court has brought up an issue about the use of checkoff funds going towards this monitoring program. The checkoff funds are collected pursuant to federal law in such a way that there was a challenge brought to--under the First Amendment--to the use of checkoff funds by producers who had--who felt that their speech was being compelled by the advertising campaigns that use these checkoff funds. And the Supreme Court ruled that this was government speech and was not subject to that limitation.

Now, this money is collected pursuant to these government programs to advertise and promote those products. It's being used here for the monitoring funding, so I think that raises a very interesting Miscellaneous Receipts Act question.

I think also, just looking at the terms of the agreement, you can see the degree to which EPA

controls. EPA requires respondents to establish a monitoring fund; EPA sets the amount that each respondent must be required to submit or be accounted for; EPA convened the experts to develop the monitoring protocol; EPA must review and approve the monitoring plan; EPA must approve the independent monitoring contractor. If before completion of the study it appears that there's not enough money, the so-called independent monitoring contractor cannot commit to use additional funding without EPA approval. EPA has its hands firmly on the strings of this monitoring plan such to the extent that it controls substantial components of its operation.

I do want to ask the court that it should decline to ratify this agreement, and we believe that it's a rulemaking.

JUDGE REICH: Thank you, Mr. Newell. Just a couple of questions. In terms of consistency with penalty policies, is it not true that both of the penalty policies that are replicated here have language that indicates that the Agency can deviate

from the penalty policy if it makes an appropriate finding?

MR. NEWELL: Sure. That's absolutely correct. It can deviate from those policies, but, as I mentioned, there is no way that EPA could have made any of those findings with respect to the respondents. It has no information about the duration of the violation; it had no information about the economic performance of the particular operation other than its size.

And I would like to point out that there is a basis for EPA to figure out what the economic benefit would be. EPA's website--epa.gov/agstar, A-G-S-T-A-R, includes an entire program of pollution control technology in use at the manure storage lickins (ph) for capturing the emissions. It contains cost data that shows farmers that it is efficient for them to install these systems and protect their neighbors.

As Mr. Schwartz pointed out, there is a significant cost of monitoring if EPA were to send them a 114 order. Those costs can be factored into

an economic benefit analysis.

JUDGE REICH: Going back to the way penalties are established, we have, as I remember it, seen other enforcement initiatives industry-based that did structure penalties up front based on a multiple of something that related to the particular facility, a number of facilities or whatever, but it was still pretty black and white. You just looked at a number and you came up with a penalty.

As I remember it, the Bakery Partnership, which is one of the things you actually cited for a different purpose with some degree of approval was kind of structured along those lines. You were saying that the Agency cannot come up with a penalty formulation based on the kinds of criteria that went into a matrix, essentially, that was created for these agreements; that it has to wait and get that facility's specific information before it can even create that matrix.

MR. NEWELL: I think there's a possible middle ground that you're suggesting that was

applied in the Bakery Partnership agreement. But this situation does not even approach that middle ground. We're only looking at the size of facilities based on thresholds that EPA has come up with for purposes of water pollution control, not air pollution control.

JUDGE REICH: Do you think that the factors they've looked at relative to number of facilities, size of facilities are unrelated to the environmental impact of the violations?

MR. NEWELL: I haven't seen anything in the record that takes those thresholds and equates them to the environmental impact of air emissions. So I would say that there has been no nexus drawn between those thresholds and the penalties that are being assessed here.

JUDGE STEIN: Can you explain to me--and I realize part of your earlier remarks was intended to do that--exactly how the monitoring fund under which no funds go to EPA violates the Miscellaneous Receipts Act?

MR. NEWELL: I would really like to

explore that in our brief that's due in a week. And I'd be happy to go all out on that issue. It's--EPA just can't pass the hat around and collect money through an enforcement action in order to accomplish a goal. And, you know, the Miscellaneous Receipts Act is set up to prevent that kind of fund-raising by the government.

JUDGE WOLGAST: But here they've specifically structured it so that the government isn't in receipt of money for the compliance aspects, do they not?

MR. NEWELL: I think EPA knew about the Miscellaneous Receipts Act when it crafted this agreement and tried to circumvent that restriction. But just because EPA doesn't control the bank account or employ the bookkeeper, EPA still is controlling substantial substantive components of the monitoring program to the point where it has a degree of control over this. It's demanding the money, and it's saying how the money should be spent, and it's dictating the plan and who's running it. EPA might as well be writing the

checks.

JUDGE STEIN: But how is that any different from the other kinds of typical consent agreements you would see where a company that's been in noncompliance is required to take certain steps to come into compliance, and they're required to submit a plan to the Agency, and the Agency reviews the plan and they modify the plan? How is this any different than that, that the Agency has a measure of oversight to assure that, in fact, the company is taking reasonable steps to come into compliance?

MR. NEWELL: I'd direct the court to a guidance document EPA's promulgated in terms of implementing the set policy, and it's the guidance concerning the use of third parties and the performance of SEPs and the aggregation of SEP funds. It's dated September 15, 2003. In that document the guidance suggests that if defendants make a cash payment to a third party for a project where EPA retains discretion to direct the use of that money, then that violates the Miscellaneous

Receipts Act.

We'll attach that guidance document for--

JUDGE STEIN: But this is not a SEP, as I understand it. This monitoring fund, as I understand it, there's no reduction in the penalty amount because of the performance of the monitoring fund issue you would expect in a typical setup. Am I correct in that?

MR. NEWELL: I do not have the ability to answer that question.

JUDGE STEIN: Okay, well, we'll look forward to--

MR. NEWELL: We'll address it in our brief.

JUDGE STEIN: --seeing your brief on that topic.

MR. NEWELL: Okay.

JUDGE WOLGAST: You directed us to the provision in the consent agreement that deals with the effect of this agreement on nonfederal entities, and we hear today a clarification that that is in no way intended to include citizen suit

from organizations such as those you represent. Does that not adequately protect your enforcement interest?

MR. NEWELL: Actually, I was very glad the court asked that question of EPA, but the answer that I heard was that: We take no position on that issue, and we're going to let the district courts resolve it when citizens expend their resources to enforce the law.

JUDGE WOLGAST: Well, what I heard was that they don't take the position that the terms of the agreement precluded such an action.

MR. NEWELL: I would be happy for this court to make that part of any order that would come out, that it does not preclude any citizen enforcement action.

JUDGE REICH: I guess I did hear those not taking a position either way, but when OECA comes up, maybe they can clarify exactly what they were saying.

MR. NEWELL: That would be fabulous. Thank you very much.

JUDGE REICH: Thank you

MR. NEWELL: We really appreciate the degree to which you've allowed us to participate in this proceeding.

JUDGE REICH: OECA, you have five minutes if you want. Otherwise, we probably do have some additional questions.

MR. KAPLAN: Okay, if Your Honor please, I'd take the five minutes, and let me just clarify the issue that was raised by the Board. We have not taken any position whatsoever on that, nor do we render advisory opinions on any of the provisions in the usual consent decrees that we do in courts. They may or may not have "bruth glusome" (ph) effect. They may or may not have some res adjudicata or collateral estoppel effects, but again OECA does not, every time it issues a consent decree, also issue an advisory opinion to district courts how they're supposed to be interpreted and how the court should rule. So that clarifies that.

As far as a rebuttal to some of the

arguments raised, the first argument that was raised was Part 22, and I think Mr. Newell's argument well clarifies that the public has achieved and has attained the notice that is envisioned by 22.14. Mr. Newell was very clear on what it is that we're alleging, and it was broad, absolutely, but Mr. Newell was able to tick off all the provisions that are included within it. That is exactly what's envisioned by these rules: to allow the public to know what EPA is doing, know what is being settled, know what the matter is in our allegations. No more is required to satisfy that underlying policy.

My sense is, if you've got a hole in the fence large enough for the large cat, you don't have to make one for the small cat as well, and that's exactly what Mr. Newell is asking us to do is to specify that all of these other SIP requirements come within the broader context. We've pled broadly in this case precisely because we get broad relief. And it's customary and usual for the allegations of the complaint to correspond

with the covenant not to sue, and that's exactly what we've done here. We're getting broad relief, we're giving broad relief, and that's perfectly parallel and makes sense in this context.

As far as the MRA argument goes, this is best left for briefing. I understand that Mr. Newell's group intends to file a brief. We look forward to it because we find no MRA problems, and as the court has anticipated, we crafted this agreement to--I would say, use the word "circumvent," as Mr. Newell did, but rather to comply specifically with the MRA. It is our division that issued the policy guidance that Mr. Newell is citing. We are well aware of that guidance, and I will tell you that al of our actions here comport with that guidance.

As Judge Stein points out, this is not a SEP. Again, we look forward to briefing this. I would in the meantime just refer the court to Section 114 of the Clean Air Act which provides that EPA can order sampling, which is exactly what we're doing here, where we can put conditions on

it. We have to say where the sampling is taking place, what the location is, and what the protocol is. We are doing no more than doing that, exactly, here. We're not in receipt of funds, we don't expend funds, we don't control funds. All we're doing is retaining control, as we should, properly of the protocol.

Counsel raised some issues about penalty as well. The first point to be made is EPA has on occasion determined that an industry-based penalty is appropriate; that the penalty factor should be consulted but, at bottom, sometimes it makes sense to instead go industry by industry in terms of the penalty assessment.

And that's exactly what was done in the recent refinery industry--again I would refer the court to the Chevron decision where the penalty was based there upon a consideration of the factors, but in the end based on a per barrel amount. That's exactly akin to what we've done here. It is to be per farm amount and scaled it to the size of the business.

As far as bend goes, I wish it were true that we could determine what bend goes. Again it was my division that did the Buckeye case. We were faced with a situation where we had to determine what was appropriate to bring this facility under the 250-ton limit to make it a synthetic minor. If they weren't able to do that, they'd have to get a PSD permit. That's the way the settlement was structured.

We looked very carefully with the best minds of the country to try and figure out what BACT was, what would bring this facility under 250 tons. We came up with two systems that would do it, one an ammonious system, another, as Mr. Ferguson alluded to, a particulate impaction system. One failed, did not work. The other disintegrated. So it's just not right to say that we know what BACT is and what was at a labor of witted (ph) cost here.

From first-hand experience and from experience within this industry, I will tell you that technologies are nascent right now, and we

don't have a way to this is BACT and this should ha e been put on such that we can determine what was a delayed or avoided cost.

With that, I conclude by saying that nonparties have raised a number of issues. Most of the issues that they've raised have been addressed time and time again in response, either across the table or in comments. Perhaps the most important one that they've raised is the time that it's going to take to do this, and we've considered that comment and told them EPA will not wait until the end of the two-year monitoring process before beginning the process of developing the emissions estimating methodologies; but rather, we will do so as soon as data become available.

We will do so as soon as the data will become available. So they are setting out a parade of horribles where this could take up to five years. EPA has made clear, in response to comments, that this is going to go further than that.

Thank you.

JUDGE REICH: Thank you. Let me ask one question that relates to the aspect of giving public notice as to the violations. I know that certain statutes--I think the Clean Water Act and Safe Drinking Water Act have provisions requiring notice and comment on consent agreements and other statutes, including the three implicated here: Clean Air Act, CERCLA and EPCRA do not have comparable provisions.

Are you aware of anything in the legislative history of the respective statutes that bears on what kind of public notice is intended to be given in a context like this, whether there's anything that distinguishes the Water Act from the Air Act in that regard? Or it's just an artifact of what they happened to do when the statute came through?

MR. KAPLAN: I'm not aware of anything in the legislative history that compels more specific notice than what we've given. I refer the court to the general provision as followed by the Department of Justice--that's 50.7--and this takes care of all

the statutes in question and is intended to take care of all of the statutes in question.

JUDGE REICH: Are you aware of anything in the legislative history of the Water Act that indicates what the intention of giving notice under that statute was?

MR. KAPLAN: I'm not, Your Honor. I would be pleased to brief that point.

JUDGE REICH: Okay. It would be helpful just in case it has some analogous relevance to the purpose of giving notice here as well even though it is not an express requirement.

MR. KAPLAN: Yes, Your Honor, we'd be pleased to brief that.

JUDGE REICH: Okay, thank you.

MR. KAPLAN: Thank you very much.

JUDGE REICH: We appreciate the participants joining with us this morning. I know I found it very helpful, and I'm sure the other judges did as well.

Just a reminder that according to the Board's order of December 8, we did give AIR the

right to file a nonparty brief. Mr. Newell made reference to that, and there is also, pursuant to the regulations, the right of any party which would include OECA or any of the respondents to file a response to that brief within 15 days, I think, of service of that brief.

So it is our expectation that process will play out over the next few weeks, and then the Board will turn its attention to try to resolve this rather promptly.

MR. KAPLAN: As far as the scheduling goes, if you multiply or add the 15-day, that brings us right to Christmas or right to New Years. I was hoping that if we could ask for a day where extensions are given.

JUDGE REICH: I think we will take that under consideration.

JUDGE STEIN: I echo that request.

JUDGE REICH: Okay.

MR. NEWELL: We have no objection.

JUDGE REICH: Do you have any objection? Okay, the Board will issue an order granting that.

So we will--what is the deadline under the order for your follow-up filing, Mr. Newell?

MR. NEWELL: It's on Tuesday, a week from today.

JUDGE REICH: A week from today? Okay, and you're comfortable with that date?

MR. NEWELL: Absolutely.

JUDGE REICH: Okay. So we'll stick with that date, and we will issue an order allowing the filing of responses by January 6th. We will not further extend that date.

Okay, thank you. This hearing is adjourned.

(Whereupon, at 11:25 a.m., the hearing was adjourned.)

REPORTER CERTIFICATE

I, **STEPHEN GARLAND,** the official Court Reporter for Miller Reporting Company, Inc., hereby certify that I recorded the foregoing proceedings; that the proceedings have been reduced to typewriting by me, or under my direction and that the foregoing transcript is a correct and accurate record of the proceedings to the best of my knowledge, ability and belief.

STEPHEN GARLAND