STAPPA / ALAPCO

STATE AND TERRITORIAL
AIR POLLUTION PROGRAM
ADMINISTRATORS

ASSOCIATION OF
LOCAL AIR POLLUTION
CONTROL OFFICIALS

S. WILLIAM BECKER
EXECUTIVE DIRECTOR

February 18, 2004

Mr. Robert A. Kaplan
Division Director
Special Litigation and Projects
Office of Enforcement and Compliance Assistance
U.S. Environmental Protection Agency
Room 2248A
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Mr. Kaplan:

We are writing on behalf of the Agriculture Committee of the State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO) to express our concerns with the December 10, 2003, draft of the consent agreement and final order (CA/FO) for animal feeding operations (AFOs).

As you know, STAPPA and ALAPCO wrote to the EPA Administrator in April 2003 with our views on a safe harbor agreement for AFOs. We said that such an agreement might make sense if certain principles were met: (1) there must be a clear environmental benefit at the end of the program; (2) any waiver of enforcement (i.e., "safe harbor") must be narrowly drawn and for a limited timeframe; (3) work should be conducted under accelerated timelines; (4) there should be no backsliding from current regulatory requirements or practices, and (5) enforcement waivers should be limited to participants in the agreement, with perhaps some consideration to exempting nonparticipating small farms. We expressed our concerns that the agreement EPA drafted looked almost identical to what the AFO industry had proposed and conflicted with most of STAPPA/ALAPCO's principles. While we appreciate that EPA has made efforts to revise the agreement to address these points, unfortunately, additional significant concerns remain. These are detailed below.

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1. The CA/FO states that it "aims to promote a *national consensus* on appropriate Emissions-Estimating Methodologies for air emissions from AFOs" (¶6, emphasis added). This implies that this agreement, or suite of agreements, is making national policy, which is not appropriate for a consent agreement. National policy decisions should be made in public with participation by all stakeholders – for example, in a rulemaking.

2. The term "facility" should be expressly defined rather than simply stating it has the same meaning given to that term under the Clean Air Act (¶14). How "facility" is defined is important for determining what is monitored (¶25), what is covered by the releases and covenants not to sue (¶26), and the penalty paid (¶47). In addition, the agreement should clarify that the use of the term "facility" in this agreement shall have no impact on determinations of applicability, or any other regulatory determinations, under the Clean Air Act. Whether a "facility" is a single barn or lagoon, or an entire farm, or contiguous farms operated and controlled by the same company, could affect applicability determinations under Title V, for example, and this issue should not be resolved in this agreement. See, e.g., *Sierra Club Inc. v. Tysons Foods Inc.* (Civil Action No. 4:02CV-73-M, U.S. District Court, Western District Court of Kentucky, Owensboro Division) (defendants argued that "facility" under CERCLA section 103 meant each poultry house on a farm; court ruled that entire farm site was the "facility").

3. The CA/FO states that EPA releases and covenants not to sue Respondents for, among other things, "any other federally enforceable state SIP requirements for major or minor sources based on emission rates and relating to air emissions that will be monitored under this Agreement . . . from any emission source listed in Attachment A" (¶26(A)). This undermines states and localities' ability to meet SIP requirements if EPA waives its authority to force these facilities to comply with SIP requirements. While states and localities technically retain their authority to enforce these requirements, in reality it is difficult for states and localities to do this without EPA support.

4. The CA/FO states that "whether the annual emissions from a particular facility exceed the major source threshold for its location will be determined based on Respondent's current operating methods *and an assumption that the number of animals housed at the facility is the maximum number of animals (excluding changeovers) housed at the facility during any time* over the 24 months prior to EPA's publication of the applicable Emissions-Estimating Methodologies" (¶28(B)(i)(b), emphasis added). It is not reasonable to assume, for the purposes of determining whether a facility could be a major source, that the number of animals that happen to be in a facility at a particular time is the maximum number of animals. It is also not consistent with the Clean Air Act, which looks at a source's potential-to-emit. Furthermore, EPA's proposed approach is not enforceable (nothing in the agreement requires a company to not exceed this number of animals). A more reasonable assumption for the maximum number of

animals is how many animals are *capable* of being housed in the facility (i.e., the reasonable capacity of the facility).

5. The CA/FO provides that the releases and covenants not to sue are only valid if Respondent "complies with all final actions and final orders issued by the state or local authority that address a *nuisance* arising from air emissions at the facility and that are (i) issued after Respondent has been given notice and opportunity to be heard (*including any available judicial review*) as required by applicable state law" (¶29(A)(i), emphasis added). We do not think this provision should be limited to orders to address nuisances, but rather should also include orders to address violations of any state and local health and environmental laws. In addition, allowing companies to wait to respond until the end of any available judicial review could take years.

6. The CA/FO provides that participating companies agree not to challenge the validity of the study protocols or emissions data under the nationwide monitoring program (¶32). However, nothing prevents a participating AFO from challenging at any time the validity of the emissions-estimation methodology developed by EPA, and this methodology is one of the most important byproducts of this agreement. In addition, the ability to challenge these methodologies in an enforcement action should be limited as follows: "In the event of an enforcement action brought against Respondent involving a facility listed in Attachment A, Respondent may, however, challenge the application of the emissions estimation methodology to that specific facility *by submitting site-specific monitoring data.*" (¶32, new language in italics).

7. Please explain why facilities with waste-to-energy systems are granted an additional 180 days to comply with paragraph 28 (¶33).

8. The CA/FO provides that EPA will not sue for a Clean Air Act violation "resulting from emissions from a facility listed in Attachment A that causes or contributes to an exceedance of federally-enforceable, applicable state ambient air quality standards *beyond the facility's property line*" . . . if a company promptly reports and corrects the violation (¶34, emphasis added). If a violation is detected beyond the facility's property line, then the violation was not discovered <u>because of</u> the monitoring program at the facility, and thus the violation should not be covered by the enforcement waiver. In addition, the agreement provides that EPA will not sue for such a violation as long as "[t]he violation is not a repeated exceedance of a standard that Respondent previously tried to correct *pursuant to this provision.*" (¶34(C)). Therefore, if a company violated a standard prior to entering into the monitoring program, and violates it again during the program, the company is still eligible for an EPA enforcement waiver because it wasn't required to correct the violation pursuant to <u>the provision</u> in the agreement.

9. A previous version of the CA/FO contained a paragraph that provided that nothing in this agreement is intended to affect the ability of state and local

agencies to enforce compliance with state and local laws. This paragraph should be restored.

10. We believe it is reasonable to provide for a sliding scale of penalties based on size (¶47); however, we do not think the penalties are adequate. For example, a company could own facilities with up to 1,200,000 chickens per facility and only be assessed a penalty of $500 per facility. Or a company could own facilities with up to 24,000 large swine per facility and only be assessed a penalty of $500 per facility.

11. Finally, we have several concerns and one compliment regarding the provisions covering monitoring. First, we are concerned that assessing $2500 per facility to pay for monitoring may not be sufficient (¶52). Second, in order to eliminate any potential conflict of interest arising from the companies picking the contractor responsible for the monitoring program, we believe that there needs to be sufficient regulator oversight of the selection of the contractor (¶54). Third, we believe the development of best management practices and control technologies should be a priority of this agreement. The only discussion of developing best management practices and control technologies is in the event there is leftover money in the fund, and even so, it is discretionary (¶63). Our final concern is the monitoring protocol – the absence of one, that is, for us to review. And last, but not least, a compliment: we approve of the provision in the CA/FO that provides that "all emissions data generated and all analyses of the data made by the monitoring contractor during the nationwide monitoring program shall be provided to EPA as soon as possible, . . . this data and analysis will be fully available to the public," and participating companies and EPA waive any right to claim any privilege with respect to such data and analysis (¶59).

STAPPA and ALAPCO urge EPA to seriously take into consideration our concerns before entering into the CA/FO with the AFO industry. At the end of the agreement, it will be the state and local agencies that will need to ensure that the AFO industry complies with the Clean Air Act. If we can provide any further information on these issues, please feel free to contact either of us or Amy Royden, Senior Staff Associate of STAPPA/ALAPCO.

Sincerely,

Shelley Kaderly
STAPPA Chair
Agriculture Committee

Doug Quetin
ALAPCO Chair
Agriculture Committee