

National Association of Clean Air Agencies

October 27, 2006

Assistant Attorney General
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U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611

Reference: *United States v. Seaboard Food LP*, Civil Action No. 06-cv-00989-R; D.J.
Ref. No. 90-5-1-1-07570

To Whom It May Concern:

On behalf of the National Association of Clean Air Agencies (formerly known as STAPPA and ALAPCO), we are pleased to submit these comments on the proposed consent decree between the Environmental Protection Agency (EPA) and Seaboard Food LP (Seaboard). NACAA is the national association of air pollution control agencies in 54 states and territories and over 165 major metropolitan areas throughout the United States.

On April 2, 2002, EPA issued an order pursuant to section 114(a)(1) of the Clean Air Act requiring Seaboard to monitor and sample air emissions from several of its swine animal farming operations (AFOs). EPA does not issue these orders lightly; in fact, we are aware of very few issued against AFOs. Unfortunately, Seaboard never complied with this order. Moreover, rather than enforce its terms, EPA is instead proposing in this consent decree to withdraw the monitoring order altogether and absolve Seaboard of legal liability for violations of the Clean Air Act in exchange for the company paying a small penalty and participating in a program where it is one of thousands of AFOs that may potentially have their air emissions monitored. Accordingly, NACAA opposes this consent decree. We believe it is bad public policy and contrary to the spirit of the AFO Air Compliance Agreement.

EPA announced the creation of the AFO Air Compliance Agreement on January 31, 2005 (70 Fed. Reg. 4958), pursuant to which EPA waives enforcement of certain provisions of the Clean Air Act,¹ Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and the Emergency Planning and Community Right to Know Act (EPCRA) for participating AFOs, who agree to fund a program to monitor their air emissions. Participating AFOs receive this waiver regardless of whether their air emissions are monitored. As we understand, of the thousands of participating AFOs,

¹ The waiver applies to “civil violations of the permitting requirements contained in Title I, Parts C and D, and Title V of the Clean Air Act, and any other federally enforceable State implementation plan (SIP) requirements for major or minor sources based on quantities, rates, or concentrations of air emissions of pollutants that will be monitored under this Agreement, namely Volatile Organic Compounds (VOCs), Hydrogen Sulfide (H₂S), Particulate Matter (TSP, PM₁₀ and PM_{2.5}), and Ammonia (NH₃).” Paragraph 26(A).

approximately 14 will have their air emissions monitored. EPA will use the emissions data collected in this study and other data that meets its technical specifications to create an emissions-estimation methodology, which participating AFOs agree to use to determine whether they need to apply for a permit or install control technologies.

As noted above, EPA sent Seaboard on April 2, 2002 a notice pursuant to section 114(a)(1) of the Clean Air Act that required the company to “install and use monitoring equipment and to sample emissions” at certain farms. EPA stated that the information gathered by this equipment “is needed to determine whether these facilities and other swine CAFOs owned by Seaboard” are complying with provisions of the Clean Air Act.

NACAA strongly believes that EPA should not allow Seaboard to participate in the AFO Air Compliance Agreement. Rather, EPA should insist that Seaboard comply with the terms of the section 114 letter the agency sent to Seaboard on April 2, 2002. We believe it sends the wrong message to allow companies that fail to comply with EPA orders to benefit from their noncompliance (in this case, receiving a waiver of enforcement and a rescission of a monitoring requirement). Additionally, EPA would not have issued the section 114 order if it did not have reason to believe that Seaboard’s air emissions are degrading air quality; accordingly, these emissions should be monitored. Since the AFO Air Compliance Agreement does not guarantee that Seaboard’s air emissions will be monitored, EPA should ensure that Seaboard’s air emissions are monitored pursuant to the section 114 order.

EPA’s decision to allow Seaboard to participate in the AFO Air Compliance Agreement is also inconsistent with EPA’s treatment of another AFO operation issued a section 114 order a year prior to Seaboard. EPA issued a section 114 order and notice of violation against Buckeye Egg (which is now owned by Ohio Fresh Egg) on January 19, 2001 regarding air emissions from its poultry facilities. After Buckeye Egg failed to adequately comply with these orders, EPA initiated legal action, which was settled by a consent decree in January 2004. At that time, EPA was developing its AFO Air Compliance Agreement, but nevertheless the agency required Buckeye Egg to install controls on emissions of particulate matter and ammonia from its operations (and to perform extensive testing to evaluate the effectiveness of these controls). In other words, EPA enforced the terms of its orders. In addition, we understand that EPA rejected Ohio Fresh Egg’s application to participate in the AFO Air Compliance Agreement because of EPA’s enforcement history with Buckeye Egg. EPA should apply the same principles to Seaboard and reject Seaboard’s application.

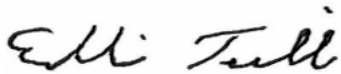
NACAA is also concerned about the penalty being assessed Seaboard. The fact that Seaboard is being assessed a penalty because it failed to comply with a Clean Air Act order means that Seaboard should not be permitted to participate in the AFO Air Compli-

ance Agreement.² In addition, NACAA takes strong exception to the amount of the penalty. We do not believe a \$205,000 penalty is appropriate for a company as large as Seaboard that willfully failed to comply with an EPA order. We note that Buckeye Egg was assessed a penalty of \$880,598 for its failure to comply with EPA directives and Ohio Fresh Egg paid an additional \$500,000 in stipulated penalties for failing to meet testing deadlines. Finally, if EPA does allow Seaboard to participate in the AFO Air Compliance Agreement, its participation should not be subsidized by using *almost half* of the penalty being assessed against them. (The consent decree allows Seaboard to use \$100,000 of its \$205,000 penalty towards paying for Seaboard's participation in the AFO Air Compliance Agreement. The AFO Air Compliance Agreement requires participating AFOs to pay for the monitoring study and the amount assessed is based on their size.)

In sum, we are deeply troubled that EPA would withdraw an administrative order requiring monitoring – an order predicated on a premise that emissions from these AFOs are likely in sufficient quantity to be regulated under the Clean Air Act – and instead allow Seaboard to pay a small penalty, participate in a program where its emissions are likely not going to be monitored and receive assurance from EPA that it will not be sued. Seaboard has failed to comply with an EPA order issued over four years ago. Rather than give the company cover under EPA's Air Compliance Agreement for AFOs, EPA should insist that Seaboard comply with the 2002 section 114(a)(1) order.

If you have any questions, feel free to contact either of us or Amy Royden-Bloom at NACAA at 202-624-7864.

Sincerely,



Eddie Terrill
Co-Chair
NACAA Enforcement Committee



Felicia A. Robinson
Co-Chair
NACAA Enforcement Committee

² The terms of the AFO Air Compliance Agreement regarding payments conflict with the penalty provisions in the consent decree. Paragraph 42 of the Agreement provides that “[a]ny payments made in connection with the national air emissions monitoring study do not constitute a fine or penalty and are not paid in settlement of any actual or potential liability for a fine or penalty.” Yet, paragraph 9 of the consent decree states that the “Defendant [(Seaboard)] shall pay the sum of \$205,000 as a civil penalty, of which \$100,000 may be satisfied by proof of payment under the AFO Air Compliance Agreement” and paragraph 11 states that “Payments made pursuant to this Section are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), and are not tax-deductible expenditures . . .” If the consent decree payments are penalty payments, then they cannot be used “in connection with the national air emissions monitoring study.”