8/22/03 DRAFT

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	
	)	
[Participating Company]	)	**CONSENT AGREEMENT AND FINAL ORDER**
	)	
	)	**CAA-HQ-2003-XX**
	)	
	)	
	)	

I. Preliminary Statement

1. The United States Environmental Protection Agency ("EPA") and [Participating Company] ("Respondent") voluntarily enter into this Consent Agreement and Final Order (Agreement) to resolve outstanding issues regarding [Participating Company's] compliance with the Clean Air Act and the hazardous substance release notification provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) at the facility(ies) listed in the Attachment to this Agreement.

2. The purpose of this Agreement is to ensure that [Participating Company] complies with all applicable requirements of the Clean Air Act and the hazardous substance release notification provisions of CERCLA. To that end, this Agreement requires [Participating Company] to contribute funds towards an extensive, nationwide emissions monitoring program that will lead to the development of methodologies for estimating emissions from animal feeding operations (AFOs) and that will assist AFOs in determining and complying with their regulatory responsibilities under the Clean Air Act and CERCLA.

3. This Agreement is issued pursuant to the authority of 40 CFR 22.13(b), 22.18(b)(2) and (3), which pertain to the quick resolution and settlement of matters without the filing of a complaint.

4. This Agreement resolves the liability for alleged violations of the Clean Air Act and CERCLA at [Participating Company's] facility(ies). It will resolve violations identified and quantified by applying, to Respondent's facilities, the emission monitoring methodologies developed from the nationwide emissions monitoring program described herein.

5. This Agreement is intended to address air emissions from those AFOs that are potentially significant sources of air pollution. It is not intended to address emissions from smaller animal feeding operations, though any size AFO may enter into this Agreement.

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II. Definitions

6. Unless otherwise defined herein, terms used in this Agreement shall have the same meaning given to those terms in the Clean Air Act (42 U.S.C. § 7401 (2003)) and the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9601 (2003)), and the implementing regulations promulgated thereunder.

7. The term "AFO Partnership Program" means the compliance program described in the public notice dated [insert date] in the Federal Register, [insert cite], whose terms and conditions with respect to Respondent are set forth in this Agreement.

8. The term "agricultural waste nutrients" or "agricultural livestock waste nutrients" means livestock manure and litter, including bedding material for the disposition of manure. Agricultural livestock comprise bovine, swine, and poultry among others.

9. The term "emissions-estimating methodologies" means those procedures that will be developed by EPA, using the data from the nationwide emissions monitoring program, to estimate the total annual emissions from an AFO.

10. The term "NPO" means a nonprofit organization established for the purpose of collecting and holding Respondent's contribution to the nationwide emissions monitoring program and the contributions of the other participants in the AFO Partnership Program.

11. The term "nuisance" is defined according to the local statutes, regulations, ordinances or usage.

12. The term "permitting authority" means the local, state or federal government entity with jurisdiction to require compliance with the permitting requirements of the Clean Air Act.

13. The term "qualified, independent third party" means a person or entity that is not affiliated with Respondent or any other participants in the AFO Partnership Program, with sufficient experience and expertise to fully implement the nationwide emissions monitoring program, and that is approved by EPA.

14. The term "qualifying hazardous pollutant" means those substances that trigger the reporting requirement under section 103 of CERCLA.

15. The term "Respondent" means the person or entity that owns (if applicable) and operates the covered facility(ies) listed in the Attachment to this Agreement.

16. The term "State or local authority" means the State or local government entity with Clean Air Act and CERCLA jurisdiction over Respondent's facility(ies).

##. The term "marketing order" means [insert definition]

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III. Consent Agreement

17. Based on [Participating Company's] obligations set forth in section IV of this Agreement, EPA and Respondent have agreed to resolve this matter by executing this Agreement.

18. Respondent asserts that it owns (if applicable) and operates the facilities listed in the Attachment to this Agreement ("the covered facility(ies)").

19. For the purpose of this proceeding, Respondent does not contest the jurisdiction of EPA's Environmental Appeals Board.

20. As specified more fully below, Respondent or representative consents to pay a civil penalty, to contribute funds, through a marketing order or similar funding mechanism, to the nationwide emission monitoring program, to facilitate implementation of the AFO Partnership Program for the duration of this study, and to make its facility(ies) available for monitoring.

21. In consideration of Respondent's obligations specified in this Agreement, with respect to the covered facility(ies), EPA covenants not to sue Respondent, for the duration of the AFO Partnership Program, for failing to comply with the following requirements under the Clean Air Act and CERCLA: (a) requirements under the Clean Air Act to obtain permits under Title I, Parts C and D, and Title V; (b) all requirements triggered by applicable Clean Air Act requirements based on source emissions thresholds; and (c) requirements under section 103 of CERCLA to report releases of hazardous substances.

22. The covenants not to sue set forth in paragraph 21 remain valid if and only if Respondent complies with all requirements set forth below:

(A) Within 120 days after EPA has published on its website (www.epa.gov) methodologies for estimating emissions applicable to the Respondent's facility(ies):

(i) Respondent must comply with all applicable Clean Air Act requirements that, based on the emissions-estimating methodologies published on EPA's website, are found applicable to Respondent's facilities. This requirement includes submitting all necessary permit applications. For all sources whose emissions (as determined by application of the emissions-estimating methodologies) exceed the major source threshold based on the area's attainment status, this requirement includes submitting NSR, PSD, and Title V permit applications and complying with any permit that is subsequently issued. Respondent must promptly and fully respond to any notices of deficiency (or other equivalent notification that the permit application is incomplete or incorrect) issued by the permitting authority with respect to its permit application.

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(ii) For all sources whose emissions exceed the major source threshold for their location based on Respondent's current operating methods and the average number of animals housed at the facility over the 24 months prior to EPA's publication of the applicable emissions-estimating methodologies (as determined by taking the highest number of animals present at the facility(ies) at any time during the calendar month, adding those numbers for the 24 calendar months preceding the publication of the applicable emissions-estimating methodologies, and dividing by 24), Respondent must submit a permit application and comply with any permits that are subsequently issued. Respondent must promptly and fully respond to any notices of deficiency (or other equivalent notification that the permit application is incomplete or incorrect) issued by the permitting authority with respect to its permit application.

(iii) Respondent must report all qualifying hazardous pollutant releases under section 103 of CERCLA.

(B) For all sources whose emissions (as determined by application of the emissions-estimating methodologies) exceed the major source threshold for their location, Respondent must install applicable controls, as determined by the state and local authority, and consistent with EPA regulations.

(C) After Respondent has been given notice and opportunity to be heard as required by applicable State law, Respondent must comply with all final actions and final orders by the State or local authority that require Respondent to address a nuisance arising from air emissions at any of Respondent's facilities. Respondent must provide U.S. EPA with written certification that Respondent has complied with the final action or final order to the satisfaction of the State or local authority and within a time schedule approved by the State or local authority.

23. Respondent agrees to accept the emissions-estimating methodologies published by EPA, and the data used in developing these methodologies, as described in paragraph 22. Respondent further agrees not to contest the validity of the emissions-estimating methodologies and data collected during the AFO Partnership Program as a defense to an enforcement action in any federal, state, or local enforcement action related to compliance with the Clean Air Act.

24. Respondent may choose to install and operate one or more systems that use agricultural livestock waste nutrients to produce electricity (a waste-to-energy system). If Respondent selects this option it will have, with respect to the facilities at which such a system will be installed, an additional 180 days to comply with the requirements of paragraph 22 provided the following requirements are met:

(A) Within 120 days after EPA has published methodologies for estimating emissions applicable to the Respondent's facility(ies), Respondent must notify EPA that it has

installed or intends to install a waste-to-energy system and identifies each facility at which such a system is or will be installed.

(B) At least 50% of the agricultural waste nutrients produced at the facility must be utilized by the waste-to-energy system.

(C) Respondent must make each facility at which a waste-to-energy system is installed available for inspection by EPA.

(D) Respondent agrees to operate the waste-to-energy system for 24 months from the first date of operation or the date EPA publishes methodologies for estimating emissions from Respondent's facilities, whichever is later.

25. The covenants not to sue set forth in paragraph 21 of this Agreement expire with respect to a covered facility operated by Respondent:

(A) At the end of the nationwide monitoring program if there are no applicable Clean Air Act or CERCLA requirements based on the facility's estimated emissions; or

(B) If a facility must comply with Clean Air Act requirements or report under CERCLA, when the facility has complied with all applicable Clean Air Act requirements, including obtaining any required permits and installing appropriate control measures, and made the requisite CERCLA notices.

Any violations occurring after the expiration of the covenants not to sue are not covered. In addition, liability is not waived for any violations occurring prior to the expiration of the covenants not to sue if any obligations of the Respondent set forth in this Agreement are not met, including the requirement set forth in paragraph 22 to timely apply for applicable Clean Air Act permits, install appropriate control technology, and make the requisite notices under CERCLA once emissions estimating methodologies have been provided by EPA.

26. Respondent receives a conditional covenant not to sue for Clean Air Act violations resulting from emissions from the covered facility(ies) that cause an exceedance of applicable national ambient air quality standards beyond the facility's property line during the pendency of the nationwide monitoring program, provided that the violation is promptly reported and corrected as set forth below:

(A) In the case of any violation based upon facts known to Respondent but unknown to EPA, Respondent provides notice of the violation to EPA and the State in which the facility(ies) is(are) located within 21 days of Respondent's discovery of the violation or entry of this Agreement, whichever is later. This notice shall not be required as a condition of the covenant not to sue if, before the Respondent discovered the violation, EPA notifies Respondent in writing of the possibility of such a violation; and,

(B) Respondent corrects the violation, including making adjustments to its operations at the facility to prevent the exceedance from happening again, within 60 days after Respondent discovers the violation or is notified of the violation by EPA or the State, whichever occurs first. If the violation cannot reasonably be corrected within 60 days, Respondent must, before the end of the 60 day time period, submit a plan that is ultimately approved by EPA and the applicable state to correct the violation and must comply with the approved plan in accordance with the specified schedule; and,

(C) The violation is not a repeated exceedance of a standard that Respondent was previously required to correct. Respondent may rectify the loss of the above covenant not to sue for a repeated violation, however, if it pays a stipulated penalty of $500 a day for each facility that exceeds the national ambient air quality standard, and it meets the requirements of subparagraphs (A) and (B), except that the time to correct the violation shall be 30 days instead of 60 days.

27. The execution of this Agreement is not an admission of liability by Respondent, and Respondent neither admits nor denies that it has violated any provisions of the Clean Air Act or CERCLA.

28. Respondent waives its right to request an adjudicatory hearing on any issue addressed in this Agreement unless otherwise provided for in this Agreement.

29. Respondent and EPA represent that they are duly authorized to execute this Agreement and that the parties by signing this Agreement on their behalf are duly authorized to bind Respondent and EPA to the terms of this Agreement.

30. Respondent agrees not to claim or attempt to claim a federal income tax deduction or credit covering all or any part of the civil penalty paid to the United States Treasurer.

31. Respondent and EPA mutually agree that, notwithstanding any other provisions contained in this Agreement, nothing is intended to affect the ability of states to enforce compliance with state laws.

32. This Agreement is without prejudice to all rights of EPA against Respondent with respect to any claims not expressly released herein. In addition, this Agreement does not limit in any way EPA's authority to restrain Respondent or otherwise act in any situations that may present an imminent and substantial endangerment to public health, welfare, or the environment or the United States' authority to prosecute Respondent for criminal violations of the Clean Air Act or CERCLA.

33. Respondent recognizes that EPA may not execute this Agreement if an insufficient number of AFOs agree to participate in the AFO Partnership Program to adequately fund the nationwide monitoring program or if there is inadequate representation of all the eligible animal groups and types of facilities.

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34. Respondent and EPA stipulate to the issuance of the proposed Final Order below.

[Participating Company], Respondent

By:_____

(Print Name):_____

Title:_____

Dated:_____

U.S. Environmental Protection Agency, Complainant

By:_____

Title:_____

Dated:_____

IV. Final Order

Penalty

It is hereby ordered and adjudged as follows:

35. Respondent shall comply with all terms of this Agreement and the public notice dated [insert date] in the Federal Register, [insert cite].

36. Respondent is hereby assessed a penalty in the amount of $500 per covered facility listed in the Attachment to this Agreement for a total amount of _____.

37. Respondent shall pay the assessed penalty no later than thirty (30) calendar days from the date a confirmed copy of this Agreement is received by Respondent.

38. All penalty assessment monies under this Agreement shall be paid by certified check or money order, payable to the United States Treasurer, and mailed to: U.S. Environmental Protection Agency (Washington, D.C. Hearing Clerk), P.O. Box 360277, Pittsburgh, Pennsylvania 15251-6277. A transmittal letter, indicating Respondent's name, complete address, and this case docket number must accompany the payment. Respondent shall file a copy of the check and of the transmittal letter by mailing it to:

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Bessie Hammiel, Headquarters Hearing Clerk
US EPA
1921 Jefferson Davis Hwy
Crystal Mall #2, Room 104
Arlington, VA 22202.

39. Failure to pay the penalty assessed under this Agreement may subject Respondent to a civil action pursuant to Section 113 (d)(5) of the Clean Air Act, 42 U.S.C. § 7413(d)(5), to collect any unpaid portion of the monies owed, together with interest, handling charges, enforcement expenses, including attorney fees, and nonpayment penalties. In any such collection action, the validity, amount, appropriateness of this Order or the penalty assessed hereunder are not subject to review.

40. Pursuant to 42 U.S.C. § 7413(d)(5) and 31 U.S.C. § 3717, Respondent shall pay the following amounts:

(A) Interest. Any unpaid portion of the assessed penalty shall bear interest at the rate established pursuant to 26 U.S.C. § 6621(a)(2) from the date a confirmed copy of this Agreement is received by Respondent; provided, however, that no interest shall be payable on any portion of the assessed penalty that is paid within 30 days of the date a copy of this Agreement is received by Respondent.

(B) Attorney Fees, Collection Cost, Nonpayment Penalty. Should Respondent fail to pay on a timely basis the amount of the assessed penalty, Respondent shall be required to pay, in addition to such penalty and interest, the United States' enforcement expenses, including but not limited to attorney fees and costs incurred by the United States for collection proceedings, and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be ten percent of the aggregate amount of Respondent's outstanding penalties and nonpayment penalties accrued from the beginning of such quarter.

(C) Payment. Interest, attorney fees, collection costs, and nonpayment penalties related to Respondent's failure to timely pay the assessed penalty shall be made in accordance with subparagraphs (a) and (b) of this paragraph.

Monitoring Fund

41. Respondent, through a marketing order or similar funding mechanism, shall pay $2,500 for each covered facility listed in the Attachment to this Agreement for a total of _____ into a fund to implement a nationwide monitoring program at AFOs. The fund and the Respondent's obligations with respect to the nationwide monitoring program are more fully described in paragraphs 41 through 51.

42. Within 30 days from the date that Respondent receives a confirmed copy of this Agreement (hereinafter referred to as the "Agreement date"), Respondent or its representative

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shall establish a nonprofit organization ("the NPO") that will be responsible for collecting and holding Respondent's contribution to the nationwide emissions monitoring program and the contributions of the other participants in the AFO Partnership Program described in the public notice dated [insert date] in the Federal Register, [insert cite].

43. Within 30 days of the Agreement date, Respondent or its representative shall, through the NPO, contract with a "qualified, independent third party" (hereinafter referred to as the "monitoring contractor") to conduct the monitoring program.

44. The contract between the NPO and the monitoring contractor shall require the monitoring contractor to submit to EPA, within 60 days of the Agreement date, a detailed proposed plan to conduct the nationwide monitoring program. The proposed plan shall:

(A) Identify the monitoring contractor and its qualifications for implementing the nationwide monitoring program, and

(B) Be consistent with and include all the elements of the monitoring plan set forth in the public notice dated [insert date] in the Federal Register, [insert cite], and

(C) Identify the facilities to be monitored and the justification for including those facilities based on the specifications for the monitored facilities set forth in above public notice, and finally,

(D) Require the monitoring contractor to submit detailed quarterly reports to EPA discussing its progress in implementing the approved monitoring plan, including what was done during the previous three months and what the monitoring contractor intends to do during the next three months. The monitoring contractor shall submit quarterly reports starting with the end of the first calendar quarter (i.e., March 31, June 30, September 20, or December 31) after the proposed monitoring plan is approved by EPA, unless the plan is approved by EPA with less than 30 days left in the current calendar quarter. In which case, the first quarterly report shall be submitted at the end of the next calendar quarter. The quarterly reports shall continue through the end of the calendar quarter during which the nationwide monitoring program is completed.

45. EPA will review and approve or disapprove the proposed plan within 30 days of receiving it from the monitoring contractor. If the proposed plan is disapproved, EPA will specifically state why the plan is being disapproved and what changes need to be made. The monitoring contractor shall then have 30 days from the date EPA disapproves the plan to modify the proposed plan to address the changes required by EPA and to submit the modified plan to EPA for review and approval. Once the plan is approved, the contract between the NPO and the monitoring contractor shall require the monitoring contractor to fully implement the approved plan in accordance with the approved schedule.

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46. The contract between the NPO and the monitoring contractor shall require the monitoring contractor to schedule periodic meetings (either by phone or in person) with EPA, and special meetings upon request by EPA or the monitoring contractor, to discuss progress in implementing the approved plan. The monitoring contractor shall be required to promptly inform EPA of any problems in implementing the approved plan that have occurred or are anticipated to occur or of any adjustments that may be needed. No changes may be made to the approved plan without the written consent of EPA.

47. 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 in a form and through means acceptable to EPA. The parties agree that this data and analysis will be fully available to the public and that Respondent and EPA waive any right to claim any privilege with respect to such data and analysis.

48. Respondent agrees to make its facility(ies) available for emissions monitoring under the nationwide emission monitoring program if it is chosen as a monitoring site under the approved plan.

49. Respondent also agrees to give EPA or its representatives access to its facility(ies) for the purpose of verifying the suitability of the facility(ies) for monitoring or to observe monitoring conducted under the approved nationwide monitoring plan. EPA agrees that prior to entering Respondent's facility(ies), it will comply with proper biosecurity measures as are normal and customary within the industry. Nothing in this Agreement is intended in any way to limit EPA's inspection, monitoring, and information collection authorities under the Clean Air Act or CERCLA.

50. If, prior to completion of the nationwide monitoring program, it appears that there will be insufficient funds to complete the program, Respondent or its representative shall notify EPA of this problem. The notice shall contain a detailed explanation of why there are insufficient funds, account for all money spent, and identify how much more money is needed to complete the monitoring program. While Respondent is not individually required to contribute additional money to the nationwide monitoring program, Respondent or its representative, along with the other participants in the AFO Partnership Program, shall make all reasonable efforts to find additional funding to complete the monitoring program. Respondent or its representative shall advise EPA of the efforts to locate additional funding and shall not commit to the use of additional funding sources without the prior approval of EPA. If, despite the best efforts of Respondent, the nationwide monitoring program cannot be completed due to lack of funding, then the covenants not to sue set forth in paragraphs 21 and 26 of this Agreement will no longer be in effect.

51. If, after completion of the nationwide monitoring program, there is unspent money in the nationwide monitoring fund, Respondent or its representative shall notify EPA of this fact within 90 days of completion of the monitoring program. The notice shall contain a detailed explanation of why there are unspent funds, including an accounting of all money spent to