

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) AMA PPRCIA Docket No. 05-0001  
)  
Mark McDowell, Jim Joens, )  
Richard Smith, and the Campaign )  
for Family Farms, including Iowa )  
Citizens for Community )  
Improvement, Land Stewardship )  
Project, Missouri Rural Crisis )  
Center, Illinois Stewardship )  
Alliance, and Citizens Action )  
Coalition of Indiana on behalf of )  
their pork checkoff-paying hog )  
farmer members, )  
)  
Petitioners ) **Decision and Order**

**PROCEDURAL HISTORY**

On March 14, 2005, Mark McDowell, Jim Joens, Richard Smith, and the Campaign for Family Farms [hereinafter Petitioners] instituted this proceeding by filing a letter dated March 2, 2005, addressed to the Secretary of Agriculture [hereinafter the Petition]. Petitioners filed the Petition pursuant to the Pork Promotion, Research, and Consumer Information Act of 1985, as amended (7 U.S.C. §§ 4801-4819) [hereinafter the Pork Act]; the Pork Promotion, Research, and Consumer Information Order (7 C.F.R. pt. 1230) [hereinafter the Pork Order]; and the Rules of Practice Governing Proceedings on

Petitions To Modify or To Be Exempted From Research, Promotion and Information Programs (7 C.F.R. §§ 900.52(c)(2)-.71; 1200.50-.52) [hereinafter the Rules of Practice].

On April 1, 2005, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed a motion to dismiss the Petition asserting the Petition does not include information required by 7 C.F.R. § 1200.52(b)(1), (3), (6). On April 12, 2005, Administrative Law Judge Jill S. Clifton dismissed the Petition.

On May 6, 2005, Petitioners filed an Amended Petition. On June 6, 2005, the Administrator filed a motion to dismiss the Amended Petition for failure to state a legally cognizable claim. Petitioners opposed the Administrator's motion to dismiss the Amended Petition. On June 28, 2005, Petitioners filed an unopposed motion for leave to file a second amended petition, and on July 8, 2005, Administrative Law Judge Jill S. Clifton granted Petitioners' motion.

On July 18, 2005, Petitioners filed a Second Amended Petition in which Petitioners request that: (1) the Secretary of Agriculture stop the National Pork Board's expenditure of pork checkoff funds for the study of air emissions from hog feeding operations; (2) the Secretary of Agriculture return any monies expended for the study of air emissions from hog feeding operations to the pork checkoff fund; (3) the Office of the Inspector General, United States Department of Agriculture, conduct an investigation of the use of pork checkoff funds for the study of air emissions from hog feeding operations;

and (4) the Office of the General Counsel, United States Department of Agriculture, institute an action against the National Pork Producers Council for return of any pork checkoff funds that the National Pork Producers Council received for work relating to the study of air emissions from hog feeding operations (Second Amended Pet. at 1, 11). On August 3, 2005, the Administrator filed a motion to dismiss the Second Amended Petition for failure to state a legally cognizable claim. On August 22, 2005, Petitioners filed a response opposing the Administrator's motion to dismiss the Second Amended Petition.

On August 3, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] conducted a telephone conference during which the parties agreed that neither an evidentiary hearing nor oral argument was necessary. On September 5, 2006, (1) Petitioners filed Petitioners' Proposed Findings of Fact and Conclusions of Law and Petitioners' Brief in Support of Proposed Findings of Fact and Conclusions of Law; (2) the Administrator filed Respondent's Proposed Findings of Fact and Conclusions of Law and Respondent's Memorandum in Support of Its Proposed Findings of Fact and Conclusions of Law; and (3) Petitioners and the Administrator filed a Joint Statement of Undisputed Facts.

On October 24, 2006, the ALJ issued a Decision and Order [hereinafter Initial Decision]: (1) concluding the National Pork Board's use of pork checkoff funds to pay a per-farm-fee associated with the United States Environmental Protection Agency's [hereinafter EPA] National Industrial Air Emissions Study [hereinafter Air Emissions

Study] contravenes public policy and is not in accordance with law because the funds are used to purchase a limited and conditional release of civil liability and covenant by EPA not to sue certain animal feeding operations for violations of federal environmental statutes; (2) denying the Administrator's motion to dismiss the Second Amended Petition; and (3) enjoining the National Pork Board from using pork checkoff funds for the purpose of paying the per-farm-fee associated with EPA's Air Emissions Study (Initial Decision at 11).

EPA and the National Pork Producers Council each filed a motion for leave to file an amicus brief, both of which I granted. On December 15, 2006, the Administrator appealed the ALJ's Initial Decision and EPA and the National Pork Producers Council each filed an amicus brief. On January 9, 2007, Petitioners filed a response to the Administrator's appeal petition. On January 17, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

## **DECISION**

### **Decision Summary**

Based upon a careful review of the record, I reverse the ALJ's Initial Decision. I conclude Petitioners lack standing, the Second Amended Petition fails to state a legally cognizable claim, and the National Pork Board's payment of the per-farm-fee associated with EPA's Air Emissions Study is in accordance with the Pork Act and the Pork Order; therefore, I grant the Administrator's motion to dismiss the Second Amended Petition.

### **Findings of Fact**

1. The Pork Act was established to create an orderly procedure for financing and carrying out an effective and coordinated program of promotion, research, and consumer information designed to strengthen the position of the pork industry in the marketplace and to maintain, develop, and expand markets for pork and pork products. (See 7 U.S.C. § 4801(b)(1).) (Joint Statement of Undisputed Facts ¶ 2.)

2. The pork promotion, research, and education program created by the Pork Act and Pork Order is commonly known as the “pork checkoff program” and is funded with mandatory assessments paid by every pork producer on every porcine animal marketed. (See 7 U.S.C. § 4809; 7 C.F.R. pt. 1230.) (Joint Statement of Undisputed Facts ¶ 3.)

3. Petitioners challenge the National Pork Board’s expenditure of \$6,000,000 of pork checkoff funds to support the Air Emissions Study conducted pursuant to EPA’s Notice of Animal Feeding Operations Consent Agreement and Final Order [hereinafter Notice of Air Compliance Agreement]. (See 70 Fed. Reg. 4958-77 (Jan. 31, 2005).) The Notice of Air Compliance Agreement contains the Air Compliance Agreement, which animal feeding operations may voluntarily enter with EPA. (See 70 Fed. Reg. 4962-77 (Jan. 31, 2005).) (Joint Statement of Undisputed Facts ¶ 4.)

4. The Secretary of Agriculture has jurisdiction over the instant proceeding conducted under 7 U.S.C. § 4814(a)(1), which provides that a person subject to the Pork

Order may file with the Secretary of Agriculture a petition stating that the Pork Order, a provision of the Pork Order, or an obligation imposed in connection with the Pork Order is not in accordance with law and requesting a modification of the Pork Order or an exemption from the Pork Order (Joint Statement of Undisputed Facts ¶ 5).

5. The instant proceeding is governed by the Rules of Practice (Joint Statement of Undisputed Facts ¶ 6).

6. Petitioners are Mark McDowell, Jim Joens, Richard Smith, and the Campaign for Family Farms, including Iowa Citizens for Community Improvement, Land Stewardship Project, Missouri Rural Crisis Center, Illinois Stewardship Alliance, and Citizens Action Coalition of Indiana on behalf of their pork checkoff-paying hog farmer members (Joint Statement of Undisputed Facts ¶ 7).

7. Mark McDowell is an individual hog farmer residing in Hampton, Iowa, who pays the pork checkoff (Joint Statement of Undisputed Facts ¶ 8).

8. Jim Joens is an individual hog farmer residing in Wilmont, Minnesota, who pays the pork checkoff (Joint Statement of Undisputed Facts ¶ 9).

9. Richard Smith is an individual hog farmer residing in Wilmont, Minnesota, who pays the pork checkoff (Joint Statement of Undisputed Facts ¶ 10).

10. The Campaign for Family Farms is an unincorporated association comprised of: Iowa Citizens for Community Improvement, Des Moines, Iowa; Land Stewardship Project, Minneapolis, Minnesota; Missouri Rural Crisis Center, Columbia,

Missouri; Illinois Stewardship Alliance, Rochester, Illinois; and Citizens Action Coalition, Indianapolis, Indiana. The Campaign for Family Farms and its member organizations have hog farmer members who are subject to the Pork Act and Pork Order. (Second Amended Pet. at 2-3; Joint Statement of Undisputed Facts ¶ 11.)

11. The National Pork Board is a 15-member board created to carry out the Pork Act. The National Pork Board, which is overseen by the Secretary of Agriculture, is responsible for developing and implementing programs and projects under the Pork Act through the collection and expenditure of pork checkoff funds. (See 7 U.S.C § 4808.) (Joint Statement of Undisputed Facts ¶ 13.)

12. EPA is an agency of the United States government that administers the Air Emissions Study in conjunction with the Air Compliance Agreement. (See 70 Fed. Reg. 4962-77 (Jan. 31, 2005).) EPA is responsible for enforcement of numerous federal environmental statutes, including the Clean Air Act; the Comprehensive Environmental Response, Compensation and Liability Act; and the Emergency Planning and Community Right-To-Know Act. (Joint Statement of Undisputed Facts ¶ 14.)

13. The Agricultural Air Resources Council is the nonprofit organization established by the Air Compliance Agreement to administer the funding for the Air Emissions Study. (See 70 Fed. Reg. 4969-70 (Jan. 31, 2005).) (Joint Statement of Undisputed Facts ¶ 15.)

14. The Air Emissions Study is a nationwide emissions monitoring study that allows EPA to collect and study data concerning air emissions from animal feeding operations, including pork operations. (See 70 Fed. Reg. 4958-77 (Jan. 31, 2005).) (Joint Statement of Undisputed Facts ¶ 29.)

15. During the Air Emissions Study, emissions data for hydrogen sulfide, ammonia, volatile organic compounds, fine particulate matter (PM<sub>10</sub> and PM<sub>2.5</sub>) and total suspended particulate matter is to be collected. (See 70 Fed. Reg. 4963 (Jan. 31, 2005).) (Joint Statement of Undisputed Facts ¶ 30.)

16. EPA conducts the Air Emissions Study by monitoring air emissions from a small number of representative livestock and poultry operations selected from the pool of animal feeding operations that enter into the Air Compliance Agreement with EPA. (See 70 Fed. Reg. 4959 (Jan. 31, 2005).) (Joint Statement of Undisputed Facts ¶ 31.)

17. Under the Air Emissions Study, EPA selected for monitoring approximately six pork operations located within three geographic regions. (See 70 Fed. Reg. 4971 (Jan. 31, 2005).) (Joint Statement of Undisputed Facts ¶ 32.)

18. The Air Emissions Study is conducted by the Independent Monitoring Contractor, which is required to be an organization that is separate from the industries funding the Air Emissions Study. The Agricultural Air Resources Council has selected Purdue University to be the Independent Monitoring Contractor. In addition, Albert J. Heber, Ph.D, P.E., professor and executive director of the Purdue Agricultural Air Quality

Laboratory, has been chosen to be the science advisor. Dr. Heber and Purdue University are responsible for recruiting scientists from additional universities and for deploying monitoring teams to collect data and conduct the Air Emissions Study. (RX A;<sup>1</sup> 70 Fed. Reg. 4969-70 (Jan. 31, 2005).) (Joint Statement of Undisputed Facts ¶ 33.)

19. Pursuant to the Notice of Consent Agreement and the Air Compliance Agreement, EPA agreed to a limited and conditional release of civil liability and a covenant not to sue for certain violations of the Clean Air Act; the Comprehensive Environmental Response, Compensation and Liability Act; and the Emergency Planning and Community Right-To-Know Act for animal feeding operations that sign the Air Compliance Agreement. Animal feeding operations that enter into an Air Compliance Agreement agree to pay a civil penalty, which is based on the size of the animal feeding operation, and approximately \$2,500 per farm into a fund to conduct the Air Emissions Study. (70 Fed. Reg. 4959 (Jan. 31, 2005).) (Joint Statement of Undisputed Facts ¶ 34.)

20. The National Pork Board has agreed to use approximately \$6,000,000 of pork checkoff funds to cover participating pork animal feeding operations' per-farm-fee required under the Air Compliance Agreement to fund the Air Emissions Study (RX E-H; Joint Statement of Undisputed Facts ¶ 35).

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<sup>1</sup>References to the Administrator's exhibits attached to the Declaration of Kenneth R. Payne in Support of Respondent's Supplemental Motion to Dismiss are designated "RX."

21. All pork animal feeding operations participating in the Air Compliance Agreement are individually responsible for paying the civil penalty assessed by EPA. The amount of the civil penalty is based on the size of the animal feeding operation. (See 70 Fed. Reg. 4959 (Jan. 31, 2005).) (Joint Statement of Undisputed Facts ¶ 36.)

22. The initiation of the Air Emissions Study was contingent upon EPA's determination that a sufficient number of animal feeding operations of each species elected to participate. The determination was based on whether the number of participants is sufficient to fully fund the Air Emissions Study and whether the number of participants for each type of operation was sufficient to provide a representative sample to monitor. If EPA had determined that the total number of participants was insufficient, EPA would not have signed any Air Compliance Agreements and would not have proceeded with the Air Emissions Study. (See 70 Fed. Reg. 4962 (Jan. 31, 2005).) (Joint Statement of Undisputed Facts ¶ 37.)

23. On August 22, 2006, EPA announced that its Environmental Appeals Board approved 2,568 Air Compliance Agreements (Joint Statement of Undisputed Facts ¶ 39).

24. Based on the approvals of the Air Compliance Agreements, EPA proceeded with the Air Emissions Study. (See 70 Fed. Reg. 4962 (Jan. 31, 2005).) (Joint Statement of Undisputed Facts ¶ 40.)

25. The National Pork Board entered into a Memorandum of Understanding with the Agricultural Air Resources Council whereby the National Pork Board agreed to

pay \$6,000,000 to the Agricultural Air Resources Council for preparatory expenses in two lump sums. The first payment of \$4,000,000 was due upon EPA approval of the Independent Monitoring Contractor's proposed detailed plan to conduct the Air Emissions Study. The remaining balance was due within 60 days of final EPA approval of the monitoring plan. (RX I; Joint Statement of Undisputed Facts ¶ 41.)

26. The Secretary of Agriculture has approved the National Pork Board's budget requests for payments under the Memorandum of Understanding with the Agricultural Air Resources Council for the Air Emissions Study (RX E-H; Joint Statement of Undisputed Facts ¶ 42.)

#### **Petitioners' Petition and Amended Petition**

Administrative Law Judge Jill S. Clifton dismissed Petitioners' Petition on April 12, 2005. On May 6, 2005, Petitioners filed an Amended Petition, which, despite Petitioners' filing the Second Amended Petition, has not been dismissed. The Administrator correctly notes previous cases in which original pleadings have been treated as if they survive the filing of amended pleadings (Respondent's Supplemental Motion to Dismiss at 2).<sup>2</sup> Generally, an amended pleading supercedes the original pleading and renders the original pleading of no legal effect.<sup>3</sup> Therefore, in order to avoid

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<sup>2</sup>See e.g., *In re Stark Packing Corp.*, 51 Agric. Dec. 1015, 1017 (1992) (dismissing the petition and the amended petition).

<sup>3</sup>*Washer v. Bullitt County*, 110 U.S. 558, 562 (1884); *Mink v. Suthers*, 482 F.3d 1244, 1254 (10th Cir. 2007), cert. denied sub. nom *Knox v. Mink*, 128 S. Ct. 1222 (2008); (continued...)

confusing and muddled records, I adopt the general rule and hold that in proceedings that come before me, unless the applicable rules of practice explicitly provide otherwise or the record clearly indicates otherwise, an amended pleading supercedes the original pleading and renders the original pleading of no legal effect. Therefore, I conclude Petitioners' Amended Petition, filed May 6, 2005, was superceded by Petitioners' Second Amended Petition and the Amended Petition is of no legal effect.

### **Petitioners' Second Amended Petition**

#### *I. Introduction*

I dismiss the Second Amended Petition because Petitioners lack standing and the Second Amended Petition does not state a claim upon which relief can be granted. Moreover, even if I were to find Petitioners have standing and the Second Amended Petition states a claim upon which relief may be granted, I would deny the Second Amended Petition because the National Pork Board's expenditure of pork checkoff funds for the Air Emissions Study does not violate the Pork Act or the Pork Order.

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<sup>3</sup>(...continued)

*Lucente v. International Business Machines Corp.*, 310 F.3d 243, 260 (2d Cir. 2002); *In re Atlas Van Lines, Inc.*, 209 F.3d 1064, 1067 (8th Cir. 2000); *Malowney v. Federal Collection Deposit Group*, 193 F.3d 1342, 1345 n.1 (11th Cir. 1999), *cert. denied*, 529 U.S. 1055 (2000); *Kelley v. Crosfield Catalysts*, 135 F.3d 1202, 1204 (7th Cir. 1998); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997), *aff'd*, 525 U.S. 299 (1999).

## *II. Petitioners Lack Standing*

Petitioners allege the National Pork Board's expenditure of pork checkoff funds for the Air Emissions Study violates the Pork Act and the Pork Order. Petitioners have failed to allege any particularized harm they will suffer as a result of the National Pork Board's use of pork checkoff funds for the Air Emissions Study. The nature of the harm alleged by Petitioners is merely an injury to Petitioners' interest in the National Pork Board's lawful expenditure of its funds. This type of generalized harm is not an injury in fact.<sup>4</sup> Therefore, I conclude Petitioners do not have standing, and I dismiss the Second Amended Petition.

## *III. Petitioners Do Not State A Claim Upon Which Relief Can Be Granted*

Even if I were to find that Petitioners suffered an injury in fact as a result of the National Pork Board's use of pork checkoff funds for the Air Emissions Study, I would dismiss Petitioners' Second Amended Petition because Petitioners do not seek modification of or exemption from the Pork Order. A person subject to the Pork Order may file a petition with the Secretary of Agriculture requesting modification of the Pork Order or exemption from the Pork Order (7 U.S.C. § 4814(a)(1); Rules of Practice).

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<sup>4</sup>*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (rejecting as an injury the right to have the Executive observe procedures required by law and concluding the claimant did not have standing when the only claim was harm to the interest in the proper application of the Constitution and laws); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 476-82 (1982) (holding a taxpayer challenge to the expenditure of funds belonging to the United States Treasury is nonjusticiable).

Petitioners seek four forms of relief in the Second Amended Petition. Petitioners request that: (1) the Secretary of Agriculture stop the National Pork Board's expenditure of pork checkoff funds for the Air Emissions Study; (2) the Secretary of Agriculture return any monies the National Pork Board expended for the Air Emissions Study to the pork checkoff fund; (3) the Office of the Inspector General, United States Department of Agriculture, conduct an investigation of the use of pork checkoff funds for the Air Emissions Study; and (4) the Office of the General Counsel, United States Department of Agriculture, institute an action against the National Pork Producers Council for return of any pork checkoff funds that the National Pork Producers Council has received for any work relating to the Air Emissions Study (Second Amended Pet. at 1, 11). None of Petitioners' requests are requests for modification of or exemption from the Pork Order; therefore, Petitioners have not stated a claim legally cognizable under 7 U.S.C.

§ 4814(a)(1).

*IV. The National Pork Board Has Not Violated The Pork Act Or The Pork Order*

Even if I were to find Petitioners have standing and the Second Amended Petition states a legally cognizable claim, I would deny the Second Amended Petition because I find the National Pork Board's expenditure of pork checkoff funds for the Air Emissions Study is in accord with the Pork Act and the Pork Order. Congress, in enacting the Pork Act, described the purpose of the Pork Act as follows:

**§ 4801. Congressional findings and declaration of purpose**

.....  
 (b)(1) It is the purpose of this chapter to authorize the establishment of an orderly procedure for financing, through adequate assessments, and carrying out an effective and coordinated program of promotion, research, and consumer information designed to—

(A) strengthen the position of the pork industry in the marketplace; and

(B) maintain, develop, and expand markets for pork and pork products.

7 U.S.C. § 4801(b)(1).

The Pork Act defines the term “research” as follows:

**§ 4802. Definitions**

For purposes of this chapter:

.....  
 (13) The term “research” means—

(A) research designed to advance, expand, or improve the image, desirability, nutritional value, usage, marketability, production, or quality of porcine animals, pork, or pork products; or

(B) dissemination to a person of the results of such research.

7 U.S.C. § 4802(13).

The Regulations contain a similar definition of the term “research”:

**§ 1230.23 Research.**

*Research* means any action designed to advance, expand, or improve the image, desirability, nutritional value, usage, marketability, production, or quality of porcine animals, pork, or pork products, including the dissemination of results of such research.

7 C.F.R. § 1230.23.

The National Pork Board has authority to carry out research, as follows:

**§ 1230.58 Powers and duties of the Board.**

The Board shall have the following powers and duties:

.....

(s) To carry out an effective and coordinated program of promotion, research, and consumer information designed to strengthen the position of the pork industry in the marketplace and maintain, develop, and expand markets for pork and pork products.

7 C.F.R. § 1230.58(s). The Air Emissions study is “research” as that term is defined in the Pork Act and the Pork Order. Although the Air Emissions Study is essentially an environmental study, I find environmental issues cannot be separated from the production and image of pork. Therefore, I conclude the Air Emissions Study is consistent with the Pork Act and the Pork Order in that it is designed to provide information which could be used to develop management practices which would reduce air emissions and thereby improve pork production, improve the image of the pork industry, and strengthen the pork industry. The National Pork Board clearly has authority under 7 C.F.R. § 1230.58(s) to use pork checkoff funds to carry out this research.

Petitioners contend the National Pork Board’s use of pork checkoff funds for the Air Emissions Study violates the Pork Order’s express prohibition on the use of pork checkoff funds to influence government policy and government action (Petitioners’ Response to Respondent’s Appeal at 32-39).

The Pork Order expressly prohibits the use of pork checkoff funds for the purpose of influencing legislation, government policy, and government action, as follows:

**§ 1230.74 Prohibited use of distributed assessments.**

(a) No funds collected under this subpart shall in any manner be used for the purpose of influencing legislation as that term is defined in section 4911(d) and (e)(2) of the Internal Revenue Code of 1954, or for the purpose of influencing governmental policy or action except in recommending to the Secretary amendments to this part.

7 C.F.R. § 1230.74(a). I agree with the ALJ's conclusion that the collection and study of data concerning air emissions falls far short of "influencing governmental policy or action." (ALJ's Initial Decision at 6.) I find the prohibition in 7 C.F.R. § 1230.74(a) is largely aimed at lobbying, not at data collection. The Air Emissions Study is not designed to advocate regulatory approaches to air emissions. Instead, it is designed to provide a more complete understanding of the environmental impacts of the pork industry and assist producers in developing responses to those impacts. The mere possibility that a government agency might at some point in the future use National Pork Board research when seeking the enactment of legislation, when formulating government policy, or as the basis for government action does not disqualify that research under 7 C.F.R. § 1230.74(a).

The ALJ concluded the National Pork Board has the authority to fund the Air Emissions Study; however, the ALJ found the National Pork Board used the pork checkoff funds not only to fund the Air Emissions Study, but also to purchase a limited and conditional release of civil liability, as well as a covenant on the part of EPA not to sue animal feeding operations for violations of environmental laws. The ALJ found the use of pork checkoff funds to purchase a release of civil liability and a covenant not to sue a

contravention of public policy and a violation of law. (Initial Decision at 7.) Petitioners agree with the ALJ (Petitioners' Response to Respondent's Appeal), while the Administrator (Respondent's Appeal of October 24, 2006, Decision and Order), the National Pork Producers Council (Amicus Curiae Brief of the National Pork Producers Council), and EPA (U.S. Environmental Protection Agency Amicus Brief) disagree with the ALJ.

As an initial matter, whether the National Pork Board's expenditure of pork checkoff funds for the Air Emissions Study contravenes policy is not at issue in the instant proceeding.<sup>5</sup> The applicable statutory provision affords a means for adjudicating only whether the Pork Order, a provision of the Pork Order, or any obligation imposed in connection with the Pork Order is not in accordance with law.<sup>6</sup> Therefore, to the extent that the ALJ's Initial Decision is based upon the National Pork Board's contravention of policy, the Initial Decision must be set aside.

More importantly, I find the ALJ's determination that the National Pork Board purchased a release of civil liability and a covenant not to sue, error. The ALJ bases his conclusion on the incorrect view that the civil penalty and the per-farm-fee "are not severable and may be viewed as comparable to restitution required to be paid in addition to a fine or confinement" (ALJ's Initial Decision at 7 n.7).

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<sup>5</sup>*In re Daniel Strebin*, 56 Agric. Dec. 1095, 1133 (1997); *In re Sunny Hill Farms Dairy Co.*, 26 Agric. Dec. 201, 217 (1967).

<sup>6</sup>7 U.S.C. § 4814(a).

EPA states the per-farm-fee is a flexible obligation that is not compulsory for some animal feeding operations and is conditional for all animal feeding operations. In contrast to the per-farm-fee, the civil penalty component is not optional or subject to being waived.<sup>7</sup> EPA discusses the civil penalty and the per-farm-fee as separate and distinct.<sup>8</sup> Animal feeding operations that sign an Air Compliance Agreement have a conditional obligation to fund the Air Emissions Study. The EPA makes clear that this conditional obligation to fund the Air Emissions Study is unrelated to any civil penalty and is not consideration provided in exchange for any release of civil liability:

42. [The Animal feeding operation] 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. Any payments made in connection with the [Air Emissions 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.

70 Fed. Reg. 4965 (Jan. 31, 2005).

Thus, the ALJ's conclusion that the National Pork Board is purchasing a release of civil liability is incorrect. Instead, the National Pork Board is only funding research which the ALJ found to be authorized under the Pork Act and the Pork Order. The National Pork Board has chosen to accomplish this funding by helping to fund the Agricultural Air Resources Council. While EPA's covenant not to sue is being given to animal feeding operations "in consideration of [their] obligations under [the Air Compliance] Agreement"

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<sup>7</sup>70 Fed. Reg. 4959, 4966 (Jan. 31, 2005).

<sup>8</sup>*Id.*

(70 Fed. Reg. 4963 (Jan. 31, 2005)), these obligations do not inevitably include an obligation to fund the Air Emissions Study. The animal feeding operation may or may not have an obligation to fund the Air Emissions Study, but they are obligated to pay the EPA-imposed civil penalty.<sup>9</sup>

I find no quid pro quo between EPA's covenant not to sue and the National Pork Board's decision to help fund the Air Emissions Study through the Agricultural Air Resources Council. The National Pork Board's funding of the Air Emissions Study does not protect an animal feeding operation that fails to pay its civil penalty or otherwise fails to meet any of the other conditions in the Air Compliance Agreement. Accordingly, the ALJ's conclusion that the National Pork Board's expenditure of funds for the Air Emissions Study is not in accordance with law because it is a payment for a release from civil liability and a covenant not to sue, is error. To the contrary, I conclude the National Pork Board's expenditure of funds for the Air Emissions Study is an expenditure of funds for research designed to carry out the purposes of the Pork Act and the Pork Order and fully comports with the Pork Act and the Pork Order. Therefore, even if I were to find Petitioners have standing and the Second Amended Petition states a legally cognizable claim, I would deny Petitioners' Second Amended Petition.

For the foregoing reasons, the following Order is issued.

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<sup>9</sup>70 Fed. Reg. 4966 (Jan. 31, 2005).

**ORDER**

Petitioners' Second Amended Petition, filed July 18, 2005, is dismissed. This Order shall become effective on the day after service on Petitioners.

**RIGHT TO JUDICIAL REVIEW**

Petitioners have the right to obtain review of the Order in this Decision and Order in the district court of the United States in which district Petitioners reside or do business. A complaint for the purpose of review of the Order in this Decision and Order must be filed not later than 20 days after the date Petitioners receive notice of the Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the complaint to the Secretary of Agriculture.<sup>10</sup>

Done at Washington, DC

December 18, 2008

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William G. Jenson  
Judicial Officer

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<sup>10</sup>7 U.S.C. § 4814(b)(1)-(2).