

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

AMA PPRCIA Docket No. 05-0001

In re: 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

Preliminary Statement

This action was brought by the Petitioners, who include both individual hog farmers and a number of unincorporated associations representing their pork checkoff paying hog farmer members, challenging the commitment of \$6,000,000.00 of the funds received by the National Pork Board (“Pork Board”) through producer assessments (pork checkoffs) under the Pork Promotion, Research, and Consumer Information Act (“Pork Act”), 7 U.S.C. § 4801 *et seq.*(2005), commonly referred to as the “pork checkoff

program.” In their Second Amended Petition¹, the Petitioners allege that this particular obligation of checkoff funds to support the work of the Agricultural Air Resource Council (“AARC”) or the National Air Emissions Monitoring Study (“Monitoring Study” or “Air Emissions Study”) being conducted pursuant to the United States Environmental Protection Agency’s (“EPA”) Animal Feeding Operations (“AFO’s”) Consent Judgment and Final Order (“Notice of Consent Agreement”) is not in accordance with law as being outside the scope of the Pork Board’s authority under the Pork Act and Pork Order and because it is a violation of the express provisions of the Pork Act and Pork Order.

The Respondent, the Administrator of the Agricultural Marketing Service (“AMS”), has filed serial Motions to Dismiss, contending that none of the Petitions state a legally cognizable claim in compliance with 7 U.S.C. §4814(a)(1)(A) and 7 C.F.R. § 1200.52(b)(4) of the Rules of Practice and that they should be dismissed with prejudice. The extensive procedural history of the case is set forth in detail in the Joint Statement of Undisputed Facts (“JSUD”) filed by the parties is incorporated by reference without repetition herein.

Although the parties were offered an opportunity to orally argue their respective positions, neither side desired to avail themselves of that opportunity, briefs have been received from both parties, and the parties agree that the case is now ripe for determination on the record.²

¹ This action was originally initiated by a letter dated March 2, 2005 addressed to Secretary of Agriculture Mike Johanns. The letter along with a Notice of Filing was filed with the Hearing Clerk’s Office on March 14, 2005 by the Office of General Counsel.

² In addition to the Joint Statement of Undisputed Facts (JSUD), the Briefs of the Parties, the record now consists of three volumes of pleadings and contains a number of exhibits and attachments to the various pleadings. References to these attachments will be prefaced with P for Petitioners’ exhibits or attachments and R for Respondent’s exhibits or attachments.

Statutory and Regulatory Provisions

Congress, in enacting the Pork Act in 1985, found that pork and pork products are basic foods that are a valuable part of the human diet and that production of pork and pork products plays a significant role in the economy of the United States. In 7 U.S.C. § 4801(b)(1), the Congress expressed the purpose of the chapter to be:

(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.

The term “research” is defined in 7 U.S.C. § 4802(13):

(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.

A similar provision appears in the implementing regulation:

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 the results of such research. 7 C.F.R. § 1230.23

The Board is vested with specific authority concerning promotion, research, and consumer information:

7 C.F.R. § 1320.58. 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.

The Regulations also contain an express prohibition for the use of checkoff funds:

(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. § 1320.74

7 U.S.C. § 4814(a)(1) of the Act expressly permits those subject to an order to petition for review of the order, a provision of the order, or an obligation imposed in connection with the order, to request modification or exemption from its provisions, and specifies the grounds on which an order may be challenged:

(a)(1) A person subject to an order may file with the Secretary a petition—
(A) stating that such order, a provision of such order, or an *obligation imposed* in connection with such order is not in accordance with law; and
(B) requesting modification of such order or an exemption from such order.

The Petitioners’ Challenges to the obligation of funds. The Petitioners set forth four grounds upon which they assert that the obligation of funds is not in accordance with law:

1. It violates 7 C.F.R. § 1230.74(a) of the Pork Order because it will influence the development of EPA’s policies, regulations, standards, guidelines and methodologies;

2. It violates 7 C.F.R. § 1230.74 of the Pork Order because it will influence EPA’s enforcement actions for certain past, on-going, and future violations under the Clean Air Act³ (“CAA”), the Comprehensive Environmental Response, Compensation and Liability Act⁴ (“CERCLA”), and the Emergency Planning and Community Right-To-Know Act⁵ (“EPCRA”);

³ 42 U.S.C. § 4601, *et seq.*

⁴ 42 U.S.C. § 9601, *et seq.*

⁵ 42 U.S.C. § 11001, *et seq.*

3. It violates 7 U.S.C. § 4801(b)(1) and 7 C.F.R. § 1230.58(s), the express purpose of the Pork Act and Order, because it is not designed to strengthen the position of the pork industry in the marketplace or maintain, develop, and expand markets for pork and pork products; and

4. It violates 7 U.S.C. § 4802(13)(A) of the Pork Act and 7 C.F.R. § 1230.23 of the Pork Order because it is not research designed to advance, expand, or improve the image, desirability, nutritional value, usage, marketability, production, or quality of porcine animals, pork, or pork products.

The Respondent's Response to the Petitioners' Challenges. In response, the Respondent maintains:

1. The Air Emissions Study is “research” and the use of pork checkoff funds for such research is in accordance with the Act. In explaining its position, the Respondent argues that despite the fact that the Air Emissions Study is “environmental,” it is impossible to separate environmental issues and air emissions concerns from the production or image of pork, pointing to the existence of committees established at the Pork Board dedicated to environmental issues and environmental stewardship. The research study would be consistent with the Act by producing unbiased factual information which could be used in developing management practices and environmental management systems to reduce air emissions, thereby improving pork production and the image of the pork industry and strengthening the industry's position.

2. The commitment of pork checkoff funds to the study was rational and reasonable.

3. The use of pork checkoff funds for research is not barred by the order and Petitioner's reliance upon § 1230.74(a) of the Order is misplaced as the collection and study of data concerning air emissions falls far short of "influencing government policy or action."

4. The National Pork Board's role in the Air Emissions Study is not unlawful.

Discussion

It is clear from the language of the enabling legislation that the Pork Board has broad statutory authority to obligate and expend checkoff funds on research designed to strengthen the position of the pork industry in the marketplace and maintain, develop, and expand markets for pork and pork products.⁶ An Air Emissions Study, similar to that to be performed by the AARC, might well produce information of benefit to the pork industry as a whole, as environmental concerns do significantly impact the image of pork producers, large and small. Accordingly, to the extent the Petitioners are suggesting that an unbiased study which collects and analyzes emissions data might "influence governmental policy or action," their argument must be rejected as such studies provide policy neutral information upon which informed and enlightened choices might be made in determining policy rather than to advocate a particular approach as is done with lobbying efforts.

Notwithstanding the Board's broad power to obligate funds for research, the commitment being challenged, while being labeled as being for research, is in fact to be used to cover a portion of the costs of securing the limited and conditional release of civil liability as well as a covenant not to sue for certain past and on-going violations of CAA,

⁶ 7 U.S.C. §§ 4801(b)(1), 4802(13), and 4809(c)(3)(B)

CERCLA, and EPCRA for [pork producing] AFOs that voluntarily sign an Air Compliance Agreement. (RX E-H, JSUF ¶35). The two components of the Notice of Consent Agreement and the Air Compliance Agreement are (a) a civil penalty component which is based upon the size of the AFO which would be borne by the AFO and (b) the \$2,500.00 per farm fee to be used to fund the Air Emissions Study. It is the Board's \$6,000,000.00 commitment to fund the per farm fee for participating AFOs that is being challenged in this case.

There can be little doubt that the Board could have independently commissioned and funded an Air Emissions Study as research; however, public policy precludes the Board from purchasing,⁷ as is contemplated in this case, a limited and conditional release of civil liability and a covenant on the part of another governmental agency not to sue for past or on-going violations of federal statutes for selected pork producers with pork checkoff funds assessed against all pork producers.

Accordingly, I find that the Pork Board's obligation of \$6,000,000.00 to secure the limited and conditional release of civil liability as well as a covenant not to sue for certain past and on-going violations of the CAA, CERCLA and EPCRA for AFOs that voluntarily sign an Air Compliance Agreement contravenes public policy and is not in accordance with law. For the foregoing reasons, the following Findings of Fact, Conclusions of Law and Order will be entered.

⁷ In order to secure EPA's limited and conditional release of civil liability and the covenant not to sue for past or on-going violations, an AFO is obligated to pay both the civil penalty and the per farm fee. As the components are not severable and may be viewed as comparable to restitution required to be paid in addition to a fine or confinement, the lack of severability taints what otherwise might have been considered a legitimate expenditure for research. The public policy is reflected in the well established rule that fines or similar penalties for violations of any law may not be deducted under the Internal Revenue Code. 26 U.S.C. § 162(f)

Findings of Fact

1. Mark McDowell, Jim Joens and Richard Smith are individual hog farmers, each of whom pay the pork checkoff assessments. McDowell resides in Hampton, Iowa; Joens and Smith reside in Wilmont, Minnesota.

2. 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 of Indiana, 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 who are required to pay the mandatory pork checkoff assessments.

3. The National Pork Board (the “Pork Board”) is a 15 member entity created by § 4808 of the Pork Act to carry out the policies and provisions of the Pork Act. The Pork Board is subject to the Secretary of Agriculture’s oversight and is responsible for developing and implementing programs and projects under the Pork Act through the collection and expenditure of pork checkoff funds.

4. The EPA is an agency of the United States federal government that is administering the Air Emissions Study in conjunction with the Consent Agreement, in which AFO’s can voluntarily participate. The EPA is responsible for enforcement of numerous environmental statutes, including the Clean Air Act,⁸ the Comprehensive Environmental Response, Compensation and Liability Act,⁹ and the Emergency Planning

⁸ 42 U.S.C. § 4601, *et seq.*

⁹ 42 U.S.C. § 9601, *et seq.*

and Community Right-To-Know Act.¹⁰

5. The AARC is the nonprofit organization (“NPO”) established by the Consent Agreement to administer the funding for and to oversee the Air Emissions Study, including role of receiving of funds, approving the budget, selecting the Science Advisor and the Independent Monitoring Contractor (“IMC”),¹¹ receiving reports on progress, reviewing audits and expenditures, disbursing funds for the completion of the study, and compiling a list of candidate AFOs to participate in the study, from which the Science Advisor would choose the actual sites to be monitored in the study. 70 Fed. Reg at 4970.

6. On January 30 1, 2005, EPA published a Notice of Consent Agreement and Final Order in the Federal Register, 70 Fed. Reg. 4958 (January 31, 2005). EPA refers to the agreement discussed in that notice as the “Consent Agreement” or the “Air Compliance Agreement.” 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 past and ongoing violations of the CAA, CERCLA, and EPCRA for AFOs that voluntarily sign an Air Compliance Agreement. AFOs entering an Air Compliance Agreement agree (1) “to pay a civil penalty which is based on the size of the AFO” and (2) to pay a \$2500 per farm fee “into a fund to conduct a nationwide emissions monitoring study.” 70 Fed. Reg. at 4959, JSUD ¶34. *See also* 70 Fed. Reg. at 4963, ¶¶ 25, 26, 28.

7. The decision to conduct the Air Emissions Study is contingent upon EPA's determination that “a sufficient number of AFOs of each species¹² have elected to

¹⁰ 42 U.S.C. § 11001, *et seq.*

¹¹ Purdue University was selected as the IMC and Albert J. Heber, Ph.D. as the Science Advisor. Payne Declaration, Exh.A, JSUD ¶33.

¹² Both livestock, including both beef and pork producers and poultry operations are to participate.

participate. The determination will be based on whether the number of participants is sufficient to fully fund the monitoring study and whether the number of participants for each type of operation is sufficient to provide a representative sample to monitor." 70 Fed. Reg. at 4962. If EPA determines that "the total number of participants is insufficient, EPA will not sign any air compliance agreements and will not proceed with the [Air Emissions] monitoring study." *Id.*, JSUD ¶37.

8. The Pork Board agreed to expend \$6,000,000.00 of pork checkoff assessments to cover participating pork producing AFOs's at \$2500 per farm as the fee required under the Consent Agreement to fund the Air Emissions Study.¹³ Payne Declaration, Exh. E.-H, JSUD ¶35. On April 28, 2005, the Pork Board entered into a Memorandum of Understanding with AARC on the Conduct of A National Air Emissions Study for the Pork Industry. Payne Declaration, Exh. I.

9. By approving the Pork Board's budget submissions, AMS has authorized the Pork Board's actions.

10. To date, the only funds expended on the Air Emissions Study by the Pork Board have been for administrative costs pursuant to the Board's agreement with the AARC. JSUD ¶43.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over this matter pursuant to 7 U.S.C. § 4814(a)(1).

¹³ The Pork Board submitted a budget of \$4,500,000.00 2004 and \$1,500,000.00 for 2005, both of which were approved by AMS. (Payne Declaration, Exh. E-H)

2. The Petitioners, who include both individual hog farmers subject to the Act and the unincorporated associations that have joined on behalf of their pork checkoff paying members, have standing to bring this action.

3. The Petitioners have alleged sufficient facts in the Second Amended Petition to support a legally cognizable claim that the commitment of \$6,000,000.00 in pork checkoff funds to support the work of the AARC and the Monitoring Study to be conducted pursuant to the Notice of Consent Agreement is contrary to public policy and not in accordance with law.

4. The Respondent's approval of the 2004 and 2005 Pork Board budgets was not in accordance with law to the extent that those budgets included funds to pay the per farm fee which was a part of the cost of securing a limited and conditional release of civil liability and a covenant not to sue for violations of certain past and on-going violations of federal and environmental statutes.

Order

1. The Respondent's Motion to Dismiss for failure to state a legally cognizable claim is **DENIED**.

2. The Pork Board is **ENJOINED** from expending funds received from the pork checkoff assessments collected from pork producers for the purpose of paying the per farm cost of participation in the AARC study being conducted pursuant to the United States Environmental Protection Agency Animal Feeding Operations Consent Judgment and Final Order.

3. Pursuant to 7 C.F.R. § 900.64(c), this Order shall become final and effective without further proceedings 35 days after service upon the Petitioner, unless appealed to the Judicial Officer.

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

Done at Washington, D.C.
October 24, 2006

PETER M. DAVENPORT
Administrative Law Judge

Copies to: Susan E. Stokes, Esquire
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