

**UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE**

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

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TO: Secretary of Agriculture, Michael Johanns:

Pursuant to 7 U.S.C. § 4814(a)(1)(A) and (B), Petitioners request that the Secretary of Agriculture halt the expenditure of \$6 million in pork checkoff funds for a “research study” of air emissions from concentrated hog feeding operations to be conducted pursuant to a “Consent Agreement” between the Environmental Protection Agency (EPA) and pork industry interests. *See* 70 Fed. Reg. 4958 (January 31, 2005) (“Consent Agreement”). Petitioners request expedited consideration of this Petition and waive their right to oral argument.

Petitioners are hog farmers Mark McDowell, Jim Joens, and 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.

## **THE ADMINISTRATIVE LAW JUDGE'S DISMISSAL WITHOUT PREJUDICE**

On April 18, 2005, Farmers' Legal Action Group, Inc. ("FLAG") received the Administrative Law Judge's "Dismissal Without Prejudice" ("Dismissal"), along with Respondent USDA's Motion To Dismiss, which apparently was served on the Office of the Hearing Clerk on April 1, 2005.

USDA's Motion to Dismiss avers that Petitioners' request does not comply with 7 C.F.R. 1200.52(b)(1), which states that a petition must contain:

The correct name, address, and principal place of business of the petitioner. If the petitioner is a corporation, such facts shall be stated, together with the name of the State of incorporation, the date of incorporation, and the names, addresses, and respective positions held by its officers and directors; if an unincorporated association, the names and addresses of its officers, and the respective positions held by them; if a partnership, the name and address of each partner; . . ."

Without specifying which portion of this rule Petitioners purportedly did not comply with, USDA alleges that Petitioners' "request does not contain such information." Respondent's Motion, p. 2. The Administrative Law Judge decision states simply that "For the reasons stated in the Motion to Dismiss, I find the 'Petition' should be and hereby is dismissed with prejudice."

As an initial matter, Petitioners object to the Dismissal on the grounds that the Hearing Clerk failed to serve Petitioners with Respondent's Motion to Dismiss prior to the Administrative Law Judge issuing her decision. This amounts to a complete failure of even minimal due process, and is tantamount to *ex parte* contact with the Administrative Law Judge.

Petitioners Jim Joens, Richard Smith, and Mark McDowell are individual hog farmers.

Their addresses are as follows:

Jim Joens  
22254 State Highway 266  
Wilmont, MN 56185

Richard Smith  
1452 Hasselroth  
Wilmont, MN 56185

Mark McDowell  
2032 – 200th Street  
Hampton, IA 50441

The Campaign for Family Farms is an unincorporated association comprised of:

Iowa Citizens for Community Improvement  
2001 Forest Avenue  
Des Moines, IA 50311

Land Stewardship Project  
2919 East 42nd Street  
Minneapolis, MN 55406

Missouri Rural Crisis Center  
1108 Rangeline Street  
Columbia, MO 65202

Illinois Stewardship Alliance  
114 East Main  
Rochester, IL 62563

Citizens Action Coalition of Indiana  
5420 North College Avenue  
Indianapolis, IN 46220

The Campaign for Family Farms (the “Campaign”) does not have officers. It and its member organizations have hog farmer members who are subject to the mandatory pork checkoff. *See*

*Michigan Pork Producers v. Campaign for Family Farms*, 229 F. Supp. 2d 772, 775 (D. Mich. 2002). The Campaign’s “agricultural interests are to promote family farming as opposed to the vertical integration of agricultural production, *i.e.*, factory farms. Since 1998, CFF has pursued as a primary goal the termination of the Pork [Checkoff] Program. CFF views the Pork [Checkoff] Program as beneficial to factory farming but antithetical to the interests of its members, who are family farmers.” *Id.*

The Campaign’s hog farmer members object to the use of pork checkoff funds as set forth herein, and the Campaign and its member organizations bring this Petition on behalf of their checkoff-paying hog farmer members. The factual and legal bases of their objections are set forth below. The information provided herein regarding Petitioners, the nature of their business, and the manner in which they are affected by the provisions complained of was found to satisfy the standing and capacity requirements of Article III of the United States Constitution by the United States District Court for the District of Michigan. *See id.* at 780-784. The Sixth Circuit Court of Appeals affirmed this finding. *Michigan Pork Producers Ass’n v. Veneman*, 348 F.3d 157 (6th Cir. 2003) (noting that more detailed challenges to the Campaign’s standing than the challenges presented by Respondent here were “not well taken.”). It is certainly more than sufficient to satisfy the requirements of 7 C.F.R. § 1200.52(3), contrary to Respondent’s unsupported and unexplained allegation that Petitioners have not complied with that rule.

## **FACTUAL BACKGROUND**

The Consent Agreement allows individual producers to enter into agreements with

EPA that give them immunity from civil liability under the Clean Air Act, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), and the Emergency Planning and Community Right-To-Know Act (EPCRA) in exchange for payment of a civil penalty. 70 Fed. Reg. 4959 (January 31, 2005). In addition, all participating operations must make their operations available for monitoring and pay a fee of approximately \$2,500 per farm to pay for a two-year study of data collected from selected farms. *Id.* Only a very small number of pork operations will be selected for monitoring. *See* National Air Emissions Research Study Questions and Answers, <http://www.porkboard.org/environment/Information/National%20Air%20Emissions%20Study%20QA.rtf> (copy attached). The pork checkoff has committed \$6 million for the “study,” which will cover pork producers’ \$2,500 fee to cover the pork portion of the EPA study. *See* Air Emissions Agreement, <http://www.porkboard.org/environment/Information/LeadStory.asp>; *see also* Alan Guebert, *Sweet Deal for Large Farms Likely Will Raise a Big Stink*, Farm and Food File (Feb. 10, 2005) (copy attached).

As set forth in the mailing to checkoff-paying hog farmers, the National Pork Board (NPB) “has committed a total of \$6 million for the nationally coordinated study from the 2004 and 2005 budgets.” Declaration of Mark McDowell, Ex. 1, p. 2. This commitment and expenditure of funds is improper under the Pork Promotion, Research, and Consumer Information Act (“Pork Act”), 7 U.S.C. § 4801 *et seq.*, because it is beyond the scope of the Pork Act, as it not designed to “strengthen the position of the pork industry in the marketplace” or “maintain, develop, and expand markets for pork and pork products.”

7 U.S.C. § 4801(b)(1) and does not fall within the definition of “research” under 7 U.S.C. § 4802(13)(a). Moreover, given the imminent decision from the United States Supreme Court that may well likely result in the termination of the entire pork checkoff program (see below), it is wholly irresponsible of USDA to approve the expenditure of such significant funds for two years; such commitment of funds is an intentional and disgraceful waste of hog farmers’ hard-earned money.

## **ARGUMENT**

### **I. The Use of Checkoff Funds for the EPA Study Violates the Pork Act.**

Even if the Supreme Court does not declare the Pork Act unconstitutional, the use of pork checkoff funds for the EPA study is not in accordance with the Pork Act and is in excess of the statutory jurisdiction granted to NPB and USDA under the Pork Act.

The purpose of the Pork Act is 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). This purpose is to be fulfilled through a coordinated program of promotion, research, and consumer information....” *Id.* “Research,” under the Pork Act, is limited to: “research designed to advance, expand, or improve the image, desirability, nutritional value, usage, marketability, production, or quality of porcine animals, pork, or pork products.” 7 U.S.C. § 4802(13)(a); 7 C.F.R. § 1230.23.

The National Pork Board has agreed to spend \$6 million of checkoff funds from its 2004 and 2005 budgets to fund a “study” of air emissions from a “sampling” of concentrated

hog feeding operations. McDowell Declaration, Ex. 1, pp. 2, 1. The National Pork Board has represented that: “The Pork Checkoff is involved in selecting the researchers, designing the research protocols, selecting monitoring sites and assisting in project verification.” *Id.*, p. 2. This “study” has nothing to do with the promotion of pork or finding markets for pork or pork products. It therefore does not fulfill the purpose of the Pork Act pursuant to 7 U.S.C. § 4801(b)(1).

The “study” also is not “designed to advance, expand, or improve the image, desirability, nutritional value, usage, marketability, production, or quality of porcine animals, pork, or pork products,” as the term “research” is defined in the Pork Act. 7 U.S.C. § 4802(13)(a). The study clearly has nothing to do with the nutritional value of pork. It will not improve the usage or quality of pork. It does nothing to improve the production of pork. By the National Pork Board’s own admission, this is an “environmental” study, not a study having anything to do with the marketing or promotion of pork. McDowell Declaration, Ex. 1, p. 3.

And it will not improve the image or desirability of pork. If anything, it will *harm* the image of pork, drawing attention to pork producers who are signing up for immunity from any liability for violating our nation’s federal pollution laws. Any reasonable person would read this Consent Agreement as only benefiting large, concentrated animal feeding operations (CAFOs), since only large operations emit sufficient quantities of covered substances to have to worry about application of the Clean Air Act in the first instance. The Consent Agreement also raises more questions than it answers: if hog operations are safe—as NPB would like

consumers to believe—why would operators need immunity? Why wouldn't they consent to monitoring without first demanding immunity if they have nothing to hide? Already the agreement has been criticized in the public media. *See* attached.

Because the “study” does not fall within any of the purposes of the Pork Act and is well beyond what is permissible checkoff-funded “research,” the study therefore is an unauthorized expenditure of checkoff funds. The commitment and expenditure of these checkoff funds for this purpose is not in accordance with the Pork Act and is in excess of its statutory jurisdiction set forth in the Pork Act. We request that the Secretary halt it immediately.

Even if the EPA “study” were considered “research” under the Pork Act, the mechanism chosen for funding it is impermissible. Rather than directly funding the “research,” the pork checkoff is paying the \$2,500 “fee” on behalf of pork producers who sign up. *See* Air Emissions Agreement, <http://www.porkboard.org/environment/Information/LeadStory.asp>; *see also* Alan Guebert, *Sweet Deal for Large Farms Likely Will Raise a Big Stink*, Farm and Food File (Feb. 10, 2005). The immunity producers receive under the Consent Agreement is contingent upon receipt of that “fee.” 70 Fed. Reg. 4967 (January 31, 2005). The pork checkoff thus is funding a fee that buys individual pork producers’ immunity from environmental laws. That the fee thereafter goes into a pot of money that pays for the “study” does not save this program. It is merely a thin veil of cover for what the \$6 million is really doing: buying legal immunity for large CAFOs that bully their way into local communities, pollute the air and water of those communities, and reduce the quality of life

of those people who live nearby. That the pork checkoff is paying \$6 million for this immunity is an affront to the checkoff-paying hog farmers who oppose this factory farm liability giveaway. It is also outside the statutory authority of the Pork Act under 7 U.S.C. §§ 4801(b)(1) and 4802(13)(A).

**II. Entering Into Two-Year Obligations of Pork Checkoff Funds, Given the Possible Imminent Termination of the Pork Checkoff is Irresponsible and an Abuse of Discretion.**

On October 25, 2002, United States District Court Judge Richard Enslen declared the entire pork checkoff “unconstitutional and rotten.” 229 F. Supp. 2d 779, 791 (D. Mich. 2002). Judge Enslen ordered the pork checkoff terminated within 30 days. *Id.* The Sixth Circuit affirmed Judge Enslen’s decision on the merits, *see Michigan Pork Producers Ass’n v. Veneman*, 348 F.3d 157 (6th Cir. 2003), but the termination order has been stayed pending a decision on the government’s petition for certiorari in the case. The certiorari petition is being held pending the outcome of the Supreme Court’s decision in *Livestock Marketing Ass’n v. Veneman*, 335 F. 3d 711 (8th Cir. 2003), *cert. granted*, 124 S. Ct. 2389 (U.S. May 24, 2004).

A decision in the *LMA* case is expected any day now, and a decision affirming the lower courts’ opinions would result in the entire pork checkoff being terminated in a matter of months. The National Pork Board’s two-year commitment and the Secretary’s approval of \$6 million from 2005 and 2006 budgets—which may not even exist after the Supreme Court rules—is arbitrary, capricious, and an abuse of discretion. It is also an outrage.

**III. The Pork Checkoff’s Commitment Pursuant to the Consent Agreement Appears to Violate the 2001 Settlement Agreement Between USDA and the National Pork Producers Council.**

For many years, the National Pork Producers Council (NPPC) was the general

contractor for the pork checkoff. USDA was sternly chastised by the Office of Inspector General for allowing NPB to broadly delegate its duties to NPPC. In 2001, USDA and NPPC entered into a court-approved settlement agreement that allowed the pork checkoff to continue, but separated NPPC from NPB and required that NPB fulfill its statutorily mandated duties to itself administer the pork checkoff program.

Despite the supposed separation, this Consent Agreement involving the commitment of \$6 million of pork checkoff funds was negotiated by NPPC, supposedly on behalf of pork producers. *See EPA Air Emissions Consent Agreement Fact Sheet*, [http://www.nppc.org/hot\\_topics/airemissionsbackgrounder.html](http://www.nppc.org/hot_topics/airemissionsbackgrounder.html) (“NPPC has worked for three years to help negotiate this agreement.”); *Questions and Answers*, [http://www.nppc.org/hot\\_\\_topics/Q&A.html](http://www.nppc.org/hot__topics/Q&A.html) (“NPPC helped negotiate the legal protections in the consent agreement”). In none of the materials put out by NPB, NPPC, EPA, or USDA is NPB mentioned as having any involvement in the negotiations. In addition, it is NPPC, not NPB, that conducted information sessions around the country about the Consent Agreement, with the pork checkoff paying—at a minimum—to promote those information sessions. *See McDowell Dec.*, Ex. 1, p. 3. Although it appears that checkoff funds are being used to pay for NPPC’s role, apparently NPB has not formalized any contractual relationship with NPPC. *See* attached FOIA Request and AMS Response. These representations demonstrate that NPPC, rather than NPB, was responsible for committing the pork checkoff’s \$6 million to underwrite the “study.” Accordingly, NPB has once again improperly delegated its duties to NPPC.

## CONCLUSION

Petitioners hereby request that the Secretary of Agriculture immediately halt all pork checkoff commitments for any expenses related to the EPA Consent Agreement, and that any monies already expended be returned to the pork checkoff fund.

Petitioners also request that the Office of Inspector General conduct an investigation into this “under the table” arrangement. The Office of Inspector General should investigate: NPPC’s past, current, and future role in the Consent Agreement; NPB’s past, current, and future role in the negotiations and the EPA Consent Agreement; what checkoff funds have been paid or committed to NPPC; whether the 2001 separation agreement has been violated; and whether USDA has properly fulfilled its oversight roles. Petitioners ask the Office of General Counsel to take immediate action requiring NPPC to disgorge and return any pork checkoff funds it has received for any work relating to the EPA Consent Agreement.

Dated: May 5, 2005.

Respectfully submitted,

s/Susan E. Stokes  
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ATTORNEYS FOR PETITIONERS