CLIENT ALERT

DC Circuit Upholds EPA Consent Agreements With America's Farms

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The full ten-member U.S. Court of Appeals for the D.C. Circuit has denied a citizens' group request for the rehearing of a landmark environmental case, ruling that air emissions consent agreements between the U.S. Environmental Protection Agency (EPA) and more than 10,000 animal feeding operations are not judicially reviewable and therefore may proceed. The Court's ruling clears the way for EPA and America's farms to effectively resolve scientific and regulatory uncertainty, and serves as a template for resolving future industry-wide environmental challenges in the face of uncertain science.

The National Pork Producers Council (NPPC) and Roe Farm, Inc., represented by Crowell & Moring LLP, served as intervenors on the side of EPA in this legal challenge against the California-based Association of Irritated Residents (AIR), Sierra Club, and other citizen advocacy groups. AIR had challenged EPA's decision to use consent agreements, rather than protracted litigation and enforcement actions, to bring the pork, dairy, poultry and egg-laying industries into compliance with air laws. By denying AIR's motion for rehearing, the full DC Circuit ended a two-year legal battle and affirmed the EPA's discretion to make enforcement decisions.

The case stems from the EPA's 2005 announcement of a first-ever voluntary agreement with thousands of America's animal feeding operations, providing them immunity from penalties concerning the federal clean air rules so that the farms could conduct scientific studies of air emissions in order to obtain more accurate data for monitoring and preventing emissions. The agreements resolved potential liabilities related to air emissions from the signatory farms under the Clean Air Act, CERCLA, and EPCRA. In exchange, the farms paid civil penalties and provided more than $15 million in funding for an independent scientific study that will produce air emissions estimating methodologies, which EPA will apply to the entire industry to ensure future compliance with the relevant air laws.

In *AIR v. EPA*, the D.C. Circuit rejected AIR's arguments that the agreements were unlawful exercises of rulemaking power and adopted the EPA and farming community's arguments that the agreements constituted unreviewable exercises of the agency's enforcement discretion. A three-judge panel held that the agreements do not constitute rules, but rather enforcement actions within EPA's statutory authority, and dismissed the petitions in July. On November 29, the DC Circuit denied AIR's motion for rehearing.

"We are in an age when sound science or the lack of it can make or break regulatory and litigation outcomes. The EPA's consent agreement is a good example of the agency partnering with industry to replace uncertainty with knowledge. The end result will be an industry better equipped to tackle its environmental challenges and a government that will be able to rely on fact rather than guesswork," said Richard E. Schwartz, partner in Crowell & Moring's Environment & Natural Resources Group. "We imagine other industries will take note of this approach, particularly as scientific research proves to be the best tool for protecting both the environment and the bottom line."

Crowell & Moring worked on behalf of the NPPC, independent farms, and agricultural associations to create the consent agreement with EPA, as well as respond to litigation brought by AIR. The Crowell & Moring team includes Richard E. Schwartz, Kirsten L. Nathanson, and C&M Capitolink's Dr. John Thorne.

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