

DC Circuit Upholds EPA Consent Agreement With America's Farms

National Pork Producers Council and Crowell & Moring Applaud Ruling

Washington, D.C. – December 4, 2007: The full ten-member DC Circuit Court 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 able to 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 Irrigated Residents (AIR) 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 Court ended a two-year legal battle and affirmed the EPA's discretion to make enforcement decisions.

"We applaud this ruling. EPA and farmers simply didn't have the science to know whether air laws were being triggered, and a one-size-fits-all approach to environmental enforcement was not fair or effective. Now, because of quality scientific research and EPA's willingness to work with America's farms, we have a chance to see what's really happening, and the results will help all parties create improvements where they're truly needed," said NPPC Environment Committee Chairman Randy Spronk, a pork producer based in Edgerton, Minnesota.

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.

The National Pork Producers Council (NPPC) is the global voice for the U.S. pork industry, fighting for reasonable legislation and regulations, developing revenue and market opportunities, and protecting producers' livelihoods. For more information, visit NPPC's Web site at www.nppc.org.

Crowell & Moring LLP is a full-service law firm with more than 350 lawyers practicing in litigation, antitrust, government contracts, corporate, intellectual property and more than 40 other practice areas. More than two-thirds of the firm's attorneys regularly litigate disputes on behalf of domestic and international corporations, start-up businesses, and individuals. Crowell & Moring's extensive client work ranges from advising on one of the world's largest telecommunications mergers to representing governments and corporations on international arbitration matters. C&M Capitolink is Crowell & Moring's government-affairs affiliate. Based in Washington, D.C., the firm also has offices in California, New York, London, and Brussels.

Contact: **An Pham**
Senior Communications Manager
+1 202.508.8740
apham@crowell.com