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Client Alert: Federal Court Orders CAFOs to Report Air Emissions

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MEDIA CONTACT

Wendy M. Byrne
wbyrne@shumaker.com

On April 11, 2017, the U.S. Court of Appeals for the D.C. Circuit struck down a U.S. EPA rule exempting concentrated animal feeding operations ("CAFOs") from requirements under CERCLA that mandate reporting of releases of hazardous substances in excess of a reportable quantity to the National Response Center. The exemption from release reporting had been on the books since 2008.

In rejecting the U.S. EPA's position that CAFO release reporting is "unnecessary" because the agency could "not foresee a situation where the Agency would initiate a response action as a result of such notification," the court noted that commenters opposing the rule stated that hydrogen sulfide, ammonia and methane can be released in excess of reportable quantities when manure pits are agitated.

"While controls are not needed at the present time, the ruling regarding the CERCLA and EPCRA exemption will require some paperwork from most new pork, layer and dairy operations," said Dr. Albert Heber, Professor of Agricultural and Biological Engineering at Purdue University and an expert on CAFO air emissions.

Other experts in animal agriculture were more critical of the ruling.

"This regulation was never intended to apply to a farm raising animals, and the expectation for farms to report estimates of unknown quantities of emissions that have been a normal part of the daily production of milk, meat, eggs and fiber for generations is hard to comprehend as being either useful or reasonable," said Thomas Menke of Menke Consulting, Inc. in Greenville, Ohio. "These farms neither store harmful gases, nor can there be any 'sudden' release of harmful gaseous substances that a community needs to be prepared to protect themselves from, which was the intent of this law."

Paradoxically, notwithstanding its ruling, the Court acknowledged that at the time the exemption was promulgated, "[t]here appear[ed] to have been no clear resolution of the best way to measure these releases, which after all do not come conveniently out of a smokestack." The Court did not identify or

discuss any new scientific consensus for measuring emissions from CAFOs, but still struck down the exemption because it found that efficiency concerns "don't give the agency carte blanche to ignore the statute whenever it decides the reporting requirements aren't worth the trouble."

Under the current U.S. EPA penalty policy, any failure to immediately report a release in excess of a reportable quantity can result in a civil penalty of up to $53,907 per violation.

For this reason, we encourage all CAFO operators to contact Kevin P. Braig as soon as possible to discuss a pro-active reporting plan to avoid and prevent any potential civil penalty liability. Kevin focuses his practice on agribusiness and environmental compliance and litigation.

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