

Moffatt Thomas

WATER, ENVIRONMENTAL, AND NATURAL RESOURCES LAW NEWSLETTER (Sept. – Nov. 2009)

RECENT EVENTS PROVIDE HELPFUL COMPLIANCE REMINDERS

Four recent, yet different, events provide helpful reminders of the importance for members of the regulated community to continually evaluate their compliance with the various federal and state environmental quality regulations. This is particularly true of agricultural operations, which are becoming subject to increased scrutiny from regulatory agencies and environmental groups.

For example, during recent testimony before the House Transportation and Infrastructure Committee, EPA Administrator Lisa Jackson identified animal feeding operations as a major source of pollutants to the nation's waters, and stated that EPA will be focusing its Clean Water Act ("CWA") enforcement efforts on those types of facilities. Critical in this regard is the fact that Idaho is one of only a handful of states in which EPA is the CWA permitting authority. This, coupled with the fact that Idaho is a highly agricultural state, could mean that EPA's stated focus on animal feeding operations could manifest itself soon.

According to Jackson, another major focus for CWA enforcement will continue to be storm water runoff from industrial facilities, construction sites, and city streets. Generally speaking, the CWA requires these types of facilities to obtain a permit and to prepare and implement a storm water management/pollution prevention plan in order to minimize polluted storm water runoff. Indeed, a subdivision developer in Smiths Ferry was recently fined \$125,000 for violations of these same CWA storm water permitting requirements.

In addition to regulatory agencies, agriculture is also receiving increasing scrutiny from environmental and public interest organizations. Recently, a coalition of such organizations petitioned EPA to increase its regulation of animal feeding operations under the Clean Air Act ("CAA"). In particular, the petitioners are requesting that EPA adopt what are known as "new source performance standards" for animal feeding operations that emit air pollutants such as methane, nitrous oxide, ammonia, hydrogen sulfide, particulates,

and volatile organic compounds. Generally speaking, rather than setting numeric limitations on emissions, "new source performance standards" are standards that require the implementation of certain types of technologies that help control the emission of air pollutants from new or modified pollution sources.

Finally, a Mountain Home-area facility recently settled an enforcement action with EPA over alleged violations of the federal Emergency Planning and Community Right-to-Know Act ("EPCRA"). Generally speaking, EPCRA requires those who store or release certain threshold quantities of chemicals to submit written reports to EPA and local emergency response authorities. Here, the facility in question had failed to report the ammonia associated with its refrigeration system. While environmental compliance efforts by members of the regulated community commonly focus on the "big three" areas of air emissions, wastewater discharges, and hazardous waste management, EPCRA is a federal law with broad applicability to many types of facilities. This recent enforcement settlement is a good reminder that any facility storing chemicals onsite should assess whether it is subject to EPCRA requirements.

ALL THREE BRANCHES OF GOVERNMENT INVOLVED IN CLIMATE CHANGE ACTIVITIES

In our July 2009, issue we reported that the U.S. House of Representatives had passed its own climate change bill, which would regulate emissions of greenhouse gases ("GHG") through a "cap and trade" system. Recently, Senators John Kerry and Barbara Boxer introduced a similar climate change bill in the U.S. Senate. While the overall structure of the regulatory regime proposed in the Senate version largely mirrors that of the House version, there are differences that will need to be worked out over the next several months. Of particular note to the agricultural community is the administration of the emissions "offsets" program. While agricultural and forestry operations would not be required to reduce their GHG emissions under the current bills, such operations could reduce their own GHG emissions and then sell those "offsets" to entities that are subject to the cap and trade system. Under the

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House version of the climate change legislation, the U.S. Department of Agriculture would have responsibility for administering that offset program. Under the Senate version, the President would have discretion to delegate that program.

The executive branch of government has also been busy with climate change activities. In particular, EPA recently issued a final rule establishing a mandatory monitoring and reporting program for “major” sources of GHG emissions. The rule applies to certain enumerated sectors of the economy and, for most of the designated sectors, the rule applies to facilities emitting at least 25,000 tons of GHGs annually. However, facilities within other sectors are automatically subject to the rule, regardless of the amount of emissions. The only agricultural facilities subject to the new rule are large livestock operations that qualify as manure management systems. For now, food processing facilities are not subject to the reporting rule, but may be added later. Other sectors that are subject to the reporting rule include pulp and paper, landfills, stationary combustion, and electricity generation. Facilities covered by the new rule are required to begin collecting their GHG emission data on January 1, 2010, and to submit their first annual report to EPA by March 31, 2011.

Importantly, this recently finalized rule only deals with the reporting of GHG emissions, not the limitation of those emissions. However, in addition to this final rule, EPA has also recently issued a proposed rule that would regulate GHG emissions at large industrial facilities through the implementation of technology-based standards at new or modified sources. In other words, EPA and the Obama administration do not appear to be content to wait for climate change legislation to work its way through the Congress and are moving forward with the regulation of GHGs through the more stringent “command and control” regime of the Clean Air Act.

And, finally, the judicial branch has also been dealing with climate change issues. Both the Second and Fifth Circuit Courts of Appeal have recently held that a plaintiff could maintain a common law nuisance claim against a facility emitting GHGs. And, environmental interest organizations have filed other lawsuits asserting that agencies must consider and mitigate the climate change impacts of their actions.

There is no question that there will continue to be significant activity over the next several months as government officials grapple with how to best regulate GHGs. The only question at this point is what form that regulation will take.

If you would like additional information regarding the topics covered, or if there are additional topics that you would like us to cover in upcoming newsletters, please contact Lela Peña at (208) 345-2000 or llw@moffatt.com, and she will connect you with the appropriate contact. In addition, please contact Ms. Peña if you would prefer to receive the newsletter electronically, or if you would like to be removed from our mailing list altogether.