

# Moffatt Thomas

## WATER, ENVIRONMENTAL, AND NATURAL RESOURCES LAW NEWSLETTER (March 2010)

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### IDAHO SUPREME COURT UPHOLDS COUNTY REGULATION OF CAFOS

In a recent decision (*Idaho Dairymen's Ass'n, Inc. v. Gooding County*, 2010 Opinion No. 12), the Idaho Supreme Court upheld a Gooding County ordinance regulating the location of confined animal feeding operations ("CAFOs"). Specifically, in 2007, Gooding County adopted an ordinance prohibiting a new CAFO from being located within one mile of the rim of either the Snake River Canyon or the Malad River Canyon, and from being located within a half-mile of a Zone "A" floodplain. The Idaho Dairymen's Association, Inc. and the Idaho Cattle Association, Inc. filed a complaint for declaratory and injunctive relief challenging the ordinance. According to the challengers, the ordinance is unconstitutional because it constitutes an attempt by Gooding County to regulate water quality at CAFOs, an area of the law which, according to the challengers, has been preempted by the Idaho Legislature through its enactment of statutes in that area of the law.

The Court assumed the ordinance does in fact regulate water quality, and proceeded to address the question of whether the Idaho Legislature had intended to occupy the entire field of water quality regulation at CAFOs in Idaho, to the exclusion of counties. Ultimately, the Court concluded that the Idaho Legislature had not preempted local regulation of water quality at CAFOs. According to the Court, statutes such as Idaho Code Section 67-6529, which specifically delegate some authority to counties to regulate CAFOs, demonstrate that the Idaho Legislature does not actually, or intend to, comprehensively regulate water quality at CAFOs to the exclusion of local governments. In short, according to the Court, the Gooding County ordinance does not conflict with state statutes in violation of the Idaho Constitution; instead, it complements state and federal environmental quality statutes already applicable to CAFOs.

The challengers also challenged other aspects of the Gooding County ordinance regulating animal density at CAFOs. However, the Court rejected those challenges,

as well, concluding that all of the provisions at issue bear a "reasonable relationship" to Gooding County's objectives in enacting the ordinance.

Reportedly, in the wake of the Idaho Supreme Court's decision, industry groups have asked the Idaho Legislature to enact legislation curtailing local regulation of CAFOs.

### EPA UNVEILS COMPREHENSIVE CLEAN WATER ACT ENFORCEMENT PLAN

The U.S. Environmental Protection Agency ("EPA") recently drafted and issued what it is calling the "Clean Water Act Action Plan" ("Plan"). The Plan was submitted to the EPA Administrator for review and approval on October 15, 2009, and was also known as the "Clean Water Act Enforcement Action Plan" prior to February 22, 2010. The Plan lays the framework for more vigorous EPA oversight and enforcement of the federal Clean Water Act, regardless of whether individual states have been previously authorized to implement and enforce the Act's National Pollutant Discharge Elimination System ("NPDES") program. The Plan also seeks to specifically address what the EPA believes is an ever-expanding universe of diffuse, "non-point" (as opposed to point source) pollution sources—sources of pollution that EPA contends are not effectively regulated by the Clean Water Act.

Historically, the EPA and authorized states have focused their efforts on controlling and enforcing discrete point source discharges through the NPDES permit program. That program regulates CAFOs, industrial discharges, construction sites, and municipal storm sewer systems ("MS4s"). Point sources were previously believed to be the most significant sources of water pollution. However, EPA, among others, now believe that diffuse, non-point sources of pollution, such as agricultural farm runoff, mining waste runoff, and spills from aging septic and sanitary sewer system infrastructure, are a major source of water degradation that currently goes unaddressed under the Clean Water Act. Moreover, EPA is also concerned that while approximately one quarter of NPDES permitted point

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source facilities were routinely in “significant noncompliance” with their permits, only 26% of those noncompliant facilities faced enforcement action in 2008. In response, EPA’s Plan seeks to study, better understand, and enforce against (to the extent possible), non-point sources of pollution, and to increase enforcement of point source violations.

In short, the EPA’s Plan sets three distinct directives: (1) the targeted enforcement of those water pollution sources (both point and non-point source) deemed to be the most important sources of pollution; (2) stricter oversight of state NPDES programs (via the rejection of state-issued permits and takeover of state enforcement proceedings if those permits or actions are deemed insufficient); and (3) improved transparency, accountability, and information sharing (via the nationwide dissemination of electronic reporting of water quality permit data and reports). While the Plan targets broad spectrum enforcement, it is anticipated that EPA will at least initially focus its efforts upon addressing CAFOs, mining operations, municipal waste water treatment facilities, and construction sites. Many also expect citizen suit enforcement of the Clean Water Act to increase as a result of the information/permit data reporting directive of the Plan. EPA has also announced its intention to investigate citizen advocacy group claims that “shell” state enforcement actions are often commenced in an effort to preempt citizen suits, and that the administrative enforcement result is too lenient once the underlying citizen suit is effectively cut off.

While it remains to be seen how quickly EPA will implement its new enforcement Plan, the Plan is now in place, and the regulated community should expect Clean Water Act enforcement to increase. Of particular interest is how EPA will effectively enforce against non-point source pollutants, given what some say is a lack of coverage of such discharges under the Act. Vigorous enforcement of non-point source pollutants could generate litigation regarding the nature and scope of EPA authority to regulate those types of discharges.

## **SEC ISSUES CLIMATE CHANGE DISCLOSURE GUIDANCE**

In past newsletters, we have reported regarding developments at the legislative, judicial, and administrative levels with respect to climate change. In that regard, the U.S. Securities and Exchange Commission (“SEC”) recently published interpretive guidance in the Federal Register regarding how public companies should disclose climate change issues in

their financial disclosure documents. 75 Fed. Reg. 6290 (Feb. 8, 2010).

Specifically, the SEC identified four categories of information that can potentially trigger disclosures under the SEC’s financial disclosure requirements: (1) the impact of federal and state legislation and regulation (for example, if compliance with new regulations will require significant capital expenditures); (2) the potential impact on their business of treaties or international accords regarding climate change; (3) indirect consequences of regulation or business trends (for example, if regulation or market trends relating to climate change will increase or decrease demand for the business’s goods or services); and (4) the physical impacts of climate change (for example, if changes in weather will affect water availability or the arability of farmland to a degree that it will affect the business’s operations or results).

Pursuant to the Securities Act of 1933, the Securities Exchange Act of 1934, and other federal legislation, as well as its own Regulation S-K, the SEC regulates the disclosure of information by publicly traded companies in their annual reports, quarterly reports, and other financial disclosure documents. While such disclosure requirements are fairly detailed, as a general matter, the standard for determining whether information should be disclosed is whether that information is “material.” More specifically, information should be disclosed “if there is a substantial likelihood that a reasonable investor would consider it important in deciding how to vote or make an investment decision, or, put another way, if the information would alter the total mix of available information.”

Therefore, according to the SEC, this recent guidance does not create new legal requirements for publicly traded companies. Instead, it applies existing financial disclosure requirements to the climate change context, in order to help companies identify material information relating to climate change, and to promote consistency in the treatment of climate change in corporate disclosure documents.

## **SUPREME COURT DECLINES TO REVIEW CWA PESTICIDE DECISION; EPA CONTINUES TO DEVELOP GENERAL PERMIT**

As we have previously reported, on January 7, 2009, the Sixth Circuit Court of Appeals found that an EPA rule exempting certain pesticide applications from NPDES permitting requirements was not a reasonable interpretation of the Clean Water Act, and held that all

pesticides applied over or near waters are subject to Clean Water Act regulations. *See National Cotton Council of America v. EPA*, 553 F.3d 927 (6th Cir. 2009). Thereafter, the American Farm Bureau Federation and CropLife America, among others, requested that the U.S. Supreme Court review the Sixth Circuit decision. On February 22, 2010, the Supreme Court declined review. Therefore, the EPA will continue to develop a general NPDES permit for numerous newly regulated entities—which will include farmers, foresters, and municipalities—so that each individual entity will not be burdened by the extensive regulatory process associated with obtaining a permit tailored to its own specific pesticide-related operations.

The general permit will describe operations triggering the need for a permit, and entities that obtain and comply with the general permit will be protected from certain environmental lawsuits and regulatory enforcement actions. Among the operations that EPA will likely include in the general permit are mosquito and other pest control activities, aquatic weed control, management of vegetation on irrigation canal embankments, and pest control in forests with waters. A draft is expected this spring, and EPA plans to finalize the general permit before the end of 2010.

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.