

# ENVIRONMENTAL LIABILITY, ENFORCEMENT & PENALTIES

R E P O R T E R

## FEATURE ARTICLE

### EPA TO REQUIRE CLEAN AIR ACT TITLE V PERMITS FOR STATE'S STATIONARY SOURCES: IS CALIFORNIA'S AGRICULTURAL INDUSTRY A HARBINGER OF FUTURE CONFLICT NATIONWIDE?

By Alene M. Taber

The agricultural industry in California is poised to become the first industry in the nation to be federally regulated by the U.S. Environmental Protection Agency (EPA) under its Clean Air Act (CAA) Title V air permitting program. The first applications for stationary source permits are due from a portion of the agricultural industry no later than May 14, 2003. Because of non-attainment status in many areas of California, it is possible that more agricultural sources will be regulated under the federal air operating permit program than in any other area of the nation. Currently, it is the local air districts in California that administer the Title V Operating Permit Program. Each state has its own Title V permitting program under 40 CFR part 70, so EPA does not generally administer Title V programs. EPA-administered programs must comply with the federal regulations at 40 CFR part 71. To date, EPA has only issued Title V operating permits to sources on Tribal lands. The agricultural industry will represent a first attempt by EPA to directly regulate a state's stationary sources.

#### The Initiating Lawsuit and Subsequent EPA Actions

On May 14, 2002, EPA entered into a settlement agreement with a number of environmental and community groups to resolve litigation over California's treatment of agricultural operations in its Title V Operating Permits program. (*Ass'n. of Irrigated Residents v. Environmental Protection Agency*, \_\_\_F.3d\_\_\_, Case No. 02-70160 (9th Cir.)) The environmental groups had asserted that the 34 local air districts in California were not adequately administering or enforcing their Title V permitting programs because California *currently exempts* agricultural operations from the requirement to obtain an air quality permit. Title V of the 1990 CAA Amendments requires that all state permitting authorities develop an operating permits program for all major sources. Specifically, California Health and Safety Code § 42310(e) provides that air districts can not require a permit for "[a]ny equipment used in agricultural operations in the growing of crops or the raising of fowl or animals. . . ."

However, the prohibition on permits has not meant that the agricultural industry was not complying with clean air rules. Post-harvest and out-of-field agricultural activities such as fumigation, ginning, milling, drying, and refining are not exempt under California law and have been subject to local air district permitting requirements. In addition, many local air districts have enacted rules that regulate various aspects without requiring a permit.

Under the settlement agreement, EPA agreed to partially withdraw approval of a portion of the Title V Operation Permits program it had previously approved for California's 34 local air districts because they were not adequately enforcing their programs. In particular, EPA cited the air districts lack authority to issue permits and assure compliance by all major agricultural sources required to have a Title V permit (see EPA's Notice of Deficiency for 34 Clean Air Act Operating Permits Programs in California, 67 Fed. Reg. 35,990 (2002).) EPA also agreed to enact a rule that would give EPA the authority to regulate major agricultural operations that are required to obtain Title V permits if California failed to remove its prohibition against regulating agricultural operations. EPA gave California 90 days to change its law prohibiting air districts from permitting agriculture operations.

When California failed to eliminate this exemption, EPA on October 15, 2002 proceeded to enact a rule to regulate the agricultural industry itself. (Partial Withdrawal of Approval of 34 Clean Air Act Part 70 Operating Permits Programs in California, 67 Fed. Reg. 63,551 (2002).) Under EPA's new rule, EPA will issue Title V Permits for the agricultural operations and the local air districts will continue to do so for all businesses except agriculture. EPA also promised that if California does not eventually remove the exemption, then stationary sources could be required to adhere to stricter emission reduction ratios and a highway funding freeze.

#### EPA's New Rule

Up to this point, certain agricultural operations in California have not been required to obtain Title V permits. However, under

EPA's final Rule, EPA will now require that those agricultural operations considered to be a "major source" obtain a Title V permit from EPA. Agricultural operations considered to be major sources due to emissions from diesel-power stationary engines will be required to submit applications to EPA no later than May 14, 2003. All other "major source" agricultural operations must submit applications to EPA no later than August 1, 2003. EPA's rationale for this tiered application process is that EPA believes there is sufficient scientifically sound information available regarding emissions from diesel engines, and that the additional time will allow for the National Academy of Sciences to complete its study on agricultural operations entitled, "The Scientific Basis for Estimating Emissions from Animal Feed Operations" to be completed. (The study is currently available at the National Academy Press website, <http://books.nap.edu>.)

While EPA will attempt to notify potentially affected agricultural operations, it will be up to each agricultural owner/operator to submit their Title V application on time. EPA has provided additional guidance including information on potential to emit (PTE) and application forms (see [www.epa.gov/region09/air/ca/title5app.html](http://www.epa.gov/region09/air/ca/title5app.html)). EPA also agreed to a priority system for reviewing the Title V permits. EPA will review the permits first for sources located in areas designated severe or extreme ozone non-attainment and serious non-attainment areas for particulate matter less than 10 microns (PM-10); sources located in all other non-attainment areas, and finally sources in attainment areas. EPA must issue or deny a permit no later than December 1, 2004.

### **A Key Issue for Agriculture: Major Source Determination**

The determination of a major source depends on which air basin the agriculture operation is located within and the total amount of emissions that are generated by the agriculture operation. For example, if the area has been designated as severe non-attainment for ozone, like California's San Joaquin Valley, the threshold for major sources is 25 tons per year for oxides of nitrogen (NO<sub>x</sub>) or volatile organic compounds (VOCs). However, if as recent air quality studies indicate, San Joaquin's air quality non-attainment status is changed, these thresholds could be reduced. In southern California, The South Coast Air Basin (general encompassing Orange County and the non-desert portions of Los Angeles, Riverside and San Bernardino counties) has the most stringent thresholds for determining whether an operation is a major source. As an extreme non-attainment area for ozone, the threshold for a major source is ten tons a year for both NO<sub>x</sub> and VOCs, and as a serious non-attainment area for particulates, the threshold is 50 tons a year for PM-10.

In determining the amount of emissions that are generated, EPA generally counts together *all potential* emissions at the agricultural operation, not just emissions from a single engine or the actual emissions emitted into the air. All the sources at an agricultural operation, including irrigation pumps, compressors, and generators, will be tallied up together to establish the PTE. Only "stationary sources" are included in the calculation, mobile sources are generally not. For example, irrigation pump internal combustion engines considered to be "mobile" ("non-road") meaning they are "portable or transportable, meaning designed to be and capable of being car-

ried or moved from one location to another. Indicia of transportability include, but are not limited to, wheels, skids, carrying handles, dolly, trailer, or platform" (40 CFR § 89.2.) Mobile sources are generally not included in the emission calculations. However, EPA has stated that portable or transportable engines would be considered stationary if the engine remains at a single site for more than 12 consecutive months or a shorter period of time for an engine located at a seasonal source. According to EPA's "Instruction Manual for Title V Permit Application for Agricultural Sources in California," for the May 14, 2003 application deadline, EPA will only consider emissions from diesel engines.

The California Air Resources Board ("CARB") estimates that there are more than 7,250 mobile and stationary irrigation pumps in California that could be potentially regulated under Title V. CARB believes that the stationary irrigation pump engines account for about 6.96 tons a day of NO<sub>x</sub>, with half of the emissions in the San Joaquin Valley.

Emissions from certain livestock operations may also be counted as stationary emissions. If EPA believes the potential exists for the emissions to be reasonably captured and pass through a stack or vent to a control device. The only category of emissions EPA is absolutely clear that is *not* included in the PTE calculation is fugitive emissions such as dust from livestock or crop-producing operations.

Generally, EPA has assumed that if there is not a permit limitation or prohibitory rule, the equipment operates 24 hours a day, even though it may actually not. For agricultural sources, this could be a problematic because these sources are not generally permitted and EPA does not have the authority to issue permits with limits to sources, that would result in the source being below the major source threshold. For example, in the permit for Nutri-Turf discussed below, the facility's actual VOC emissions ranged from 50 to 137 tons a year, but its PTE was calculated to be 2,127 tons a year. To address this issue, EPA will be considering inherent limitations in the equipment, as well as its application, in considering a facility's PTE. These limitations do not have to be in the form of a permit condition. EPA considers the federally enforceability requirement for PTE limits under part 70 to mean that it is practically enforceable by a State or local air pollution control agency. Also, EPA will be issuing guidance to the local air agencies in California regarding the creation of local programs to limit emissions sources at agricultural operations without requiring permits. If the emissions are limited by these local programs to 50% of the major source threshold, then EPA has indicated that it would not require a Title V permit.

In order for an agricultural operation to determine whether its PTE exceeds the major source definition, an emissions inventory will need to be created. This entails inventorying potential stationary sources of emissions, creating a characterization of each stationary source (e.g., hours of operation, any enforceable limitations on use, fuel, engine size, emission factors, etc.), calculating the entire agricultural operations PTE, and comparing the PTE to the appropriate threshold levels for major sources.

### **Issues in California and across the Nation**

According to EPA, with the exception of Oregon, no other states' Title V programs exempted major agricultural sources from

state air permits. Although like Colorado, it is acceptable to EPA for states to prohibit the regulation of emissions from agricultural production such as farming, seasonal crop drying, animal feeding, and pesticide application as long as there is an exception for sources that are required to obtain Title V permits. EPA assumes that if a state has any major agricultural sources then the state is issuing permits under the states' Title V permitting program. However, it appears that with few exceptions, only the California agricultural industry is likely to actually obtain federal stationary source permits. There are two primary factors that increase the likelihood that the agricultural industry in California will be permitted as a stationary source that do not exist elsewhere in the country. The first is the fact that EPA can not issue permits which would limit the potential to emit and reduce the facility's emissions below the major source threshold. EPA is only empowered under federal law to issue permits to major sources. Other states have the ability to issue permits to "minor sources" and could include enforceable limitations, so that it is not assumed that the equipment operates 24 hours a day and 7 days a week. This would result in much less emissions being attributed to equipment and the facility's total PTE.

The second factor is that the major source threshold is lower for many areas of California than in other areas of the country. Because the major source threshold is linked to an area's attainment or non-attainment status, the more severe the air quality is, the lower the major source threshold. In other areas of the nation, air quality is better than in California, and therefore the thresholds for major sources is substantially more stringent. For example, many of areas enjoy a VOC major source threshold of 100 tons a year, while areas such as the San Joaquin Valley and SCAB have more stringent thresholds of 25 and 10 tons a year of VOCs respectively. Therefore, it takes much less emissions from an agricultural operation to exceed the major source threshold in California and trigger Title V requirements.

There are other areas around the nation that are likewise home to significant agricultural operations like California, such as the hog farms in North Carolina. According to North Carolina officials it expended significant effort evaluating several large hog farms to determine whether their sources had the PTE to trigger Title V. In North Carolina, the major source threshold for NOx is 100 tons a year. Accordingly, based on the state's evaluation, none of the hog farms in North Carolina emitted emissions in excess of the Title V major source threshold. Consequently, outside of severe and extreme non-attainment areas in California, it is unlikely that the other states have issued many Title V permits to agricultural operations.

In addition, some states have regulations and programs in place that result in an incidental air quality benefit. For example, the Colorado electorate enacted a statute requiring the adoption of regulations for hog farms to reduce odors, which indirectly improves air quality. The regulation requires covers for hog waste. The covers are designed to capture, recover, and treat the odorous gas to the greatest extent practicable before the emissions are released to the atmosphere. Additionally, the regulation has requirements to minimize odor emissions from swine confinement structures, animal waste management systems, composting storage sites, and animal carcass disposal. These odor-reducing requirements also indirectly reduce emissions that contribute to ozone. Compliance with these

regulations can be used to reduce a facility's PTE, and thus, keep it from triggering Title V requirements.

California's agricultural industry could receive assistance from the state's and local air district's ongoing programs to reduce emissions from agricultural operations in an effort to create emission offsets that other regulated industries can use to expand their operations. One example is the State's Carl Moyer Memorial Air Quality Standards Attainment Program (Moyer Program). Under the Moyer Program, monetary grants are provided to operators of heavy-duty vehicles (e.g., trucks, buses) and equipment to purchase or retrofit existing vehicles and equipment with low-emission technologies. The grants cover the incremental cost between the diesel power and low-emission vehicle and equipment. Many farmers have participated in the Moyer Program and have been using cleaner-burning engines in their stationary irrigation pumps. It is estimated that more than 2,500 pump engines have been retrofitted or replaced with cleaner-burning engines in the San Joaquin Valley. In February 2003, the South Coast Air Quality Management District (SCAQMD), money was granted to an egg ranch to repower and install new diesel/electric auxiliary power units that will reduce 2.68 tons a year of NOx. The SCAQMD has also funded stationary agricultural pump engine repowers, replacements with electric motors, and engine retrofit projects. The farms and ranches that have participated in the Moyer program may have reduced their emissions below the threshold of a major source.

### **Do North Carolina Bakeries Lead to California Agriculture?**

Title V is a requirement to obtain a federal permit; it is not a rule that requires reductions in emissions. As such, it is possible that agricultural sources may be required to go through the entire permitting process and be presented with "hollow permits." This is exactly what happened in North Carolina to bakeries. The bakeries emitted VOCs in the form of fugitive ethanol, which exceeded the major source threshold. However, there are no requirements in North Carolina to reduce these emissions. In essence, North Carolina issued "hollow permits" that only included requirement to pay fees based on the amount of VOCs the bakeries emitted (in order to meet the Title V requirement that air pollution agencies to impose sufficient fees to offset the Title V compliance costs).

Whether there will be any hollow Title V permits in California will depend greatly on the local air pollution agencies. EPA includes all applicable local air quality regulations in Title V permits. As such, if a local air agency has a rule that affects agricultural operations, it could be listed in the Title V permit and become a federally enforceable requirement. For example in the South Coast Air Basin previously mentioned, the SCAQMD has enacted fugitive dust rules. A dairy rule is also on the horizon. Accordingly in the SCAB, EPA would integrate these requirements into the Title V permits for agricultural operations.

### **Colorado's Title V Permit to Commercial Crop Operation**

The Colorado Department of Public Health and Environment issued a Title V permit for a five-year duration to a Nutri-Turf, Inc., an auxiliary operation of Anheuser-Busch, Inc., which grows brome grass, alfalfa, other grasses, wheat and corn. A Title V permit was

issued to Nutri-Turf because the land application of brewery waste waters to the crops exceeded the major source threshold for VOC emissions. The process involved sending treated brewery wastewater to the farmland via a six mile pipeline, where the wastewater is stored in open tanks until it is piped to pivot sprinklers for application to the crops the next day. The soil bacteria break down the soluble organics in the wastewater and the crops utilize the water and nutrient.

Colorado placed a number of permit conditions on the land application process which ended up in Nutri-Turf's Title V permit. For example, Colorado limited the disposal of wastewater to 1,625,000 gallons a year and VOC emissions to 236 tons a year. The installation of flow meters to measure the amount of wastewater and sampling of the ethanol content of the wastewater leaving the brewery, as well as recording and reporting were required to determine compliance with these limits. The area where the wastewater is applied must be covered with vegetation at all times, except for tilling and seeding for crop rotation and fieldwork, per standard agricultural practices. Existing regulations that Nutri-Turf was subjected to were also incorporated into the permit, such as open burning, opacity emissions limits, and made federally enforceable. The Nutri-Turf Title V Permit may provide some insight into the type of permit that EPA could issue California agricultural operations.

### California Legislature Set to Evaluate Agricultural Emission Sources

In late February 2003, California State Senator Dean Florez (D-Shafter), introduced a package of bills in the State Senate aimed at reducing air emissions from the agricultural industry. Specifically, Senate Bill (S.B.) 502 would require the establishment of an incentives program to encourage dairy farm owners to improve lagoon management and provide for dust abatement. Another bill, S.B. 705, will prohibit after June 1, 2005, the issuance of burn permits for agricultural waste. Also, S.B. 702 would make it easier for farmers to obtain grants from the Moyer Program. S.B. 702 proposes to exempt from the cost-effectiveness criteria any project involving medium-weight of farm equipment. At this time, none of the legislative proposals involves eliminating the exemption of agricultural operations from local permitting. However, such a bill may not

be necessary for California to regain primary control over its agricultural operations. Many of these bills would reduce emissions in an enforceable manner that could result in the operations being below the major source threshold.

EPA's stated preference is for the local air districts to be the permitting authority for Title V sources, including the agricultural industry. If the legislature removes the prohibition for Title V sources and agrees to administer and enforce the Title V program, then EPA has stated that it intends to hand regulatory authority back over to the local air districts. EPA has not established any other firm deadline for the California to act. As such, there is no need for the legislature to prematurely remove the permitting exemption for agricultural operations until it is sure that the benefits of such a move outweigh the significant impacts.

### Conclusion

The California agricultural industry is being faced with more stringent air quality regulations at the federal and state level than other areas in the Country. EPA places the responsibility on the sources to determine whether they must obtain a Title V permit. As such, the agricultural industry will need to stay informed in order to respond accordingly. This may well be a harbinger for the rest of the nation's agricultural industry.



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