

HOME (/)
ABOUT
JOURNAL (/ABOUT)
MASTHEAD (/NEW-PAGE)
PROSPECTIVE MEMBERS (/PROSPECTIVE-MEMBERS)
SUBSCRIBE (/SUBSCRIBE)
STAFF RESOURCES (/STAFF-RESOURCES)
PUBLICATIONS
PUBLICATION ARCHIVE (/PUBLICATION-ARCHIVE)
VOLUME 1 (2009) (/VOLUME-1-2008-2009)
VOLUME 2 (2010) (/VOLUME-2-2009-2010)
VOLUME 3 (2011) (/VOLUME-3-2010-2011)
VOLUME 4 (2012) (/VOLUME-4-2011-2012)
VOLUME 5 (2013) (/VOLUME-5-2012-2013)
VOLUME 6 (2014) (/VOLUME-6-2013-2014)
VOLUME 7 (2015) (/VOLUME-7-2014-2015)
VOLUME 8 (2016) (/VOLUME-8-2015-2016)
VOLUME 9 (2017) (/VOLUME-9-2016-2017)
VOLUME 10 (2018) (/VOLUME-10-2018)
SYMPOSIUM
INFORMATION (/SYMPOSIUM)
BLOG
FULL BLOG (/FULL-BLOG)
BLOG ARCHIVE (/BLOG-ARCHIVE-1)

SUBMISSIONS (/SUBMISSIONS)

November 11, 2013 (/full-blog/2013/11/west-virginia-chicken-farmer-prevails.html)

West Virginia Chicken Farmer Prevails in Dispute Over EPA Authority: What Lies Ahead? (/full- blog/2013/11/west-virginia-chicken-farmer- prevails.html)



(<https://static.squarespace.com/static/53fe85a0e4b0516a0c4fed1a/54002444e4b0123f9872f024/54002448e4b0123f9872f093/1409295432783/1000w/>)

Image Source (<http://farmflavor.com/us-ag/west-virginia/>)

By: Matthew Forcum, Staff Member

On October 23, 2013, the U.S. District Court for the Northern District of West Virginia held in favor of Lois Alt, a West Virginia poultry farmer, in her dispute with the EPA over regulation of storm water runoff. The disagreement arose in 2011 when the EPA issued a compliance order to Alt that concluded she had violated the Clean Water Act (“CWA”) because her poultry operation had “discharged pollutants . . . during rain events generating runoff without having obtained an NPDES permit.”^[i] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn1) Alt was subject to “civil penalties of up to \$37,500 per day of violation” and the potential for imprisonment.^[ii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn2) Claiming that the agency lacked authority to issue the order, Alt filed a civil action in 2012.^[iii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn3)

Seen as a challenge to the EPA’s recent broader exercise of authority to regulate certain discharges at concentrated animal feeding operations (“CAFOs”), Alt’s case has drawn considerable attention.^[iv] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn4) Some farmer advocates have felt that the federal agency had been “overstepping its bounds.”^[v]

(http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn5) Although the October 23rd decision could be seen as a victory for Alt, outside observers and other small farmers should remain cautious with respect to how settled the law is.

The dispute centered on the meaning of the agricultural storm water discharge exception to the definition of “point source” in the CWA.[vi] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn6) In reviewing administrative agency actions like the EPA’s order, courts generally take a deferential stance to the agency.[vii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn7) The district court noted here however, that the term “agricultural storm water discharge” was not defined in the CWA, and concluded that the term should be given its ordinary meaning.[viii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn8) Importantly, the district court held that the EPA order did not constitute an agency interpretation of the statutory term.[ix] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn9) Accordingly, the court was not obliged to give the EPA’s action what is known as “Chevron deference.”[x] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn10) Under that extremely deferential doctrine, when an agency’s interpretation of its enabling statute is challenged, the court must determine if the statute is ambiguous.[xi] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn11) If it is ambiguous, then the court must uphold the agency’s interpretation so long as it is reasonable.[xii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn12) Is it possible that the EPA could, through future interpretive rulemaking on the runoff issue have another “bite at the apple?”

Under the Supreme Court’s 2005 *Brand X Internet Services* holding, a district court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute.[xiii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn13) The district court here did not explicitly state whether the statutory term was “unambiguous.”[xiv] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn14) Arguably, this leaves the door open for the agency to try and “overrule” the district court’s construction under *Brand X Internet Services*. Assuming then that the EPA has statutory authority to interpret the meaning of “agricultural storm water discharge,” the agency could conceivably through a future rulemaking promulgate a regulation encompassing its preferred definition instead of issuing a mere compliance order as it did in Alt’s case. If challenged, the agency interpretation would then likely be entitled to great deference under Chevron.[xv] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn15)

The takeaway here is that the larger dispute in respect to the EPA’s regulatory authority over storm water runoff remains potentially unsettled. This is especially true if the EPA is committed to asserting a more authoritative stance on regulating CAFO runoff. Observers should note that the EPA had issued orders nearly identical to the one issued to Alt to other farmers in West Virginia and Virginia.[xvi] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_edn16) Stakeholders should remain alert to the possibility of further legal developments.

[i] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref1) *Alt v. United States EPA*, No. 2:12-CV-42, 2013 U.S. Dist. LEXIS 152263 at *7-8 (N.D. W.Va. Oct. 23, 2013).

[ii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref2) *Id.* at *8.

[iii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref3) *Id.* at *3.

[iv] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref4) Rona Kobell, *West Virginia poultry farmer sues EPA to clarify CAFO regulations*, *Bay Journal* (Oct. 10, 2013), http://www.bayjournal.com/article/west_virginia_poultry_farmer_sues_epa_to_clarify_cafos_regulations.

[v] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref5) Vickie Smith, *WVa chicken farmer wins EPA lawsuit over runoff*, *SFGate* (October 23, 2013, 3:47 PM), <http://www.sfgate.com/news/science/article/WVa-chicken-farmer-wins-EPA-lawsuit-over-runoff-4920110.php>.

[vi] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref6) *Alt v. United States EPA*, No. 2:12-CV-42, 2013 U.S. Dist. LEXIS 152263 at *10 (N.D. W.Va. Oct. 23, 2013).

[vii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref7) *See id.* at *10.

[viii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref8) *Id.* at *23.

[ix] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref9) *Id.* at *28-29.

[x] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref10) *Id.*

[xi] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref11) *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984).

[xii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ednref12) *Id.*

[xiii] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_adminf13) Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

[xiv] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_adminf14) Ale v. United States EPA, No. 2:12-CV-42, 2013 U.S. Dist. LEXIS 152263 at *23 (N.D. W.Va. Oct. 23, 2013).

[xv] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_adminf15) See Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842-43 (1984).

[xvi] (http://www.blogger.com/blogger.g?blogID=8202935745006855383#_adminf16) Vickie Smith, WVa chicken farmer wins EPA lawsuit over runoff, SF Gate (October 23, 2013, 3:47 PM), <http://www.sfgate.com/news/science/article/WVa-chicken-farmer-wins-EPA-lawsuit-over-runoff-4920110.php>.

♥ 0 Likes ↩ Share

COMMENTS (0)

Newest First [Subscribe via e-mail](#)

Preview

[Newer Post](#)
[Injury in Frack? \(/full-blog/2013/11/injury-in-frack_13.html\)](#)

[Older Post](#)
["Ag Gag" Laws: Putting a Gag on Food Safety \(/full-blog/2013/11/ag-gag-laws-putting-gag-on-food-safety.html\)](#)

SEARCHABLE ARCHIVE (/PUBLICATION-ARCHIVE-1)

631 SOUTH LIMESTONE, LEXINGTON, KY

40508 (859) 257-4747 [BLOG.KJEANRL@GMAIL.COM](mailto:LOG.KJEANRL@GMAIL.COM) ([MAILTO:LOG.KJEANRL@GMAIL.COM](mailto:LOG.KJEANRL@GMAIL.COM))