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YLD EER committee will generally hold a monthly call the third Wednesday of each month at 12:30pm Eastern Standard Time.

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ARTICLES

Back-to-Local: Honey, Money, and Sweet Success in the Carolinas
By: Stinson W. Ferguson

The Buzz
As globalization thrives, consumers are becoming increasingly hungry for local products, services, and experiences. The ability to buy anything from anywhere with the touch of a key or screen is working to transform things nearby, native, and natural into hot commodities. Beekeeping and honey harvesting fall in this category, having “become another ‘cool’ thing to do like quilting or master gardening.” From housewives to hippies, retired doctors to lawyers – everyone wants a piece of the local hive.

Carolina Honey Bee Company in Travelers Rest, South Carolina regularly opens its doors to customers from all over – Charlotte, Charleston, Oklahoma, Illinois, Knoxville, Atlanta. Co-owner Tim Dover doesn’t see this back-to-local movement subsiding: “For a long time people were putting chickens in their yard…now it’s [hives].” The entire industry, including Dover’s business, is booming: “The demand for local honey is so large. We have sold more honey this year than we have ever sold. Our prices are higher than our closest competition and we are still outselling.”

Kerry Owen, owner of Bee Well Honey Supply Farm in Pickens, South Carolina, was in television and radio broadcasting in the late 1990’s when a company buyout left him unemployed. Owen combined his branding and marketing background, childhood family farming experience, a backyard shed, and a $600 table saw purchased on credit to launch Bee Well. He started by selling a jar at a time to pay his mortgage. Today, Owen’s products are in roughly 800 grocery store locations and he has expanded beyond honey bee supply to a natural market, bottling, and distribution. Owen employs 17 people, including his immediate family. His company is the largest beekeeping company in South Carolina – and he still uses that same $600 table saw.

Sticky Circumstances
Beech Mountain Beekeeping Supplies in Elk Park, North Carolina expressed interest in “lawyers knowing as much as possible” about the industry, including the many chemicals and pesticides that are legal in some states and found in fields, pollen, and nectar despite being known carcinogens.

Dick Merritt of Bailey Bee Supply in Hillsborough, North Carolina believes that “North Carolina does a very good job from a state government standpoint in helping beekeepers and agriculture “since it’s such a big deal in North Carolina.” Nonetheless, in some towns, “if you’re in the city limits they will not allow you to have bees – sometimes at all – sometimes beyond a certain number of hives or only so close to the property line. HOA’s have put in restrictive covenants. There was an effort to pass a state law telling communities that they couldn’t restrict bees so much but it went nowhere last year,” explained Merritt.

Owen has no insurance because no company will write him any for his beekeeping enterprise. “We have made some movement and can get storm disaster or flood coverage and file a claim for a 6% range refund, but that’s not what I need. I need workers comp and
things like that – full insurance policies to cover everyone. Other states have it but South Carolina is way behind in having insurance policies for beekeepers.\textsuperscript{xxix}

**Flying Forward**
The local honey movement has grown wings and shows no signs of stopping. Carolina Bee Company pushes education and has been offering formal beekeeping classes longer than anywhere else in Upstate South Carolina, averaging 250 students per year.\textsuperscript{xix} “I take a lot of pride in that,” shares Dover.\textsuperscript{xx} Beech Mountain Beekeeping feels “uplifted” that “younger people are coming in and want to try [beekeeping]” because he and his boss are “trying to promote pollinators.”\textsuperscript{xxxii}

To meet increased demand, Owen, president-elect for the SC Beekeeper’s Association, formed a co-op with several beekeeping friends who collectively own about 35,000 bees, assuring them “I can sell the honey – if y’all want to go big with me then you can support your family, too.”\textsuperscript{xxxiii} Owen was recently approved for a tiny house project in the city where people coming to take beekeeping classes can stay as well as a grant from the city to build huge pollinator garden to attract more tourists.\textsuperscript{xxiv} The North Carolina Commissioner of Agriculture even wants to kick his campaign off at Owen’s farm.\textsuperscript{xxv} Still, Owen has neither a 401k nor a retirement plan. “Hopefully some young beekeeper one day will like it as much as I do and take it off my hands,” he joked.\textsuperscript{xxvi} Challenges aside, the stories behind Carolina’s best beekeepers are just as sweet as their products.

**Legisitating the Environmental Impacts of Cannabis Production**
By: Julia Loney

With numerous US States recently legalizing cannabis and Canadian provinces legalizing cannabis later this year, both non-medical and medical use of marijuana is creating a growing industry. However, the growth of the production has environmental impacts due to the increasing commercialization and scale of operations.

While small scale operations can utilize outdoor growing models, most large operations need indoor facilities to ensure quality crops. Traditionally, this has occurred in bunkers and basement facilities. Consequently, obvious environmental impacts of these growing conditions include the significant amount of electricity needed for heat production, air circulation and light, large volumes of water, pesticides and fertilizers, and the organic waste generated in production. Additional environmental concerns include discharge of toxic water and waste into rivers and streams (poisoning species and creating algae blooms), land clearing and loss of topsoil, energy costs associated with transforming seed into oil, utilizing leaves and flowers for cannabidiol, and processing fibre materials.

At the time of writing, Canada’s Ministry of Environment and Climate Change has not proposed any specific environmental regulations for the cannabis industry. Additionally, the Canadian Access to Cannabis for Medical Purposes Regulations do not address environmental impacts, but instead focus on quality-assurance standards and safety. In the US, the environmental legislation and requirements for cannabis production are jurisdiction-specific, at both the state and municipal levels. Some of the more innovative states, such as Oregon and Colorado, require energy usage estimates from potential licensees, whom are then encouraged to participate in renewable energy and efficiency initiatives. Some of these initiatives are
promoted by way of tax breaks, funding or incentive opportunities. Nonetheless, there are some hindrances to these programs. For example, since cannabis is still considered illegal by the US federal government, some producers are not able to utilize tax breaks or incentives for green energy initiatives as they do not qualify for federal agricultural status or organic certification. There is also no certification program or ordinance that applies uniform standards across the industry – whether producers are private producers or conducting operations on an industrial scale.

Even in jurisdictions where there is guidance on environmental impacts for cannabis producers, since the industry is relatively new, it is more common to have best practices rather than binding regulations. As such, producers are not required to participate in initiatives or to reach certain targets unless established by their local governments or organizations. However, as more US states and Canadian provinces adopt legislation with respect to legalizing cannabis, it would seem that environmental regulation will soon follow. Adopting federal legislation which applies universally to producers in the US and Canada, or at least at the state and provincial levels, would be the most prudent way to limit the impacts of the industry and control production methods.

On a positive note, there are also numerous examples of cannabis companies partnering with or entering into joint venture opportunities with green energy companies or companies who have developed innovative agricultural technologies or greenhouse designs. These opportunities will be mutually beneficial for business and the environment.

Even though cannabis has a history of being an underground industry, as it is becoming legalized throughout Canada and parts of the US, cannabis producers have a responsibility to ensure that their operations do not cause irreparable environmental impacts. While producers may be hesitant to work with the government and authorities, doing so to develop best practices and guidelines for cultivation will be the first step towards implementing legislation that ensures adequate controls on the industry. This will ensure a sustainable industry for the long term, without expense to the environment.

On December 7, 2017, EPA Administrator Scott Pruitt issued a memorandum to regional administrators entitled New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability. The memorandum, penned in accordance with President Trump’s initiative to streamline regulatory permitting requirements, presents a markedly different approach to how EPA intends to enforce New Source Review (“NSR”) applicability determinations under the Clean Air Act (“CAA”).

Citing to the DTE Energy progeny of cases from the Sixth Circuit (and the uncertainty arising from two separate decisions by the same three-judge panel), the Administrator presents seemingly needed guidance on legislation and regulations oft embroiled in interpretive dispute. The memorandum thus, seeks to establish EPA’s “current, intended approach” to: the consideration of post-project emissions in major modification applicability; the role of post-project actual emissions in major modification applicability; EPA oversight and enforcement of

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pre-project NSR applicability analyses involving the actual-to-projected-actual applicability test; and the role of EPA-approved state and local NSR programs in implementing NSR requirements.

Under NSR, newly constructed major stationary sources and major modifications at existing major stationary sources must obtain an air permit before construction. A major modification includes “any physical change in or change in the method of operation … that would result in: a significant emissions increase … of a regulated NSR pollutant … and a significant net emissions increase. If a project does not cause a significant emissions increase, it is not considered a major modification and a permit need not be obtained. Therefore, major sources must calculate before construction the projected emissions increases from the project and potentially, the increase to net emissions to determine NSR applicability.

For new emissions units, the “actual-to-potential” test is used to determine emissions increases; for existing units, the “actual-to-projected-actual” applicability test is used, which renders the difference between the projected actual and baseline actual emissions. As the memorandum’s title makes clear, the document focuses on the issues surrounding the “actual-to-projected-actual” applicability test and “projected actual emissions,” which is defined as:

the maximum annual rate, in ton per year, at which existing emissions unit is projected to emit a regulated NSR pollutant in any one of the 5 years following the date the unit resumes regular operation after the project, or in any one of the 10 years following that date, if the project involves increasing the emissions unit's design capacity or its potential to emit that regulated NSR pollutant and full utilization of the unit would result in a significant emissions increase or a significant net emissions increase at the major stationary source.

In making this projection, the regulations allow the source to “consider all relevant information,” expressly including, but not limited to, historical operational data, the company’s own representations, certain filings with federal and state regulatory authorities, and the source’s compliance plans per the approved State Implementation Plan. Notably too, in performing such a calculation, the source may exclude “that portion of the unit’s emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions” and emissions unrelated to the project, “including any increased utilization due to product demand growth.”

Not surprisingly, a number of issues have arisen as sources calculate projected actual emissions to determine NSR applicability, which are evident in DTE Energy. One issue surrounds whether a source may factor into its projection an intention to actively manage future emissions from the project on an ongoing basis to prevent a significant emissions increase. Relying on the “all relevant information” language of the rule, the Administrator states that an intent to manage future emissions is information that could be considered along with other relevant information in making a projection. In further support, the memorandum references EPA’s 2002 revisions to the NSR rules, noting a “key objective of the projected actual emissions

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3 40 C.F.R. § 52.21(b)(2)(i).
4 40 C.F.R. § 52.21(a)(2)(iv).
5 40 C.F.R. § 52.21(b)(41)(i).
6 40 C.F.R. § 52.21(b)(41)(ii)(a) (emphasis added).
7 40 C.F.R. § 52.21(b)(41)(ii)(c).

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provisions was to avoid the need for permitting authority review … prior to implementation of a project.”

A second issue involves the exemption carved out for demand growth, which instructs the source to exclude from its projection those emissions that could have been accommodated during the baseline period and that are unrelated to the project. Citing to the rule’s 1992 preamble, the Administrator confirms EPA’s policy that the source “must exercise judgment to exclude increases for which the project is not the ‘predominant cause.’” The memorandum further reminds administrators that NSR rules have no mechanism for agency review of procedurally compliant emissions projections; “[t]o infer the existence of such a mechanism would be tantamount to inferring agency authority to require pre-approval of emissions projections.” As a result, post-project monitoring, recordkeeping, and reporting provide a means – if not the only – to evaluate a source’s pre-project NSR determination.8

EPA’s intended reliance on a source’s pre-project NSR applicability analysis is noteworthy. “[U]nless there is clear error (e.g., the source applies the wrong significance threshold),” EPA will not “second guess[ ]” the owner or operator’s emissions projections. The Administrator’s position on EPA’s enforcement outlook is similarly noteworthy: if a source projects emissions increases less than NSR thresholds, the agency will focus only on post-project actual emissions in enforcement actions. This means that EPA will not initiate an enforcement action unless post-project actual emissions data indicate a significant increase, even though the first DTE Energy opinion gives EPA the authority to pursue enforcement of pre-project analyses.

The Administrator’s memorandum marks a new – albeit not unexpected – approach to regulation under the CAA. It presents policy in line with the President’s priorities and the Administrator’s focus on a return to rule of law and cooperative federalism, while bringing some certainty to the regulated community. Conversely, it can be said to show favor to industry, which is evident in the criticisms voiced by environmental groups since publication. Notwithstanding, the memorandum, itself not legally binding or enforceable, does provide some solace to the concerned, as it emphasizes EPA-approved state NSR programs may be more stringent than federal requirements. Above all else however, the memorandum indicates a clearly more reserved role for EPA in the NSR applicability and enforcement arenas.

**NEWS AND ANNOUNCEMENTS**

**Monthly Committee Calls**

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To join the call, please use the following information: (712) 775-7031; code: 310148. We look forward to hearing from you.

**Interested in writing for the Committee?**

8 40 C.F.R. § 52.21(a)(2)(iv)(b).
Please reach out to Michael Walker, Vice Chair and Content Editor, at MWalker@atg.state.il.us, or Anthony M. DeStefano, antonmd83@gmail.com.

Publication submissions for the Spring Quarter are due to the Content Editor on March 26, 2018. EER has two types of publications. The first is for the Quarterly Newsletter which provides developments and updates in the law; each article is roughly 200-300 words. The second is the 101 Practice Series which are short practice aids to educate practitioners; each article is roughly 500-600 words. Further guidance on the 101 Practice Series is here: https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series.html.

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i Telephone interview by Stinson Ferguson of Kerry Owen, Bee Well Honey Supply, Pickens, South Carolina (Jan. 31, 2018); Telephone interview by Stinson Ferguson of Tim Dover, Carolina Honey Bee Company, Travelers Rest, South Carolina (Jan. 24, 2018) (“This has been growing in popularity over a 5 to 6 year period”).


iii The Carolina Honey Bee Company http://www.carolinaabeecompany.com/

iv Telephone interview by Stinson Ferguson of Tim Dover, Carolina Honey Bee Company, Travelers Rest, South Carolina (Jan. 24, 2018).

v Telephone interview by Stinson Ferguson of Tim Dover, Carolina Honey Bee Company, Travelers Rest, South Carolina (Jan. 24, 2018).

vi Telephone interview by Stinson Ferguson of Tim Dover, Carolina Honey Bee Company, Travelers Rest, South Carolina (Jan. 24, 2018).

vii Telephone interview by Stinson Ferguson of Tim Dover, Carolina Honey Bee Company, Travelers Rest, South Carolina (Jan. 24, 2018).

viii Telephone interview by Stinson Ferguson of Tim Dover, Carolina Honey Bee Company, Travelers Rest, South Carolina (Jan. 24, 2018).

ix Telephone interview by Stinson Ferguson of Tim Dover, Carolina Honey Bee Company, Travelers Rest, South Carolina (Jan. 24, 2018).

x Telephone interview by Stinson Ferguson of Tim Dover, Carolina Honey Bee Company, Travelers Rest, South Carolina (Jan. 24, 2018).

xi Telephone interview by Stinson Ferguson of Tim Dover, Carolina Honey Bee Company, Travelers Rest, South Carolina (Jan. 24, 2018).

xii Telephone interview by Stinson Ferguson of Kerry Owen, Bee Well Honey Supply, Pickens, South Carolina (Jan. 31, 2018).

xiii Telephone interview by Stinson Ferguson of Kerry Owen, Bee Well Honey Supply, Pickens, South Carolina (Jan. 31, 2018).

xiv Telephone interview by Stinson Ferguson of Kerry Owen, Bee Well Honey Supply, Pickens, South Carolina (Jan. 31, 2018).

xv Telephone interview with part-time staff at Beech Mountain Beekeeping Supplies, Elk Park, North Carolina

xvi Telephone interview by Stinson Ferguson of Dick Merritt, Bailey Bee Supply, Hillsborough, North Carolina (Jan. 29, 2018) (“North Carolina has been generally pretty good about encouraging the local 0governments to not restrict beekeeping too much which can be a huge impediment to the beekeeping business.”).


xviii Telephone interview by Stinson Ferguson of Kerry Owen, Bee Well Honey Supply, Pickens, South Carolina (Jan. 31, 2018).
Telephone interview by Stinson Ferguson of Kerry Owen, Bee Well Honey Supply, Pickens, South Carolina (Jan. 31, 2018).

Telephone interview by Stinson Ferguson of Tim Dover, Carolina Honey Bee Company, Travelers Rest, South Carolina (Jan. 24, 2018).

Telephone interview by Stinson Ferguson of Tim Dover, Carolina Honey Bee Company, Travelers Rest, South Carolina (Jan. 24, 2018).

Telephone interview by Stinson Ferguson of part-time staff at Beech Mountain Beekeeping Supplies, Elk Park, North Carolina (Jan. 28, 2018).

Telephone interview by Stinson Ferguson of Kerry Owen, Bee Well Honey Supply, Pickens, South Carolina (Jan. 31, 2018).

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