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Privilege under Texas Audit Act Not Applicable in Federal Court

AUGUST 19, 2021

An August 10, 2021 decision by Judge Michael J. Truncale of the U.S. District Court for the Eastern District of Texas may upend assumed privilege for documents and studies gathered as part of an environmental self-audit in Texas. The Order on Motion to Quash Subpoena, *Sierra Club v. Woodville Pellets, LLC*, No. 9:20-cv-178, 2021 WL 3522443 (E.D. Tex. Aug. 10, 2021) addressed the subpoena for stack test reports sought by the Sierra Club in a Clean Air Act enforcement case against the wood pellet manufacturing facility in Woodville, Texas.

Background

On August 18, 2020, Sierra Club filed a complaint under the citizen suit provisions of the federal Clean Air Act, alleging that Woodville Pellets, LLC had violated the statute by emitting unpermitted amounts of air pollutants from its facility. The matter will be tried before a jury in November; during discovery, the Sierra Club sought reports of stack testing that Trinity Consultants conducted as part of a facility audit under Texas law. Failing to receive the documents from Woodville Pellets, the Sierra Club served a subpoena on Trinity, which is not a party to the litigation, seeking these and other documents. Woodville and Trinity moved to quash the subpoena on the grounds that the documents sought are privileged under the Texas Environmental, Health, and Safety Audit Privilege Act (Audit Act) and this prevents their production.

The Decision

The Court accepted that the stack tests were done as part of an audit under the Audit Act, which extends a privilege to documents gathered as part of an environmental self-audit. The privilege provides these documents are not admissible as evidence or subject to discovery in a civil action under state law. Tex. Health & Safety Code Ann. § 1101.051, 1101.101. However, the Court disagreed that these documents were protected from discovery under federal law and denied the motions, determining that the state audit privilege claim does not itself justify a federal court applying that privilege. Although the stack test reports may have been created with the expectation that they would not be disclosed under state law, the Audit Act does not apply to EPA. Noting that Texas guidance states the privilege is waived in the event the violations are disclosed to EPA, the Court suggested in *dicta* that an audit report sent to EPA could then be obtained through a FOIA request to EPA. Further, EPA's staunch opposition to expansive audit privileges under state laws[1] supported the Court's determination under federal law that the stack test reports are not privileged. Finally, the Court found that the state's interest in maintaining confidential these reports did not outweigh the federal interest in the 'truth-seeking process' of the litigation.

While this case will likely be appealed to the Fifth Circuit, the decision must be taken into account when embarking on facility audits. The Court's analysis is made under federal law and is not limited to actions under the Clean Air Act. Further, the decision is likely not limited to the Texas Audit Act and may apply to audits conducted under other states' audit privilege policies or laws.

If you have any questions or would like further information regarding implications of this decision for audit laws in other states, please contact Julie R. Domike at 202-853-3453 or jdomike@babstcalland.com.

1 See EPA's Audit Policy, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19618, 19623 (April 11, 2000).

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