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DATES TO REMEMBER:

May 20, 2011 - Organic Initiative/Environmental Quality Incentives Program applications due

May 27, 2011 - Project area proposals for the Biomass Crop Assistance Program (BCAP) due

June 15, 2011 - Michigan Commission of Agriculture and Rural Development Meeting (GreenStone Farm Credit Services in East Lansing - 9:00 a.m.)

July 15-19, 2011 - Michigan Livestock Expo (MSU Pavilion)
Please join us at the Sale-a-bration Event to support youth!

July 19-21, 2011 - Michigan Ag Expo (MSU) *Stop and visit our booth!*

The Basics of H-2A Visas For Temporary Agricultural Workers

by: Ryan E. Lamb

My labor needs are not being met by the domestic market - when can I seek foreign applicants? Are potential applicants currently living in the U.S. eligible to apply under this program?

Under the H-2A program, agricultural employers who anticipate a shortage of domestic workers can petition the U.S. Citizenship and Immigration Service (USCIS) to bring foreign workers to the U.S. to perform agricultural labor or services of a **temporary or seasonal nature**. To initiate the process employers must submit a job order with the State of Michigan Department of Licensing and Regulatory Affairs (formerly known as DLEG). Once approved, employers must then obtain a *Labor Certification* from the U.S. Department of Labor (DOL) after establishing (i) that able, willing and qualified U.S. workers are not available at the time and place needed, and (ii) that the employment of aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers.

As part of meeting the above criteria, employers are also required to pay the government approved prevailing wage and to provide certain benefits to H-2A workers. Examples of these benefits include transportation, housing, meals, tools and supplies, and worker's compensation insurance. To ensure compliance, labor officials from the State of Michigan will conduct a site visit of the location where the immigrants will be housed.

Unlike the H-2B Temporary Non-Agricultural Workers Visa, the H-2A is not subject to a numerical cap on the number of participants each year.

As part of the labor certification process, the employer lists the number of workers it is seeking. The employer then engages in a supervised

active recruitment of U.S. workers. After the recruitment period and the necessary State of Michigan approval, the DOL will make a decision on certification. In doing so, it will subtract the number of U.S. workers successfully referred from the number of H-2A workers requested for the petition, reducing the number of potential visas available to the employer.

Next, the petition is filed with USCIS. Once approved, the petition is transferred to the foreign consulate. At the foreign consulate, individual foreign workers apply for their H-2A Visas and then enter the U.S. Generally, H-2A Visas are valid for up to one year. Extensions of up to one year are possible, with a maximum visa period of three years.

Two important considerations:

1. If a foreign national wishes to work for you but has been in the United States without proper visa status or work authorization, that person's individual case history may prevent their participation, and may also create issues if he or she were to depart the United States. Such persons are strongly advised to consult an immigration attorney independently for the protection of their individual interests.
2. An employer's managerial or specialized level positions, requiring higher education or skill levels, may be eligible for additional visa options outside of the H-2A program.

If you are experiencing difficulty recruiting qualified, willing and able U.S. workers for meeting peak seasonal needs or performing the arduous labor needed to operate your farm, the H-2A program may help fill the gap.

Court Upholds Permit Requirements for Concentrated Animal Feeding Operations

by: April L. Neihls

Recently, the Michigan Court of Appeals upheld Administrative Rule 2196 ("Rule 2196") issued by Department of Environmental Quality ("DEQ"). Rule 2196 requires all owners or operators of Concentrated Animal Feeding Operations ("CAFO") to apply either for an individual National Pollutant Discharge Elimination System ("NPDES") permit or a certificate of coverage under a NPDES general permit. The rule also provides an administrative process by which owners and operators may obtain a waiver by proving their CAFO has "no potential to discharge" pollutants into the waters of Michigan.

A few years ago, a federal court struck down similar requirements found in a federal rule issued by the Environmental Protection Agency ("EPA"). After the federal rule was struck down, the Michigan Farm Bureau asked a Michigan court to, among other things, vacate Michigan Rule 2196 and enjoin the DEQ from making similar rules in the future. The Michigan Milk Producers Association, Michigan Allied Poultry Industries, Michigan Pork Producers Association, Crockery Creek Turkey Farm and Four D. Farms also joined the farm bureau in its challenge.

After carefully considering the issues, the Michigan Court of Appeals rejected the Michigan Farm Bureau's challenge to Rule 2196 and upheld the rule's requirements. In its decision, the Court openly acknowledged that Rule 2196 would "displease" producers because it "certainly impose[d] new costs and requirements." Nonetheless, based on the Court's decision, CAFOs are bound by the rule and must either seek a NPDES permit or exemption.

In support of its decision, the court noted that the EPA granted Michigan the authority to administer its own NPDES program, and that federal law "allows Michigan to adopt discharge standards and effluent limitations that are more stringent than the federal NPDES standards and limitations." The court also noted that under Michigan's Natural Resources and Environmental Protection Act (NREPA) the DEQ has broad authority to protect Michigan waters from pollution, including waste from CAFOs. The Court also ruled that Rule 2196 was "rationally related to the...purpose [of preventing] the pollution of the waters of this state" noting that the regulatory impact statement citing two environmental studies supported the DEQ's claim that the "expanded rule was needed to protect the environment."

You may read the full opinion at http://coa.courts.mi.gov/documents/OPINIONS/FINAL/COA/20110329_C290323_30_290323.OPN.PDF.

Fifth Circuit Rules EPA Cannot Require Clean Water Permits For Livestock Farmers Unless Discharging into U.S. Waters

by: Liza C. Moore

On March 15, 2011, the Fifth Circuit Court of Appeals vacated portions of the EPA's 2008 Rule that required Concentrated Animal Feeding Operations ("CAFOs") that propose to discharge to apply for a National Pollutant Discharge Elimination System (NPDES) permit, and the provisions imposing liability for failure to apply for a permit. However, the court upheld the requirement that CAFOs discharging manure to waters of the United States are required to apply for a NPDES permit, and upheld the ability to regulate CAFO land application of manure. Land application requirements may be included in a NPDES permit.

The suit stemmed from EPA's 2003 regulation revisions that implemented the Clean Water Act's oversight of CAFOs, which required all CAFOs to apply for a NPDES permit unless the CAFO obtained a "no potential to discharge" determination from the EPA. After the 2003 revisions were challenged in court, the EPA revised its regulations in 2008 by only requiring a NPDES permit application if the CAFO "discharges or proposes to discharge pollutants." Liability existed for CAFOs failing to apply for a permit. The EPA also issued guidance letters. Groups including the National Pork Producers Council, American Farm Bureau Federation, United Egg Producers, and National Milk Producers Federation challenged the procedures in numerous courts nationwide. The cases were consolidated and the Fifth Circuit was randomly selected by the Judicial Panel on Multi-district Litigation to review the challenges.

The Fifth Circuit's decision can be found at:

www.ca5.uscourts.gov/opinions/pub/08/08-61093-CV0.wpd.pdf

WHAT'S NEXT?

While the Fifth Circuit's March 15, 2011 decision benefits CAFOs on the federal level, the March 29, 2011 Michigan Court of Appeals decision upheld Michigan's CAFO rule, which is more restrictive than the federal requirements. According to the Michigan Farm News, Michigan Farm Bureau's Legal Counsel Andy Kok said appealing the decision to the Michigan Supreme Court is being considered, but that action would not be decided until all parties in the lawsuit were consulted. We will continue to monitor the status of this litigation and Michigan Rule 2196.

Sign-up for Biomass Crop Assistance Program Ends May 27, 2011

by: Liza C. Moore

Project area proposals for the Biomass Crop Assistance Program (BCAP) must be submitted by close of business May 27, 2011. Authorized by the 2008 Farm Bill, BCAP provides incentives to eligible farmers, ranchers, and forest landowners for producing biomass crops for heat, power, bio-based products and biofuels. BCAP provides two categories of assistance (1) matching payments that may be available for the delivery of eligible materials to qualified biomass conversion facilities and (2) established annual payments that may be available to producers entering into contracts with the Commodity Credit Corporation to produce eligible biomass crops on contract acres within BCAP project areas.

Acting Administrator Val Dolcini commented that "The nation that harnesses the power of clean, renewable energy will be the nation that

leads the 21st century. BCAP can help rural communities save money, create jobs and improve air quality while reducing the demand for fossil fuels." "I encourage all those interested in participating in this program to contact their Farm Service Agency (FSA) state office for details," Dolcini said.

For more information, visit the USDA Farm Service Agency's website pertaining to BCAP (which contains numerous application forms) at <http://www.fsa.usda.gov/FSA/webapp?area=home&subject=ener&topic=bcap> or contact Kelly Novak at (202) 720-4053 or cepdmail@wdc.usda.gov. The BCAP project area proposal submission form is available online at BCAP Form 20 (PDF, http://www.fsa.usda.gov/Internet/FSA_File/bcap_form_20.pdf).

NRCS Funding Available for Organic Production; Application Period Ends May 20, 2011

by: Liza C. Moore

USDA's Natural Resources Conservation Service (NRCS) announced that funding is available for certified organic producers and those transitioning to organic production to implement resource conservation practices. The application period for the Environmental Quality Incentives Program ends May 20, 2011. "Organic growers continue to express interest in program support to implement conservation practices," NRCS Chief Dave White said. "This additional opportunity will allow more producers to get assistance in protecting the natural resources on their land and creating conditions that help foster organic production." Up to \$50 million is available this year through USDA's Organic Initiative and NRCS' Environmental Quality Incentives Program to help producers plan and implement conservation practices, like planting cover crops or utilizing

integrated pest management plans. Eligible producers include those certified through USDA's National Organic Program, those transitioning to organic, and those who meet organic standards but are ineligible for certification because their gross annual organic sales are less than \$5,000.

Applications must be submitted through your local NRCS Service Center. Michigan's state contact for the EQIP Organic Initiative is Steven Law, 3001 Coolidge Road, East Lansing, MI 48823, (517) 324-5282, steven.law@mi.usda.gov. For more information, please visit www.nrcs.usda.gov/news/releases/2011/organics_applications_4.2011.html

Secretary of Agriculture Tom Vilsack Announced Support for Projects to Improve Quality of Life in Rural America

by: Liza C. Moore

On April 21, 2011, Agriculture Secretary Tom Vilsack announced support for projects aimed at improving rural quality of life. The 135 projects in 40 states, Puerto Rico, and the Western Pacific are being financed through \$234 million in USDA Rural Development's Community Facilities Program loans and grants. "USDA's support for these projects reflects our commitment to ensuring that rural communities can create jobs, attract businesses and provide necessary services to their residents," Vilsack said. "USDA Rural Development continues to work with rural communities to help them develop quality health care services, modern library facilities and school buildings, and reliable first responder equipment and services to ensure that people who live in rural areas have access to critical infrastructure." According to a USDA news release, projects in Michigan will be as follows:

- **City of Bessemer** - \$14,000 direct loan to replace the roof on the fire hall;
- **City of Plainwell** - \$1,350,000 direct loan to build a public service building for fire & police departments;
- **Brevort Township** - \$300,000 direct loan to replace the Community Center & Library;
- **Schoolcraft Memorial Hospital** - \$19,000,000 direct loan to replace the hospital;
- **Creative Beginnings Child Development** - \$500,000 direct loan to purchase a day care building;

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- **Chippewa County War Memorial Hospital** - \$3,872,000 direct loan and \$18,077,000; guaranteed loan to construct a replacement hospital and renovate the emergency department;
- **City of Harrison** - \$86,000 direct loan and \$29,000 grant to purchase a fire truck.

Funding for these projects is contingent upon the recipients' satisfaction of the terms of the loan or grant agreement. For more information about USDA Rural Development, please visit <http://www.rurdev.usda.gov/Home.html>

Sen. Stabenow Announces First Farm Bill Field Hearing to Be Held in East Lansing on May 31

Senator Debbie Stabenow, Chair of the U.S. Senate Committee on Agriculture, Nutrition and Forestry, announced the Committee's first Farm Bill field hearing will be held on May 31, 2011 from 9:00 a.m. to 12:00

p.m. at the Kellogg Center, Michigan State University, East Lansing. The hearing is titled "Opportunities for Growth: Michigan and the 2012 Farm Bill." For more information, visit <http://ag.senate.gov/site/>

NEXT ISSUE

EPA ISSUES NEW DRAFT CLEAN WATER ACT GUIDANCE

On April 27, 2011, the Environmental Protection Agency (EPA) issued draft guidance that clarifies how the EPA and the U.S. Army Corps of Engineers identify "waters of the United States" under the jurisdiction of the Clean Water Act. The draft guidance will be open for 60 days of public comment. Please look for more information about this EPA action in the next Agricultural Law Update. Learn about the guidance online at <http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>

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