



Clean Water Act NPDES Permits

Background

EPA is now developing Clean Water Act “NPDES” pesticide-use permits that will preempt FIFRA product-label requirements for an estimated 1.5 million pesticide applications per year. Never in the 62 years of FIFRA or in the 38 years of the Clean Water Act (CWA) has EPA required enforceable permits for applications of pesticides “to, over or near” water for control of mosquitoes, black flies, invasive aquatic weeds or animals, algae, or other pests. Congress didn’t include such “NPDES” permits for pesticides in 1972 when it enacted the CWA, and despite major rewrites since, never addressed pesticide use. But the 6th Circuit decision in January 2009 “reinterpreted” the CWA, and forced EPA to develop an NPDES permitting system for pesticides. This one decision will almost double the entire population of CWA permitted entities assembled across the USA in the 38 years of the CWA. Affected by these NPDES pesticide-use permits will be state agencies, city and county municipalities, parks and recreation managers, utility rights-of-way managers, railroads, roads and highway vegetation managers, mosquito control districts, water districts and managers of canals and other conveyances, pesticide applicators, farmers, ranchers, forest managers and many, many others. Dozens of new requirements for monitoring and surveillance, planning, recordkeeping, reporting and other tasks will create significant delays, costs, reporting burdens and legal risks from citizen suits for hundreds of thousands of newly-minted permit holders. Congress needs to know what EPA expects from these permits and how agriculture and others could be adversely affected by them.

Talking Points

- The 6th Circuit decision trumped FIFRA and EPA’s aquatic pesticide policy: Consistent with 38 years of EPA policy, the agency’s 2006 final rule exempted from CWA permit requirements all pesticide applications made “to” or “over,” including “near” waters of the US, where a portion of the applied pesticide unavoidably entered the water in order to effectively control the targeted pests. Any left-over excess pesticide or residues were ruled to be nonpoint source pollutants, and not subject to the CWA. However, the 6th Circuit decision vacated EPA’s rule, ruled the CWA trumped FIFRA, and in doing so exposed pesticide applicators to punitive CWA enforcement and citizen law suits unless they comply with an applicable NPDES permit and any aquatic use statements on the FIFRA label.
- The Court allowed EPA two years to develop and implement a permitting program: Since EPA had never issued NPDES permits for pesticide applications, the Court agreed to EPA’s request for a 2-year stay of the decision so it could implement such a program. EPA’s 2006 rule will remain in effect until April 9, 2011, exempting aquatic pesticide applications made in accordance with FIFRA label requirements. EPA will finalize the permit this December.
- EPA’s federal CWA permit will be enforced in five states, Indian and federal lands, and most territories: EPA’s permit will be implemented only in AK, MA, NJ, NM and ID, and 45 other states must implement their own NPDES permits. Many states have indicated they will have



difficulty completing this task by the April 2011 deadline, and the added costs of administering and enforcing the program will be problematic to them.

- The scope of NPDES permits will be determined by the definition of “waters of the US:” Many farmers, ranchers and foresters could be subject to the CWA if their aerial or ground-based pesticide applications intentionally or accidentally enter ditches, creeks, prairie potholes, wetlands, or other jurisdictional waters. Legislative efforts to broaden the reach of the CWA would exacerbate the NPDES burden if “waters of the US” was redefined to include “all” waters. Many state laws require protection of “waters of the state.”

FAQs

- Why was the 6th Circuit Court of Appeals’ decision patently wrong? The Clean Water Act requires an NPDES permit when four important thresholds all occur simultaneously – when any ***pollutant is discharged*** from a ***point source*** into “***waters of the US***.” Applications of pesticides to control aquatic pests (e.g., mosquitoes) are in fact discharges from point sources to water, but *are not* “pollutants” under FIFRA. The 6th Circuit agreed that pesticides discharged to waters of the US only become “pollutants” if any excess pesticide or residue is left over in the water after the period of time during which the intended pest control action is occurring. Thus, at the time of pesticide application the products are not pollutants, so NPDES permit shouldn’t be required at that time. Later, after the beneficial-use period is over (this time period varies dramatically), there is no ongoing point source discharge, for any residues present are left-over nonpoint source pollutants. Thus, the four CWA permitting thresholds have not been met. However, the Court decided that “but for” the application of the pesticide in the first place, there would later be no left-over pesticide traces or residues in the water. On that basis, the Court ignored EPA’s expertise and incorrectly ruled NPDES permits are necessary before the pesticides can be applied – even when all FIFRA label requirements are strictly followed during the application. EPA has publicly stated that the 6th Circuit erred in its decision.
- How will EPA’s policies burden applicators, businesses, agencies and landowners? Dozens of new requirements for planning, recordkeeping, monitoring and adverse incident surveillance, reporting and other tasks will create significant delays, costs, reporting burdens and legal risks for hundreds of thousands of newly-minted permit holders. Many of these new requirements will produce public documents that activists can use to bring legal action and nuisance citizen law suits. For example, to avoid violation of its permits, EPA will require applicators, owners and operators to avoid, report, and immediately remedy “adverse effects” that EPA defines as when “A person or non-target organism ***may have been exposed*** to a pesticide residue... and ***is reasonably likely*** to suffer a delayed or chronic adverse effect ***in the future***” (emphasis added).
- What is CLA doing to address the 6th Circuit decision? CLA and a number of allies were parties to NCC vs. EPA. When the 3-judge panel wrongly ruled in January 2009, CLA filed an *en banc* appeal to have the case reheard by the full 16 judges of the Court. This appeal was denied. In December 2009, CLA and allies filed *cert* petitions to the US Supreme Court, asking for review of the decision. Nearly 3 dozen Members of Congress filed amicus briefs with the court. The Court will announce this spring if the *cert* petition is granted.



- What is CLA doing to engage other stakeholders and EPA as it develops its NPDES general permits? CLA and RISE have met nearly 10 times with EPA officials from the Office of Water and Office of Pesticide Programs to discuss issues inherent to the permitting program – such as who would be regulated by such permits; what additional CWA requirements would be added to FIFRA label requirements; and if terrestrial pesticide applications to crops, ranches or forests would also be subject to the permits. CLA and RISE have provided expert white papers, industry demographics, and opinions on matters pertaining to the permits. CLA organized an NPDES Coordinating Council, made up of representatives from agriculture, horticultural and other allied sectors, and organized group meetings with EPA. CLA and RISE also routinely briefed representatives of state and local officials, water-use and land-use managers, forest owners, aerial- and ground-based custom applicators, mosquito control organizations, etc. Members of Congress are being briefed.
- What pesticide use categories will be covered by the permits? EPA has indicated it will issue state-wide general permits that entities may obtain coverage under to avoid CWA enforcement. While this may ultimately change before finalization, EPA intends to issue NPDES permits for (a) the control of mosquitoes, black flies and other insects that spend a portion of their life cycles in water; (b) the control of aquatic weeds and algae in waters of the US and conveyances to such waters; (c) the area-wide control of terrestrial pests (e.g., insects, weeds, diseases) on parcels greater than 15 acres (e.g., forests, farms, ranches, rights-of-way) where a portion of the applied pesticides will unavoidably be discharged into waters of the US or conveyances in order to effectively control the targeted pests; and (d) the control of aquatic nuisance and invasive animals (e.g., Zebra mussels, lampreys, Asian carp). Other uses (e.g., home lawn and gardens, parks, etc. less than 15 acres) could be subject to the CWA, but will not be covered by EPA's general permits.