

Last Updated June 19, 2009

Pesticide Applications In or Near Water May Require Permit

[Court Grants EPA 2-Year Stay in National Cotton Council et al v. EPA](#)

The Sixth Circuit of Appeals ruled that residuals of chemical pesticides and biological pesticides are pollutants regulated under the Clean Water Act and has recently stayed the effective date of its decision until April 9, 2011. As a result of the ruling, anyone who applies a pesticide in, over, or near waters of the United States will need to be covered by a permit issued under the Clean Water Act after this effective date. Irrigation return flows and agricultural runoff will not require Clean Water Act permits as they are specifically exempted from the Clean Water Act. EPA plans, before the ruling takes effect, to issue general permits under the Clean Water Act for covered pesticide applications, to assist authorized states to develop their permits, and to provide outreach and education to the regulated community. EPA will work closely with state water permitting programs, the regulated community and environmental organizations in developing general permits that are protective of the environment and public health.

Although the court has issued the stay, they have not yet made a decision on the request for an En Banc review.

Last Updated May 13, 2009

The U.S. Court of Appeals, 6th Circuit decision on pesticides and National Pollutant Discharge Elimination System (NPDES) permits

Background

The Environmental Protection Agency's (EPA) aquatic pesticide use Final Rule held that because pesticides are purposefully applied to waters of the United States to manage pests, they are not pollutants. This Final Rule was challenged in the 6th Circuit Court of Appeals. On January 7, 2009 the Court decided that the EPA Final Rule was not a reasonable interpretation of the Clean Water Act, and held that NPDES permits are required for:

- (1) All biological pesticide applications that are made in or over (including near) waters of the U.S.

- (2) Chemical pesticide applications that leave a residue or excess pesticide in water when such applications are made in or over (including near) waters of the U.S.

See the decision here:

http://www.swrcb.ca.gov/water_issues/programs/npdes/docs/aquatic/nationalcottoncounsel_vs_epa.pdf

Because irrigation return flows and agricultural runoff are specifically exempted from the Clean Water Act, they are not included in the decision to require NPDES permits. However, many large categories of mosquito insecticides and aquatic herbicide uses are covered. EPA estimates 5.6 million pesticide applications per year by 365,000 applicators will be subject to the court decision.

The Montana Department of Environmental Quality (MTDEQ) has NPDES authority. The permits are traditionally used to ensure that wastewater discharged to state waters does not impair the beneficial uses of the receiving streams. MTDEQ's webpage on the Montana Pollutant Discharge Elimination System can be accessed here:

<http://www.deq.mt.gov/wqinfo/MPDES/Index.asp>

Current Status

Request for an En Banc Review: Because only three judges of the 15 member 6th Circuit were involved in vacating the federal rule, petitioners have requested a review of the decision by the full court. Read the request here: M:\ASD\TSB\AMY\groundwater\NPDES

EPA Request for a Stay: If EPA had decided to appeal the decision, that appeal would have to have been made by April 9, 2009. EPA chose not to appeal the decision, and instead requested a two year stay. The two year period was requested so that a national NPDES template could be constructed, and states with NPDES authority would have time to work with their partners to develop appropriate NPDES state permits, and leave time for implementation.

The court must decide first if there will be an En Banc review, before it can decide to grant EPA a stay. There is not a specific date by which these decisions must be made.

Future Considerations

If the court decides not to revisit the decision, and grants the two year stay, the timeline for the two year period is as the court determines. It could be two years from April 9, 2009, or from another date as decided by the court.

The Montana Department of Agriculture will work closely with the MTDEQ while they are developing a Montana-specific NPDES permit, as necessary.

At this time, there are no requirements for anyone applying a pesticide in, over or near water to attain a NPDES or Montana-specific discharge permit. Pesticide applicators must follow all use directions and precautions on the pesticide label.

Separate but related information

The Montana Water Quality Act requires that anyone applying a pesticide to state waters receive a Section 308 permit. A 308 permit allows a temporary exemption from Surface Water Quality Standards for pesticide applications. Routine maintenance in irrigation canals does not require a 308 permit. More information can be found here:

<http://www.deq.mt.gov/wqinfo/OtherCert/308Authorization.asp>