

BACKGROUND

Since the enactment of the Clean Water Act (CWA) in 1972, EPA has not required persons applying pesticides directly to or over waters of the US to obtain a CWA discharge (NPDES) permit. EPA estimates that 365,000 pesticide applicators perform approximately 5.6 million pesticide applications in, over or near water annually to control pests such as mosquitoes and gypsy moths, combat algae, weeds and other undesirable vegetation and attack invasive species such as zebra mussels.

The 9th Circuit Court ruled in 2001 (*Headwaters vs. Talent*) that FIFRA did not preempt the CWA and that pesticide residuals are pollutants and would need a NPDES permit if discharged from a point source. That decision was interpreted by EPA to only apply to the specific case before the Court.

In 2006, EPA issued a Rule titled “Application of Pesticides to Waters of the United States in Compliance with FIFRA,” 71 Fed. Reg. 68,483 (Nov. 27, 2006). Under this Rule, which was finalized in 2007, EPA identified two circumstances in which the application of pesticides consistent with all relevant requirements under FIFRA does not require an NPDES permit: 1) applications directly to water; 2) applications over water in which pesticide will inevitably fall into water.

Over the years, EPA’s Rule has been challenged in court by both industry and environmental groups. Petitions for review were filed in 11 Circuit Courts. All petitions were consolidated in 6th Circuit Court of Appeals (*National Cotton Council v. EPA*).

6TH CIRCUIT RULING

On January 7, 2009 the Sixth Circuit Court vacated EPA’s Rule, saying that it is not a reasonable interpretation of the CWA (*The National Cotton Council of America, et al. v. EPA*). The Court held that NPDES discharge permits are indeed required when pesticides are applied to, over, or near waters of the US. Although this decision was made in the 6th Circuit Court, it applies nationally.

Industry petitioners filed a motion to seek a rehearing *en banc*. EPA decided not to seek a rehearing of the Court’s decision, but instead requested a stay of the mandate until April 9, 2011 to allow pesticide users to obtain water discharge permits. EPA estimates that a two year stay of the mandate will be sufficient to enable it to develop, propose and issue appropriate general permits to authorize and regulate certain pesticide discharges to waters of the US consistent with the CWA.

SUMMARY

- The January 7 ruling of the Sixth Circuit takes effect (i.e., the need for a permit) seven days after denial of either the petition for rehearing or the motion to stay the mandate, whichever is later;
- Until the Court decides on these motions, EPA’s Rule on NPDES permits and pesticide use remains in effect;
- An *en banc* rehearing could overturn or uphold the current ruling;
- If the ruling is upheld, and EPA’s motion for a stay is granted, NPDES permits will be required for pesticide applications to, over, or near water beginning in the spring of 2011.