

National Cotton Council v. EPA



Clean Water Act NPDES Permits

CWA §301(a) makes it illegal to **discharge** a **pollutant** from a **point source** into jurisdictional **waters of the US** without obtaining and meeting the requirements of an National Pollutant Discharge Elimination System (NPDES) permit

Two kinds of permits:

- **General**: Issued by EPA or states through a public process to regulate most discharges of a particular type. Coverage is generally gained by submission of a Notice of Intent (NOI) and compliance with the permit's requirements.
- **Individual**: Issued through a public process to an entity for specific discharge(s). Difficult, costly, time-consuming to obtain. Often much more stringent than general permits.

Agricultural Exemptions

Section 402(l)(1) of the Clean Water Act

- (1) AGRICULTURAL RETURN FLOWS.—***The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.***

Section 502(14) of the Clean Water Act

- (14) The term “**point source**” means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. ***This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.***

Court Decisions about CWA Jurisdiction

In recent years, courts have issued conflicting decisions on whether NPDES permits are required for “aquatic” pesticide applications:

- **Headwaters, Inc. v. Talent Irrigation district (9th Cir. 2001)**
 - Application of pesticides to irrigation canals to control vegetation **requires** NPDES permits.
- **League of Wilderness Defenders v. Forsgren (9th Cir. 2002)**
 - Aerial application of pesticides to waters of the United States **requires** NPDES permits.
- **Fairhurst v. Hagener (9th Cir. 2005)**
 - Application of pesticides to a water of the U.S. **does not require** an NPDES permit.



EPA's NPDES Aquatic Pesticide Rule

- EPA published final rule in 2006 to resolve the issue: “Application of Pesticides to Waters of the United States in Compliance with FIFRA” (40 CFR 122)
- Rule stated that Clean Water Act NPDES permits are not required when applications of pesticides **to**, **over** or **near** waters of the U.S. are consistent with **FIFRA** labels
- Pesticides remaining after treatment are non-point source residues
- NPDES permits are not required for:
 - Application of pesticides directly to waters of U.S. to control pests (i.e. aquatic weeds, mosquitoes)
 - Application of pesticides to control pests that are present over or near waters of U.S. where a portion of the pesticides will unavoidably be deposited to the water in order to target the pests (i.e. forest canopies, banks of irrigation canals)
- Rule did not address spray drift

NCC vs. EPA: Challenges to EPA Rule

- Petitions were filed by environmentalists and others in all circuit courts challenging the rule.
- Industry also filed petitions in 8 different circuit courts to support EPA and expand its rule:
 - CLA/RISE, BASF, FMC, Syngenta, Bayer, Delta Council, National Cotton Council, Illinois Fertilizer and Chemical Association, Agribusiness Association of Iowa, Southern Crop Production Association
- Farm Bureau and American Forest & Paper Association intervened
- The 6th Circuit was chosen by lottery
 - National Cotton Council petitioner in 6th Circuit became the named party (NCC v. EPA)

6th Circuit Decision: January 7, 2009

Three-judge panel struck down EPA's 2006 Final Rule, ruling that it conflicts with CWA permit requirements:

- Waters of U.S. – pesticide applications to any waters with hydrological connection to navigable waters are jurisdictional waters (e.g., ditches, canals, lakes, wetlands, creeks)
- Point Sources – pesticide spray nozzles used in ground- and aerial applications are point sources
- Pollutants – any residual or excess products that remain in the water after the treatment period (“beneficial use”) ends become “chemical wastes,” and therefore pollutants
- Discharge – the panel ruled “*but for the application of the pesticide, the pesticide residue and excess pesticide would not be added to the water,*” – so despite the time lag from pesticide application to when they became “pollutants” – the residues were discharged from a point source into waters of the US, and thus subject to NPDES permits

Possible Scope of the 6th Circuit Decision

If NPDES permits are required for all applications when pesticide residues enter waters of US (other than through spray drift, irrigation return flow, or stormwater runoff), this may include:

- Control of weeds in and adjacent to canals, lakes and rivers
- Control of algae in canals and lakes
- Control of invasive fish, zebra mussels and other animal species
- Vegetation control along roads and highways
- Vegetation management along pipeline, railroad and electric transmission rights-of-way corridors
- Insect control in forest canopies
- Mosquito control in or over waters of US
- Golf course, park, and home & garden maintenance
- Aerial applications to crops grown in or adjacent to waters of US

Legal Status

- Industry's rehearing request was denied
- Two year stay to EPA
 - Court granted EPA two-year stay (to April 2011), to give it time to develop NPDES program
- Cert petitions filed with Supreme Court December 2, 2009
 - CLA v. Baykeeper: CropLife America, RISE, BASF, FMC, Syngenta, Southern Crop Production Association, Agribusiness Association of Iowa
 - AFBF v. Baykeeper: American Farm Bureau Federation, American Forest & Paper Association, National Cotton Council
 - Amicus briefs filed by over 30 organizations and 40 members of Congress
 - Government response due January 4 (requested 30-day extension)
 - Petitioner reply due January 19

Regulatory Status

- 2006 EPA rule stays in effect until Court 2-year stay expires
- EPA OW is leading NPDES effort; OPP and OGC are engaged, also coordinating with State regulators
- EPA will proposed rule in April 2010, and finalize December 2010
- 6th Circuit gave EPA until 4-9-11 to implement the program
- EPA permit likely will be challenged on content
- Absent successful legislative fix or Supreme Court reversal, there's a high probability that FIFRA + CWA will regulate aquatic pesticide applications

NPDES Permit Issuance

- EPA will issue permits for MA, ID, NH, AK, NM, tribal lands, and territories other than Virgin Islands for four pesticide uses:
 1. Pesticides used to control mosquitoes and other aquatic nuisance insects
 2. Aquatic weed and algae control pesticides used in and near waters, including canals and drainage systems
 3. Pesticides used in forestry programs for area-wide insect control
 4. Products applied to water to aquatic nuisance species (e.g., fish, mussels or other invasive aquatic species)
- Remaining 45 delegated states may adopt EPA's general permit (adding state-specific conditions) or develop their own
- State-issued NPDES general permits must meet as a minimum the requirements of EPA's permit but many will be more stringent

Not Eligible for General Permits

- Discharges to waterbodies listed as impaired under 303(d) “for that pesticide for any reason”
- Discharges to Tier 3 waterbodies, such as “Outstanding Natural Resource Waters”
- Other uses not covered by one of the general permits
- Individual permits must be negotiated in a public manner well in advance of expected pesticide applications
 - Slow, public process, costly
 - Likely to result in more stringent requirements
 - Pesticide applications prohibited until permit is approved

Typical NPDES Permit Holders

- Decision makers that authorize pesticide application
 - state agencies
 - water management districts
 - mosquito control districts and health departments
 - water resources control boards
 - municipalities
 - federal agencies
 - private companies
 - utilities
 - land owners
- For-hire applicators of pesticides (after submitting an NOI to gain coverage;
- Other entities that apply pesticides without submitting an NOI

Notice of Intent (NOI) Submission

- NOI is submitted in order to gain continued general permit coverage for 1-5 years (not for each pesticide treatment)
 - Will be able to do electronically
 - NOI is submitted when decision-making entity or applicator determines certain thresholds will be exceeded
 - Applications below thresholds are covered by the general permit without an NOI
 - NOI submissions are public documents
- General-permit coverage generally occurs 10 days after permitting authority receives NOI
- EPA (or State) will send a letter of NOI receipt
- Emergency applications may be made in advance of NOI application

NOI Content

- Contact information, entity description (i.e., agency, homeowner association, pesticide applicator);
- Type of discharge (forest canopy treatment, canal, etc.)
- Receiving stream(s) for which permit coverage is intended (anticipated during the period of the permit)
- Updated NOI is needed if operations differ from those identified in NOI
- CLA/RISE is arguing that only decision-makers have the information needed to file NOIs
 - When, where, what pesticides will be applied
 - To what waterbodies
 - Application by whom

Technology-Based Effluent Limits (TBELs)

- All permittees must use IPM – different requirements for NOI submitting entities
- Assumes compliance with FIFRA label
- Requires efforts to minimize pesticide applications to water:
 - Reduce discharges using control measures/BMPs
 - Use lowest amount of pesticide necessary
 - Consider non-chemical alternatives
 - Identify/assess pest problem (locate breeding sites, know pest biology, set action thresholds, conduct pest surveillance)
 - Consider if source reduction/habitat modification may significantly reduce pests without pesticides
 - Train employees, maintain & calibrate equipment, mix & load properly, rinse & recycle containers
- Services (FWS, NMFS) may add other requirements following ESA consultation on aquatic pesticides

Water-Quality Based Effluent Limits (WQBELs)

- “*Your discharge (e.g., chemical residual) must be controlled as necessary to meet applicable WQS.*”
- Applicable WQS include numeric & narrative, such as “*no toxics in toxic amounts*”
- State 401 certification can add other control measures to ensure consistency with their water quality standards

Surveillance Monitoring

- Will require pre- and post-application visual surveillance
- Surveillance = spot checks for signs of adverse effects on non-target organisms during efficacy checks (i.e., dead fish, visibly stressed amphibians or non-target plants)
- EPA is considering analytical monitoring in some circumstances

Adverse Incident Reporting

- Required within 24 hours, detailing incident and corrective actions taken/results
- May also require notification of local agencies
- Requires permittee to follow up with written report to permitting authority and to state pesticide registration office
- Report includes certification that FIFRA label directions were or were not followed
- Reports are available to the public

Annual Reporting by NOI Submitters

- Annual reports due by Feb 15 each year from NOI-submitting permittees
- Can be an electronic report
- Update NOI with names/pesticides used & associated EPA registration numbers, where applied, descriptions of locations treated, quantity applied, pests targeted
- EPA or States may require additional information
- Reports are available to the public

Recordkeeping Will Vary ± NOI Submission

Submitted to EPA/State by NOI filers:

- Copy of NOI (made public);
- Copy of acknowledgment letter for NOI (made public);
- Copy of the pesticide general permit (made public);
- Copy of any reports including corrective actions for adverse incidents (made public).

Kept on-site by permittees submitting NOIs:

- Application plan
- Pesticide application logs
- IPM documentation
- Copy of reports and all corrective actions submitted to EPA/States

Kept on-site by permittees not submitting NOIs:

- Records of compliance

EPA Expectations

- Database of pesticide applications
- Reduced applications to waters of US
- Reduced applications to 303(d) and ONRW waters
- IPM practices, calibration, maintenance required
- Post-application surveillance and immediate notification of adverse effects
- Expanded scope for who must report adverse effects on aquatic ecosystems
- Mandatory education and training

Key Concerns

- FIFRA label enforcement through CWA
- Meeting expectations for IPM use (e.g., “consider non-chemical alternatives” or “use lowest amount necessary”)
- FWS/NMFS consultation may add ESA requirements
- Costs & loss of income to meet monitoring requirements
- State permits may be more stringent than EPA’s permits
- Possible “near” waters regulation of terrestrial pesticide use (e.g., aerial pesticide applications to crops near ditches, creeks, wetlands)
- Costs of defending against nuisance citizen suits