



Status Overview

NCC v. EPA and EPA's NPDES General Permits for Pesticides

December 15, 2009

The 6th Circuit's decision in *NCC v. EPA* (<http://www.ca6.uscourts.gov/opinions.pdf/09a0004p-06.pdf>) vacated EPA's 2006 rule exempting aquatic pesticide use from Clean Water Act (CWA) jurisdiction, forcing an appeal from EPA to the Court for a 2-year stay, which was granted, to allow an accelerated effort at the EPA to establish a framework for states to follow in establishing general NPDES permits for aquatic pesticide uses. The Office of Water (OW) has the lead, with input from Office of Pesticide Programs, Office of General Counsel, Regional EPA offices, State regulatory agencies, and others that OW has organized into various work groups. General permits will be developed for at least four different aquatic pesticide uses. EPA's NPDES general permits will be implemented in 5 states (AK, ID, MA, NH & NM), most territories, tribal lands and certain federal facilities, but 45 states must develop their own NPDES permits that, at a minimum, incorporate the EPA general permits' requirements. EPA and states have until April 9, 2011, to put this program into place.

The EPA general NPDES permits will cover those pesticide applications exempted in the 2006 rule – made “to” or “over,” including circumstances “near,” waters of the US, “where a portion of the pesticides will unavoidably be deposited into waters in order to target the pests effectively.” EPA has indicated that the NPDES general permits will enforce FIFRA label requirements with CWA authorities, including civil, criminal and citizens enforcement provisions. EPA has indicated the permits will add significant additional performance, recordkeeping, monitoring, and reporting requirements generally based on integrated pest management (IPM).

CropLife America, RISE and others were unsuccessful in their *en banc* petition for a rehearing by the entire 6th Circuit (denied August 3, 2009), and in November filed a writ of certiorari with the United States Supreme Court requesting the Court overturn the Sixth Circuit's ruling (now known as *CropLife America v. Baykeeper*). Another group, lead by the American Farm Bureau Federation and including other agriculture stakeholders, also filed a cert petition on the Sixth Circuit's decision (now known as *American Farm Bureau Federation v. Baykeeper*). In support of these petitions, numerous commodity and pesticide applicator groups, agricultural organizations, and Members of Congress filed amicus briefs with the court. A decision on whether our appeals will be heard by the Supreme Court is not expected until sometime in 2010, and if accepted, likely would not be heard until early 2011.

While these legal steps are being played-out, CLA and RISE are also actively pursuing regulatory and legislative actions to address this issues, in the event the petition is not granted, by actively working help EPA understand our industries and positions on various issues related to the design of a workable permitting scheme to comply with this court order. CLA's Clean Water Issue Management Team (CWIMT) has the lead on this regulatory activity and a NPDES Steering Committee of the CWIMT has been created to manage *NCC v. EPA* generally. CLA and RISE continue to advise Members of Congress of the challenges and inconsistencies associated with this program as those details become known. A legislative option remains on the table and Members of Congress continue to be engaged. However, an immediate legislative remedy is not yet at hand.

The immediate objective is to limit the negative impact of the Sixth Circuit decision on pesticide applications. The ultimate objective of CLA / RISE is to turn back the Sixth Circuit decision and reassert FIFRA as the federal law governing the use of pesticides in and around water, where no NPDES permit is required for any pesticide application.