

Talking Points to Accompany Power Point Slides
on
EPA Efforts to Develop NPDES General Permits

12-10-09

Slides Relating to Legal Aspects Leading Up to 6th Circuit Decision:

1. Title Slide
2. Four conditions are needed before the Clean Water Act (CWA) requires National Pollutant Discharge Elimination System (NPDES) permits: (a) Discharge of a Pollutant from a Point Source to a Water of the US. Each of these terms is defined in statute and regulations. All four conditions must be met before a NPDES permit is required.
3. Some conditions of pesticide use that interact with waters of the US have been exempted by the US Congress from the NPDES permit program: (a) return flows from irrigated agriculture to waters of the US; and (b) non-point source agricultural stormwater runoff.
4. Activists' lawsuits resulted in conflicting court decisions over whether NPDES permits were needed for aquatic pesticide applications. A consistent outcome was that pesticides are not pollutants when applied, but become pollutants when left over after the beneficial use period has ended. If there are no pollutants left over in the water (e.g., Fairhurst v. Hager), then no NPDES permit is needed.
5. EPA promulgated a final rule in 2006 (40 CFR 122) that was designed to resolve these various policy decisions. It did not address spray drift, but concluded that NPDES permits are not required if applications of aquatic pesticides made to, over, or near waters of the US are done following the FIFRA labels. EPA also addressed the matter of pollutants left over after the beneficial use period has ended – calling them “nonpoint source” pollutants exempted by the CWA.

Slides Relating to the 6th Circuit Decision (NCC v. EPA):

6. EPA was sued over its 2006 rule in all Circuit courts. Industry also sued EPA to support the rule. The 6th Circuit was chosen by a judicial lottery and National Cotton Council (NCC), one of the plaintiffs, became the named party.

7. The 6th Circuit decision by a 3-judge panel (of the 24) determined EPA was wrong to exempt aquatic pesticide applications from CWA NPDES permits simply because they were applied according to FIFRA. The Court agreed with EPA and industry that pesticides when applied are not pollutants, but was concerned that later they become pollutants in the treated water – therefore the earlier application of pesticides needs to be covered by NPDES permits. If pesticides can be applied to waters that leave no residues after beneficial treatment (such as in the 9th Circuit case Fairhurst v. Hagerer) then no NPDES permit is needed.
8. Based on what we know now about EPA's intentions (from meetings, conversations, and a national webinar EPA conducted Oct 7, 2009, it appears that the EPA general permit will apply to many types pesticide applications. On this slide is a list of types of situations that may require a general permit.
9. EPA received a 2-year stay of the court's decision to vacate the 2006 rule, so it remains in effect until April 10, 2010. Between then and now EPA is working to develop general NPDES permits for 4 different categories of aquatic pesticide use. Industry filed a Cert petition with the US Supreme Court, as did the American Farm Bureau Federation, asking for a rehearing on the 6th Circuit decision. Many allied groups and Members of Congress submitted amicus briefs urging the Court to hear the case. Generally only a few submitted cases are heard each year.
10. Regulatory status during the period until the Supreme Court decides whether to hear the case remains as described in #9 above. The EPA permit will go final in Dec 2010 and enforcement would begin in the states April 2011.

Slides Related to the EPA Development of General NPDES Permits:

11. EPA will issue permits for MA, ID, NH, AK, NM, tribal lands, and territories other than Virgin Islands. The remaining 45 delegated states must either adopt EPA's general permit (adding state-specific conditions) or develop their own. State-issued NPDES general permits must meet the minimum requirements of EPA's permit but many will be more stringent. EPA is developing general permits to cover four types pesticide uses:
 - To control mosquitoes & other aquatic nuisance insects
 - To control aquatic weed and algae in and near waters, including canals and drainage systems
 - For use in forestry programs for area-wide insect control
 - To control aquatic nuisance species (e.g., fish, mussels or other invasive aquatic species) when applied to water.

12. Instead of general permit coverage, some general use conditions may be an individual permit, such as applications to waters that have been declared as impaired by EPA under the § 303(d) provisions of the CWA, or when pesticides are needed to be applied to Outstanding Natural Resource Waters (such as those encountered in high mountains by power lines and pipeline rights of way. Such rights of way require brush and weed control, and pesticide applications may need individual permits. These permits are much more time consuming to get, could involve delays of several years, during which no pesticide application may be applied.
13. Typical pesticide permit holders are “Decisions Makers” – or those organizations that choose when, where and by whom an application will be made. These decision makers submit a Notice of Intent (NOI) to be covered by the general permit. The other permit holder type is “For-hire” or “private” pesticide applicator. In this case they can be still covered by the permit but may not have to submit an NOI.
14. NOIs are submitted once at the beginning of the 5-year permit cycle or annually, and updated as needed electronically with new information. NOI submissions will provide EPA with a lot of information on the businesses and individuals involved in the decision making, the applicator, the type and amount of pesticides to be applied, and to which water body it is to be applied. They can be done electronically. These data will form a public database for EPA.
15. NOI data becomes public information once submitted; the content includes (a) When, where, what pesticides will be applied; (b) To what waterbodies; (c) Application by whom. Typically the decision maker would have this information so is the most logical entity to submit the NOI. EPA may require some large applicator entities to submit an NOI also if they exceed some permit threshold in numbers and size of applications.

Slides related to the permit contents:

16. Technology-based effluent limits (TBELs) are essentially best management practices that are enforceable – also called Best Available Technology (BAT). The range from simple to complex. The simple ones are generally those that the FIFRA label requires, like maintaining and calibrating the sprayer, spill prevention, using the right amount of products, cleaning and recycling containers, and other professional actions typically associated with FIFRA. Now EPA is adding Integrated Pest Management (IPM) methods, some of which will also be enforceable. These could include consideration of alternatives to pesticide use before selecting pesticide treatments, and using the least amount of pesticide to get the job done. EPA has to consult with the Fish & Wildlife Services and the National Marine Services Agency on

endangered species provisions. This will likely result in additional requirements added to those of EPA.

17. Water-quality based effluent limitations (WQBELs) are the numerical requirements that define the standards that define clean water. NPDES permits would include the requirement that pesticides applications be managed in such a manner that all state and federal water quality standards (including narrative standards such as “no toxics in toxic amounts,” are met by the water quality after the beneficial use period is over.
18. EPA has indicated that some monitoring will likely be necessary to ensure compliance with the permit. As a minimum, EPA believes, routine surveillance looking for dead fish, or amphibians in distress, could be done. Even surveillance would have costs, for applicators would not be able to conduct further applications if they are traveling back to the site to look. Also, aerial applicators that fly over several states would have great difficulty to return several times to the spray site, especially if that is a wetland or water body. EPA is also considering a requirement for analytical chemical analysis, which would be even more costly and difficult.
19. Adverse incident reporting is a requirement EPA is considering whereby applicators or decision makers would be required to report any adverse effects, identify what action they took, and file this report publicly with EPA or the state. In the process, the applicator would be required to state whether he/she violated FIFRA in the application leading to the incident.
20. Each year those permittees who filed an NOI would be required to submit a public document that updates the NOI and supplies information on what treatments occurred, where, to what pests, and other information.
21. Recordkeeping will vary depending on whether the entity is a decision maker or applicator. Many records will be expected to be kept at the site, while others must be sent to the state or EPA. Small landowners or applicators who gain coverage without submitting an NOI will be able to keep records on site.
22. EPA has many expectations from this new permitting program. Primarily they hope to gain a lot of new information on who is applying pesticides and where. They also are expecting this program to markedly reduce pesticide applications to waters of the US.
23. Municipalities and states have many concerns, including costs to administer this permit program and costs to comply. Applicators have many issues too. When we see the draft permit in April 2010 we'll have a better idea of what chief remaining concerns will be.

