

Sixth Circuit Holds That CWA NPDES Permits Are Required for Aquatic Pesticide Application

In a decision that has far reaching implications, including within the boundaries of the Ninth Circuit (which includes Idaho), a three judge panel of the United States Court of Appeals for the Sixth Circuit recently struck down an EPA rule exempting certain pesticide/herbicide applications from federal Clean Water Act permitting (NPDES) requirements. Though the *National Cotton Council of America v. EPA*, (6th Cir., No. 06-4630, 1/7/09) decision issued from the Sixth Circuit, the decision reaches far and wide because it decided consolidated petitions for review of the same EPA rule from other circuits, including the Ninth Circuit.

The EPA Rule

On November 27, 2006, EPA issued a final rule exempting the application of aquatic pesticides from CWA NPDES permitting requirements provided that the pesticides were applied in strict accordance with the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA")-prescribed application directions. The final rule expressly stated that NPDES permits were not required for: (1) direct pesticide application to water to control pests; or (2) the application of pesticides to control pests present over or near water. The rule allowed for the aerial application of pesticides knowing that some aerial application would result in the unavoidable "drift" of some chemicals to nearby waters. EPA also acknowledged that the rule allowed for herbicide spraying to control non-native plants growing at the water's edge, again knowing that any such spraying would, inevitably, result in the deposit of some of the pesticide into the adjacent water.

EPA promulgated the rule largely in response to a series of Ninth Circuit decisions spanning 2001-2005 presenting different factual twists on the application of pesticides both to water and to air; and what implications, if any, those various applications had upon the CWA NPDES permitting regime. For example, in *Headwaters, Inc. v. Talent Irr. Dist.*, 243 F.3d 526 (9th Cir. 2001), the Ninth Circuit held, among other things, that aquatic herbicide residue left in water constituted a pollutant for CWA purposes. Therefore, the application of such herbicides required an NPDES permit. In

League of Wildlife Defenders v. Forsgren, 309 F.3d 1181 (9th Cir. 2002), the Ninth Circuit held that the aerial application of pesticides over National Forest Service Lands which included inevitable drift into local water bodies constituted a point source discharge (via nozzles on the airplanes) requiring an NPDES permit. Last, in *Fairhurst v. Hagener*, 422 F.3d 1146 (9th Cir. 2005), the Ninth Circuit held that pesticides directly and intentionally applied to water in accordance with their FIFRA label instructions may require an NPDES permit. The Ninth Circuit drew a distinction between pesticides that leave no lingering residue or unintended effects, and those that do (*i.e.*, those that linger in the water after application and after having performed their intended function). The Ninth Circuit held that those pesticides that leave no residue are not pollutants for CWA permitting purposes, but that those that do, are pollutants requiring an NPDES permit prior to application.

The Decision

The Sixth Circuit held that EPA's 2006 rule was "not a reasonable interpretation" of the CWA and its NPDES permitting requirements. The fact that pesticides were applied in conformance with their FIFRA labeling did not sway the Court. While the Court acknowledged that the CWA did not necessarily classify "pesticides" as "pollutants," the Court also stated that the Act's definitions and use of the terms "chemical waste" and "biological materials" do "unambiguously" apply to pesticides. In reaching its decision, the Court also highlighted EPA's concessions that excess pesticide application and residues that linger after application do qualify as "pollutants" under the CWA. In sum, the Court was unwilling to stomach EPA's rule for fear that discharges that may be harmless at the time they are made, but that could become harmful at a later point through over-application and lingering residue (chemical constituent changes through degradation over time), would not be subject to the NPDES permitting regime. Ultimately, the Court was unwilling to issue such a FIFRA-related blank check.

Implications

There is no question that the Sixth Circuit's decision deals a blow to anyone using aerial or aquatic applied pesticides/herbicides in their operations (*e.g.*, farmers; ranchers; utility owners; golf courses; and state, local,

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and federal public health agencies who spray for pest control). According to the Court, these pesticide/herbicide applications now require a valid NPDES permit prior to application—an application process and oversight regime that can cost many thousands of dollars per year to maintain. The Sixth Circuit decision also opens these pesticide/herbicide uses up to the citizen suit provision of the CWA. That provision permits any citizen to sue suspected violators of the NPDES permit program in federal court in an effort to obtain enforcement. The citizen suit provision also permits the award of attorneys' fees and costs (including expert witness fees/costs) against the alleged violator if the citizen suit prevails.

Though no one group or industry has yet vowed to appeal the decision to the United States Supreme Court, such an appeal is anticipated given the sweeping implications of the decision. The decision, and its future application is also a political hot potato, and it remains to be seen how it will be handled by the Obama administration. Environmental activists see the Sixth Circuit's ruling as an important repeal of a "Bush era" regulatory rule that went out of its way to benefit industry and other private interests. Already, the environmental advocacy group Beyond Pesticides issued a letter to the Obama administration seeking the immediate and strict enforcement of CWA NPDES permitting requirements in the wake of the *National Cotton Council of America* decision to any pesticide/herbicide application taking place "on or above waters." The group is also demanding that EPA formally assess the impact of pesticide "drift" on wetlands and other sensitive aquatic habitats whenever registering pesticides for approved use. Beyond Pesticides is also urging EPA to restrict the use of pesticides/herbicides in settings where current surface water and ground water samples establish preexisting water quality standards violations. The group also seeks the promulgation of express water quality standards based upon all currently registered pesticides and their known metabolites. The regulated community must simply wait and see what administrative or legal pressure is brought to bear upon EPA in wake of the *National Cotton Council of America* decision.

Idaho State Water Board Adopts Comprehensive Aquifer Management Plan ("CAMP")

After years of contentious litigation between senior surface water users and junior ground water pumpers on the Eastern Snake Plain River Aquifer ("ESPA"), the Idaho State Water Board adopted a comprehensive

aquifer management plan for the ESPA. The plan, adopted January 29, 2009, is the culmination of three years of collaboration between various stakeholder groups and the state. Stakeholders included irrigation company representatives, ground water users, spring water users, hydro power generators, land developers, environmental conservationists, and the mayors of various municipalities overlaying the expansive, Lake-Erie-sized, ESPA. The plan is now set for submittal to the Legislature for its approval.

In short, the CAMP is designed to provide both the technical and the administrative support for efforts designed to manage the ESPA through increasing available water supplies, and reducing current demands placed upon the aquifer. CAMP-prescribed methods designed to increase local water supplies include: (1) making more thorough use of surface flows passing below Milner Dam (because these flows are highly variable depending upon the bounty of any given winter, this measure would require more timely runoff capture and the development of additional storage opportunities whether on the surface or via aquifer recharge); (2) weather augmentation (*i.e.*, cloud seeding programs); and (3) supplying the present downstream fish flow augmentation obligations of the Upper Snake River Basin from other sources, thereby making that water available for additional use within Idaho.

The ESPA is an exceedingly important regional resource. It provides drinking water to approximately one-third of Idaho's population. Also, roughly 60% of all of Idaho's irrigated agricultural land overlays the aquifer (approximately 2.1 million acres). About one half of that acreage is irrigated via surface water supplies, while the remaining half is irrigated via ground water pumping from the aquifer. For those who are interested, a finalized copy of the CAMP is available at: <http://www.esaplan.idaho.gov>.

Council, Idaho Fined by EPA for Water Quality Violations

The City of Council, Idaho has agreed to pay the EPA \$11,000 for violations of its National Pollutant Discharge Elimination System ("NPDES") permit under the Clean Water Act. NPDES permits limit the allowable discharge of pollutants into surface waters of the United States. Between May 2004 and April 2008, the City-owned wastewater treatment facility, which discharges into the Weiser River, had more than 4,000 violations of the terms of its NPDES permit. The plant exceeded limits set for the discharge of, among other

things, *E. coli.*, total suspended solids, and biochemical oxygen demand. In order to address the multiple violations, the water treatment plant has improved its chlorination system and its treatment lagoons.

Update on CAFO Emissions Reporting Rule

In our January 2009 issue, we reported on a recent rule issued by EPA that provides a limited exemption for concentrated animal feeding operations (“CAFOs”) from federal release reporting requirements. Under that rule, small and medium CAFOs are exempt from reporting their emissions of threshold quantities of hazardous substances from animal wastes, such as ammonia and hydrogen sulfide, while large CAFOs are still required to report their animal waste emissions.

EPA’s rule is now being challenged by both industry and environmental groups. On January 21, the National Pork Producers Council filed a lawsuit which seeks to block the enforcement of that rule for the time being, on the basis that EPA has not provided large CAFOs with enough time to comply with reporting requirements. In addition, on January 15, Earthjustice and other environmental organizations filed a lawsuit challenging EPA’s rule, on the basis that the exemptions for small and medium CAFOs are too broad because, according to those groups, such facilities still have the potential to emit dangerous levels of hazardous substances into the air and should therefore be regulated.

The release reporting requirements at issue arise under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the federal Emergency Planning and Community Right-to-Know Act (EPCRA). Under those acts, agricultural and industrial facilities that release threshold quantities of hazardous substances to the air, soil, groundwater, and surface water must report those releases to federal, state, and local authorities. By way of clarification, EPA’s recent CAFO rule only affects air emissions from animal wastes. Releases of hazardous substances to soil, groundwater, and surface water, and releases from sources other than animal wastes (such as tanks), are still subject to reporting requirements at all CAFOs.

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