

Clean Water Act Regulation of Aquatic Pesticides: New Exemption Under Attack

By Jacqueline L. McDonald

The boundaries of the Clean Water Act (CWA), 33 U.S.C. §§ 1251 et seq., jurisdiction over aquatic pesticides are currently in flux. The debate regarding the application of pesticides to waters of the United States and its potential implications for NPDES permit requirements began in 2001. The United States Ninth Circuit Court of Appeals expanded the traditionally-accepted CWA jurisdictional boundaries in holding that the application of aquatic pesticides to waters of the United States require coverage under a National Pollutant Discharge Elimination System (NPDES) permit. *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (2001) (Talent).

Since that time, states have enacted permitting regimes to implement the NPDES program for aquatic pesticides even though pesticide applications are subject to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 et seq (FIFRA). California, for example, enacted and implemented a statewide general permit for the application of aquatic pesticides. See California State Water Resources Control Board, Water Quality Orders No. 2001-12-DWQ and 2004-0009-DWQ.

On November 27, 2006, the United States Environmental Protection Agency (EPA) modified the Clean Water Act NPDES regulations in an attempt to again narrow the reach of the Clean Water Act regulation of aquatic pesticide applications. See 40 C.F.R. Part 122, 71 Fed. Reg. 68483 (2006) (referred to herein as "Aquatic Pesticide Rule"). EPA's effort to limit the regulation of aquatic pesticides, however, is currently under attack.

Conflicting Interpretations

The extent of Clean Water Act jurisdiction over aquatic pesticide application has suffered from

conflicting interpretations for some time. As noted above, the Ninth Circuit in *Talent* concluded that residual materials from pesticide applications are "pollutants" subject to regulation under the Clean Water Act. See 33 U.S.C. § 1362(6). In that case, EPA alleged that the irrigation district failed to apply the aquatic herbicide in accordance with FIFRA. Confusion arose from *Talent* because the court's decision hinged on the determination that the residual pesticide left in the water after application was a chemical waste and therefore a pollutant. The court did not decide if the application as originally applied constituted a pollutant under the Clean Water Act.

Soon after the *Talent* decision was published, the Ninth Circuit issued a subsequent decision requiring a NPDES permit for the aerial application of insecticides over National Forest lands to control moths. *League of Wilderness Defenders v. Forsgren* 309 F.3d 1181 (2002) (*Forsgren*). In *Forsgren*, the Ninth Circuit assumed that the insecticides qualified as a "pollutant" under the Clean Water Act and therefore the issue was not analyzed as part of the Court's decision.

Based on the Ninth Circuit Court of Appeals decisions in *Talent* and *Forsgren*, states have enacted regulatory programs requiring permits for the application of aquatic pesticides to waters of the United States, irrespective of compliance with FIFRA labels. The California State Water Resources Control Board adopted two general NPDES permits to regulate the application of pesticides into waters of the United States in California. (WQO 2004-0008-DWQ [vector control] and WQO 2004-0009-DWQ [aquatic weed control].) Under these permits, water districts and others are required to submit a Notice of Intent to comply with the provisions contained in the permits before

applying aquatic pesticides directly to waters of the United States or applying pesticides to control pests that may be over or near waters of the United States. The Aquatic Pesticide Rule, however, negates the need for water districts and others to comply with the provisions of this and other NPDES permitting programs for the application of aquatic pesticides in accordance with the FIFRA label.

EPA's Aquatic Pesticide Rule

The Aquatic Pesticide Rule, which became effective on January 26, 2007, limits the reach of the NPDES program for pesticide applications undertaken in compliance with FIFRA. 71 Fed. Reg. 68483. The Aquatic Pesticide Rule offers significant regulatory relief to water purveyors conducting aquatic pesticide management in their canals and water conveyance systems. For purposes of this article, "pesticides" refers generally to all pesticides, insecticides, fungicides and herbicides. The Aquatic Pesticides Rule is intended to clarify EPA's position regarding the applicability of the CWA NPDES permit requirements to the application of pesticides to waters of the United States. EPA asserts that NPDES permits are not required for application of aquatic pesticides in compliance with the FIFRA label in two specific circumstances: (1) when the pesticide is applied directly to a water of the United States to control pests (e.g. applications to control mosquito larvae, aquatic weeds, and other pests); and (2) when the pesticide is applied to control pests that are over or near waters of the United States and it is unavoidable that the pesticide will be deposited in a water of the United States (e.g. aerial application of pesticides applied to a forest canopy where waters of the United States may be present).

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The EPA's regulation is based on EPA's interpretation of the term "pollutant" and the agency's finding that pesticides applied in compliance with FIFRA under the two circumstances identified above are not pollutants and therefore not subject to the NPDES permitting requirements. In addition, even though pesticide residue resulting from the applications described above may become a pollutant at a later time, a permit for the residue is not required because the residual should be treated as nonpoint source pollution, which is not subject to the NPDES permit requirements. The Aquatic Pesticides Rule does not address the issue of drift over and into waters of the United States from land applications of pesticides.

Pending Litigation

The EPA's Aquatic Pesticide Rule nearly immediately triggered the filing of eleven lawsuits brought both by industry and by environmental groups. See *National Cotton Council v. EPA*, Case No. 06-4630, *BASF Corp v. EPA*, Case No. 07-3180, *Southern Crop v. EPA*, Case No. 07-3181, *Waterkeeper Alliance v. EPA*, Case No. 07-3182, *Agribusiness Assoc. v. EPA*, 07-3183, *Baykeeper v. EPA*, Case No. 07-3184, *Environmental Maine v. EPA*, Case No. 07-3185, *Syngenta Crop v. EPA*, 07-3186, *IL Fertilizer v. EPA*, 07-3185, *Croplife America v. EPA*, 07-3191, *Delta Council v. EPA*, 07-3191. These lawsuits were brought under section 509 of the Clean Water Act, which authorizes judicial review in any Circuit Court of Appeals of the United States for the Federal judicial district in which the affected person resides or transacts business. See 33 U.S.C. § 1369(b)(1). The environmental plaintiffs assert that the Aquatic Pesticides Rule violates the intent of the Clean Water Act to cover pesticides as "pollutants"

subject to NPDES permit requirements. Industry groups, however, have also challenged the Aquatic Pesticides Rule as too narrow arguing that EPA should apply the exemption more broadly to other activities, such as aerial applications to land. On January 16, 2007, a multi-district litigation panel consolidated the eleven suits in the Sixth Circuit as *National Cotton Council et al v. EPA*, Case No. 06-4630.

On February 5, 2007, Environmental Plaintiffs (BayKeeper, Californians for Alternatives to Toxics, California Sportfishing Protection Alliance, Environment Maine, National Center for Conservation Science and Policy, Oregon Wild, Peconic BayKeeper, SoundKeeper, Toxics Action Center and WaterKeeper Alliance) also filed a complaint in the United States District Court, Northern District Court of California challenging EPA's issuance of the Aquatic Pesticides Rule under the Administrative Procedure Act, 5 U.S.C. § 706(2). (*Baykeeper v. EPA*, N.D. Cal. Case No. 07-0725.) The environmental plaintiffs raise two causes of action in their Northern District Court Complaint: (1) EPA's pesticide discharge exemption is inconsistent with, and in excess of EPA's statutory authority under, the Clean Water Act; and (2) EPA's rule adding the pesticide discharge exemption was arbitrary, capricious, an abuse of discretion and not in accordance with the Clean Water Act. The environmental plaintiffs seek declaratory rulings that the pesticide discharge exemption is unlawful and that all pesticide discharges "into waters of the United States are required to obtain NPDES permits."

The parties to the litigation in the Sixth Circuit Court of Appeal and the Northern District of California await the resolution of a jurisdictional issue raised in the Sixth Circuit—that is, whether the Sixth Circuit has proper

jurisdiction over the case pursuant to section 509 of the Clean Water Act. 33 U.S.C. § 1369. Environmental interests filed a motion to dismiss the action presumably in hopes of changing the venue of the litigation to the Northern District as the Ninth Circuit has a better track record of upholding broad Clean Water Act regulation over aquatic pesticide applications. The Northern District court action is at a stand still pending the result of the motion to dismiss proceedings.

Due to the issuance of the Aquatic Pesticide Rules and the subsequent litigation, state NPDES programs for aquatic pesticides face an uncertain future. In response to the Aquatic Pesticide Rule, the California State Water Quality Control Board's Chief Counsel issued a memorandum recommending that the statewide general permit should remain in effect pending final judicial actions (at that time referring to litigation still pending in the Sixth Circuit Court of Appeal) on the regulation. Water districts and others currently subject to the permit provisions are allowed to file a notice of termination based on the Aquatic Pesticide Rule. If a court decision invalidates the Aquatic Pesticides Rule, those that submitted a notice of termination may reenroll. Until final resolution in the courts, the regulatory relief provided by the Aquatic Pesticides Rule provides more uncertainties than assurances for water purveyors and irrigators applying aquatic pesticides for management of canals and other waterways.

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