

NPDES Pesticide General Permit

Overview

In January 2009, the Sixth Circuit Court of Appeals vacated a 2006 EPA final rule that exempted pesticides applied in accordance with FIFRA from Clean Water Act (CWA) permitting requirements. The court held that EPA's conclusion about certain FIFRA-compliant pesticide applications to, over, and near navigable waters not needing NPDES permits was not reasonable and contrary to the plain language of the CWA. In June 2009, the court granted EPA's request to suspend the ruling for 2 years to allow EPA and the states time to develop permitting programs consistent with the ruling. On February 22, 2010, the U.S. Supreme Court denied industry's petition for review of the Sixth Circuit's ruling. Consequently, at the end of the 2-year suspension, all applications of biological pesticides and chemical pesticides that leave residues from the four uses addressed by the Sixth Circuit (i.e., those affecting navigable waters) must be in accordance with an NPDES permit. EPA intends to develop a final pesticide general permit by the end of 2010, which will apply directly to six states (and other specified territories and Indian tribal lands) and provide a model for the remaining 44 States that also must have permits in place by the April 9, 2011 deadline.

Update

On June 4, 2010, EPA published for comment a draft pesticide general permit, which seeks to minimize the regulatory impact of the new permit requirement by imposing certain basic requirements on all entities subject to the permit, and additional requirements on entities that exceed specific application thresholds. Thus, all operators with pesticide applications involving the four uses potentially affecting navigable waters must comply with the minimum requirements of the general permit. Operators responsible for applications that exceed treatment thresholds (i.e., specified acres or linear miles), must submit a Notice of Intent (NOI) to be covered by the general permit and must comply with additional requirements, such as a pesticide discharge management plan, integrated pest management practices, and annual reporting. All other operators would obtain permit coverage immediately upon engaging in any of the four activities, with an on-going obligation to comply with the basic requirements (e.g., conducting certain activities to minimize pesticide applications and reporting adverse incidents). EPA conducted multiple outreach events during the past year to solicit input before issuing the draft permit. However, the Agency concedes the weak basis for some permit provisions and the need for more reliable information in some areas of the permit to develop a final permit that is a fair and reasonable scheme for regulating these pesticide applications under the CWA. CPDA is currently reviewing the draft permit and related documents and is identifying areas of concern, such as possible confusion about CWA jurisdiction over certain upland water bodies and conveyances, and unknown permit conditions that may result from the ongoing Endangered Species Act consultation on the permit.