

LEGAL UPDATES

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## Services

Environmental

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# Increased Regulatory Burdens for the Use of Aquatic Pesticides

On June 27, 2013, the Environmental Protection Agency (EPA) issued a final rule that removed the exemption for pesticide applications near U.S. waters from the National Pollutant Discharge Elimination System (NPDES) permit requirements in accordance with the U.S. Court of Appeals' decision in *National Cotton Council v. EPA*.

In November 2006, the EPA issued a final rule that exempted the application of aquatic pesticides from NPDES permitting requirements under the Clean Water Act (CWA), provided that the application complied with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The exemption was limited to applications of pesticides directly to water in order to control pests and applications of pesticides to control pests present over or near waters where a portion of the pesticides would unavoidably be deposited into waters.

Numerous lawsuits challenging the rule were filed and ultimately consolidated in the Court of Appeals, Sixth Circuit. In *National Cotton Council*, industry groups challenged the EPA's treatment of pesticides applied in violation of FIFRA as pollutants, while treating the same pesticides as nonpollutants when used in compliance with FIFRA. Environmentalists, on the other hand, argued that the EPA was ignoring its obligations under the CWA by exempting FIFRA compliant pesticide applications. In 2009, the Sixth Circuit determined pesticides are pollutants under the CWA even when applied in compliance with FIFRA and vacated the NPDES pesticide rule. The court granted the EPA a two-year stay of the mandate to provide time for the EPA to issue a NPDES general permit for pesticide applications and allow pesticide operators to obtain permits for pesticide discharges into waters of the United States.

As a result of *National Cotton Council*, NPDES permits are required for any discharge of a pollutant into waters of the United States resulting from the application of a pesticide, except for discharges resulting from agricultural

stormwater or irrigation return flow. In October 2011, the EPA issued the final pesticide general permit for those areas where the EPA is the NPDES permitting authority. The general permit applies to the following pesticide use patterns: mosquito and other flying insect pest control; weed and algae control; animal pest control; and forest canopy pest control.

An operator discharging pesticides under one of the four use patterns covered by the general permit is automatically covered by the permit unless the operator exceeds specific annual treatment thresholds (e.g., 20 linear miles or 80 acres of water), in which case the operator must submit a notice of intent (NOI). The general permit defines an operator as an entity that either (1) controls the decision to perform pesticide applications (decision-makers), or (2) applies pesticides or has day-to-day control of pesticide applications (applicators). Despite the EPA's efforts to minimize the regulatory burdens and cost, the permit remains controversial.

Following the 2009 ruling by the Sixth Circuit, legislation intended to clarify that permits are not required for some or all pesticide spraying activity was introduced in Congress on multiple occasions but was never enacted. Amid growing frustration from agricultural stakeholders with the allegedly duplicative requirements of the CWA and FIFRA, members of Congress have continued to introduce legislation to ameliorate the concerns of agricultural stakeholders. Most recently, Title X of the Federal Agriculture Reform and Risk Management Act of 2013, the latest farm bill proposal, contained a provision titled "The Reducing Regulatory Burdens Act of 2013." The provision amended the CWA and FIFRA to eliminate "a costly and duplicative permitting requirement for pesticide applications." Consistent with the EPA's 2006 NPDES pesticide rule, NPDES permits would not have been required for applications of pesticides in, over or near waters of the United States when applied in compliance with FIFRA under the Reducing Regulatory Burdens Act.

### **What This Means to You**

For reasons unrelated to the Reducing Regulatory Burdens Act, the Federal Agriculture Reform and Risk Management Act of 2013 did not pass the House of Representatives. Industry representatives should continue to urge Congress to enact an exemption for pesticide applications as part of the 2013 farm bill. In the interim, agricultural producers, municipalities, utilities, railroads, as well as flood control, irrigation and drainage districts and others responsible for controlling weeds, algae, other invasive species, mosquito and other flying pests, must continue to comply with NPDES permits for pesticide applications that will or may result in a discharge into waters of the United States.

### **Contact Information**

If you have questions concerning this or other environmental issues, please contact your Husch Blackwell attorney.