



ADVISORY

Pesticide Applications and Clean Water Act Pollution Permits

April 15, 2009

The California Citrus Quality Council (CCQC) is providing this notice to inform members of the California citrus industry about a recent court ruling that could require growers and pesticide applicators to apply for permits for pesticide applications, so they are in compliance with the Clean Water Act. Little is known at this time about the scope and cost of the permitting process or how it would work. However, the U.S. Environmental Protection Agency (EPA) plans to coordinate with stakeholders over the next two years to develop a permitting process to ensure that routine pesticide applications are compliant with the Clean Water Act as mandated by the court ruling.

CCQC will continue to oppose burdensome permitting requirements by working the Minor Crop Farmer Alliance (MCFA), which sent the attached letter to EPA Administrator Lisa Jackson urging EPA to appeal the Sixth Circuit's ruling to require National Pollutant Discharge Elimination System (NPDES) permits for routine pesticide applications. Agriculture Secretary Thomas Vilsack sent a similar letter on March 6 to the Administrator pointing out that the ruling compromises the ability of American farmers to respond effectively to pest threats.

Unfortunately, the Department of Justice opted not to oppose the ruling by the deadline last week, but instead filed a motion to stay the court ruling for two years while EPA develops a permitting process. **No permits are currently required, but within two years growers may be required to apply for permits for pesticide applications.**

While DOJ did not appeal the court's ruling it is being challenged by the American Farm Bureau Federation, the American Forest and Paper Association and CropLife America. Over the following weeks and months the courts will consider arguments in the case and come to a decision over whether pesticide applications should be regulated by Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the Clean Water Act or both.

Background

In the early 2000s, antipesticide activist organizations began to sue or threaten to sue farmers for making pesticide applications near bodies of water. They alleged that even the smallest pesticide residues found in water from routine applications were pollutants and therefore required NPDES permits or the pesticide applications would violate the Clean Water Act. Growers would then be subject to stiff penalties previously reserved for industrial water polluters.

These suits caused uncertainty, pest control problems and in some cases legal liability for growers making pesticide applications near bodies of water regulated by the Clean Water Act. Agricultural interests asked EPA to clarify its policy regarding the need to obtain NPDES permits for pesticide applications.

EPA issued a policy statement on August 13, 2003 and a proposed rule on Feb. 1, 2005 regarding the need for Clean Water Act permits. The agency issued a final rule on Nov. 27, 2006 clarifying two specific circumstances in which a Clean Water Act permit is not required to apply pesticides to or around water. EPA stated that no permit is required for (i) the application of pesticides directly to water in order to control pests; and (ii) the application of pesticides to control pests that are present over or near water, where a portion of the pesticides will unavoidably be deposited to the water in order to target the pests.

EPA's Nov. 27, 2006 final rule reiterated its long held policy that pesticides registered under the FIFRA for use on or near aquatic sites and legally applied did not require Clean Water Act permits.

In January 2006, EPA received petitions to review its aquatic pesticide rule and the case was assigned to the Sixth Circuit Court of Appeals. On Jan. 7, 2009 a panel of three judges ruled that EPA's interpretation of the Clean Water Act in its final rule was incorrect. Thus, the court held that NPDES permits are required for all biological pesticide applications and chemical pesticide applications that leave a residue in water when such applications are made in or over, including near, waters of the United States. EPA estimates that the ruling affects approximately 365,000 pesticide applicators that perform 5.6 million pesticide applications annually.

The Sixth Circuit's ruling upset EPA's historical legislative interpretation, which regulated pesticides under FIFRA, not the Clean Water Act. The ruling also forced pesticides into a regulatory structure originally created for point source pollutants under the Clean Water Act.

The following process, taken from the California State Water Resources Control Board website illustrates the irrational conclusion of the Sixth Circuit's ruling, since California growers would be required to follow this process for each pesticide application according to the ruling. Please note that implementation of the court's ruling has been delayed for two years so EPA can develop another permitting process more suitable to pesticide applications, so growers are not currently subject to the following permitting process.

The process begins when a discharger submits an application to the appropriate Regional Water Board. Among other things, the application must describe the wastes to be discharged, the setting for the discharge, and the method of treatment or containment. Once the application is deemed complete, the State or Regional Water Board staff will draft a permit, which must be adopted by the State or Regional Water Board before any discharge can occur.

The specific steps to obtain an NPDES permit are as follows:

- *File the appropriate NPDES application forms with the Regional Water Board.*
- *State or Regional Water Board staff reviews the application for completeness and may request additional information.*

- *Staff determines if the discharge is to be permitted or prohibited. If a permit is needed and the application is complete, staff prepares a draft and sends out a notice for a 30-day public comment period.*

The discharger must publish the public notice for one day in the largest circulated paper in the municipality or county and submit proof of posting or publication to the Regional Water Board within 15 days after posting or publication.

The Regional Water Board holds a public hearing after the 30-day public notification. The State or Regional Water Board may adopt the permit as proposed or with modification, or not adopt it at all. A majority vote of the Water Board members is required to adopt the permit. USEPA has 30 days to object to the draft permit, and the objection must be satisfied before the permit becomes effective.

The permit issuance process takes approximately six months, but may take longer depending upon the nature of the discharge.

Permitting fees are also required and can be found at
http://www.waterboards.ca.gov/resources/fees/docs/water_quality_fees.pdf

The current process would obviously be unworkable, so EPA has opted to develop a pesticide-specific permitting process in consultation with a broad range of stakeholders over the next two years. The need for this process will depend on the outcome of the appeals process.

CCQC will continue to monitor this issue and provide input into the process along with partner organizations such as the Minor Crop Farmer Alliance and the Pesticide Policy Coalition.

Please contact CCQC by telephone at (530) 885-1894 or via e-mail at jcranney@calcitrusquality.org if you have any questions or need additional information.