



National Cotton Council v. EPA ... the NPDES Issue

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Clean Water Act

Section 301 (a)

- Discharge
- Of a pollutant
- From a point source
- Into the navigable waters of the United States

Exemption to violation – permit under the National Pollutant Discharge Elimination System (NPDES)

Agricultural Exemptions

Section 402(l)(1) of the Clean Water Act

- (l) LIMITATION ON PERMIT REQUIREMENT.—
- (1) AGRICULTURAL RETURN FLOWS.—The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

- Section 502(14) of the Clean Water Act

- (14) The term “point source” means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. *This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.*

NPDES Permits

- In recent years, courts have decided whether NPDES permits are required for pesticide applications

Examples:

- **Headwaters, Inc. v. Talent Irrigation District (9th Cir. 2001)**

- The Court held that application of pesticides to irrigation canals to control vegetation required an NPDES permit.

- **League of Wilderness Defenders v. Forsgren (9th Cir. 2002)**

- The Court held that the CWA required an NPDES permit for the aerial application of a pesticide to waters of the United States.

- **Fairhurst v. Hagner (9th Cir. 2005)**

- The Court held that the application of a pesticide applied to a water of the U.S. did not require an NPDES permit.



NPDES Aquatic Pesticide Rule

- “Application of Pesticides to Waters of the United States in Compliance with FIFRA” (40 CFR 122) published in Federal Register November 27, 2006
- CWA/NPDES permit not required when application of pesticide to, over or near waters of the U.S. is consistent with FIFRA
 - Permit not required for:
 - Application of pesticides directly to waters of U.S. to control pests (i.e. aquatic weeds, mosquitoes)
 - Application of pesticides to control pests that are present over or near waters of U.S. where a portion of the pesticides will unavoidably be deposited to the water in order to target the pests (i.e. forest canopy)
 - Rule does not address spray drift



Litigation: History

- As anticipated, numerous activist groups filed petitions in the Ninth, Second, and First Circuits.
- CLA/RISE, CLA/RISE members and industry-affiliated organizations filed petitions in eight circuit courts to support EPA and expand the Final Rule.
 - CLA/RISE, BASF, FMC, Syngenta, Bayer, Delta Council, National Cotton Council, Illinois Fertilizer and Chemical Association, Agribusiness Association of Iowa, Southern Crop Production Association
- Farm Bureau and American Forest and Paper Association intervene.
- Sixth Circuit chosen via lottery
 - National Cotton Council petitioner in Sixth Circuit becomes named party



Sixth Circuit Panel Decision

January 7, 2009: Panel issues decision striking down Final Rule – Conflict with Clean Water Act

- Waters of U.S. – any hydrological connection to navigable waters, therefore ditch, erosion or wetlands are included
- Point Source – nozzles used in ground and aerial applications are a point source
- Pollutants – chemical pesticides are not chemical wastes since they serve a beneficial purpose, BUT the residual and excess once beneficial use is over, is a “chemical waste”, and therefore is a pollutant.
- Discharge – “*But for* the application of the pesticide, the pesticide residue and excess pesticide would not be added to the water,” – therefore the residue and excess are discharged from a point source



Impact of the Decision

- If NPDES permits are required for terrestrial applications whenever pesticide residues may enter water then impacted applications could potentially include:
 - Aquatic, aerial & terrestrial agriculture applications
 - Use of herbicides used for vegetation control along federal, state, county and municipal roads
 - Rights of way management along railroad and electric transmission corridors
 - Mosquito control by municipal or county officials
 - Chemical de-icing by state, county and municipal transportation agencies
 - Home and garden fertilizer applications

Regulatory Uncertainty for Agriculture

If motion for rehearing denied and absent a new EPA rule:

- All aquatic applications will require NPDES permits – unless pesticide does not leave “residuals” or “excess”
 - How to make that showing?
- Potential for terrestrial applications to require NPDES permits
- Increased potential liability for applicators under the CWA citizen-action provisions
- Environmental groups can sue applicators for failure to obtain NPDES permit or failure to comply with permit



Legal Remedies

- Mandate not effective until appeals exhausted.
- Motion for rehearing en banc filed by CropLife, Farm Bureau, and Forest & Paper on April 9, 2009
 - Decision wrong – CWA only requires permits for substances that are pollutants when discharged
 - Rescind portions of opinion discussing terrestrial applications which were not before the court and briefed
 - Declarations and amici support from allies to show practical obstacles
- Motion to stay granted
 - Two year delay (April 2011) so permitting system can be implemented.
- 6th Circuit will take several months to decide if rehearing is heard

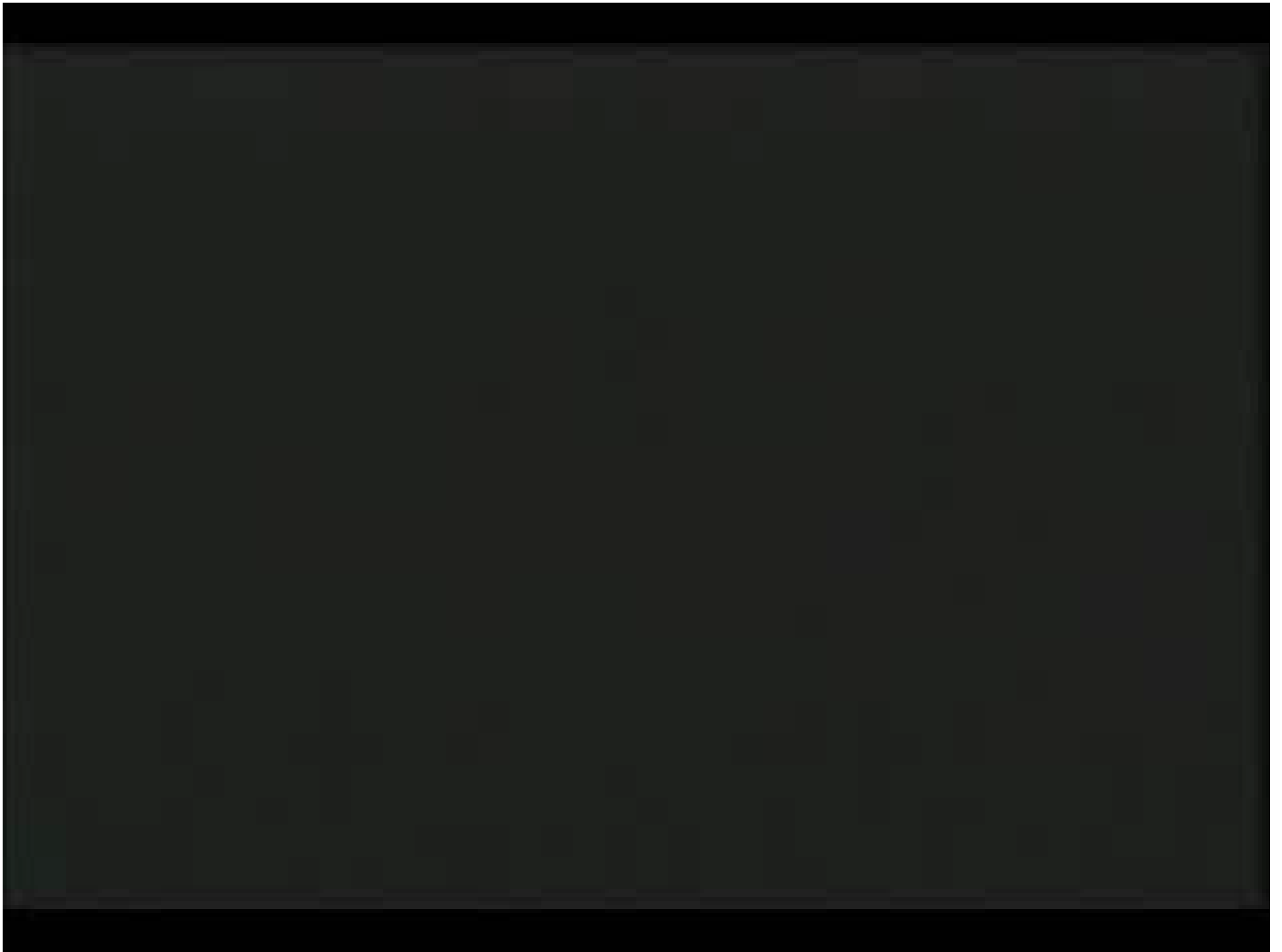


Problems with a General Permit System

- NPDES permit requires applicant seek permit 180 days before intent to use the pesticide with public notice and comment
- Permit subject to judicial review
- Citizen-Action suits if fail to obtain a permit. Applicator need to defend application.
- Activists already announced that permits which are too “general” will be challenged

Pest Control Techniques of the Future

A Look at Practices we may employ...



Chemical Facility Anti-Terrorism Standard

CFATS Rule—Legislative Activity

- DHS Authority sunsets October 4
- House Homeland Security passed its version, H.R. 2868, on 6/23
- Next stop is House Energy & Commerce for action in mid-July
- Most troublesome aspects are Inherently Safer Technology (IST) provision and citizen suit authority
- House Republicans supported 1-year reauthorization (H.R. 2477)



CFATS

Legislative Activity continued...

- Better chance to address concerns in Senate
- Senate biding its time: no drafting, no hearings
- May ultimately rely on stop-gap measure: both Houses have already passed the FY '10 DHS Appropriations bill which includes a one-year extension of CFATS

CFATS Indefinite Extension for Ag

Extension from compliance granted 12/20/07 for farmers and ag input users

DHS finally ready to address compliance issue:

- Will direct ag distributors to complete supplemental ag-focused questionnaire
- Document under one-month review by USDA
- DHS will share with AgriBusiness Security Working Group
- May revise to Chemicals of Interest (Appendix A, CFATS) and threshold levels



CFATS

When Congress returns from August vacation, we should have better idea of legislative activity and next steps for ag extension regulation.

QUESTIONS??

