



U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

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February 14, 2011

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MEMORANDUM

TO: Members, Subcommittee on Water Resources and Environment

FROM: Majority Staff, Subcommittee on Water Resources and Environment

RE: Joint hearing with the Nutrition and Horticulture Subcommittee of the House Agriculture Committee, "To Consider Reducing the Regulatory Burden Posed by the Case, *National Cotton Council v. EPA* (6th Cir. 2009), and to Consider Related Draft Legislation"
WEDNESDAY, FEBRUARY 16, 2011, starting at 1:00 p.m.
1300 LONGWORTH HOUSE OFFICE BUILDING

PURPOSE OF HEARING

The Subcommittee on Water Resources and Environment and the Nutrition and Horticulture Subcommittee of the House Agriculture Committee will hold a joint hearing to consider reducing the regulatory burden posed by the case, *National Cotton Council v. EPA* (6th Cir. 2009), and to consider related draft legislation. The witnesses that will provide testimony to the Subcommittees will include representatives of the Environmental Protection Agency, state water quality agencies, a State agricultural agency, the irrigation community, and the mosquito control community.

BACKGROUND

The Federal Insecticide, Fungicide, and Rodenticide Act

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") is a regulatory statute that governs the sale and use of pesticides in the United States through the registration and labeling of such products. Its objective is to protect human health and the environment from unreasonable adverse effects of pesticides, taking into account the costs and benefits of various product uses. Pesticides regulated under FIFRA include insecticides, herbicides, fungicides,

rodenticides, and other designated substances. The Environmental Protection Agency ("EPA") reviews scientific data submitted by chemical manufacturers on toxicity and behavior in the environment to evaluate risks and exposure associated with a product's use.

FIFRA prohibits the sale of any pesticide unless it is registered and labeled indicating approved uses and restrictions. It is a violation of Federal law to use such a chemical in a manner that is inconsistent with the label instructions. If a registration is granted, EPA makes a finding that the chemical "when used in accordance with widespread and commonly recognized practice will not generally cause unreasonable adverse effects on the environment." (7 U.S.C. Section 136a(c)(5)(D).) EPA then specifies the approved uses and conditions of use of the pesticide, and this is required to be explained on the product label.

Section 402 of the Clean Water Act

The objective of the Clean Water Act ("CWA") is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The primary mechanism for achieving this objective is a prohibition on the discharge of any pollutant without a National Pollutant Discharge Elimination System ("NPDES") permit. EPA has the authority to regulate the discharge of pollutants either through general permits or through individual permits. NPDES permits specify limits on what pollutants may be discharged from point sources and in what amounts. Under the CWA, 47 states and territories have been authorized to implement NPDES permits and enforce permits. EPA manages the Clean Water Act program in the remaining states and territories.

NPDES permits are the basic regulatory tool of the CWA. The EPA or authorized state may issue compliance orders, or file civil suits against those who violate the terms of a permit. In addition, in the absence of federal or state action, individuals may bring a citizen suit in United States district court against those who violate the terms of an NPDES permit, or against those who discharge without a valid permit.

DISCUSSION

Litigation

In over 30 years of administering the CWA, EPA had never required an NPDES permit for the application of a pesticide, when the pesticide is applied in a manner consistent with FIFRA and its regulations. While the CWA contains a provision granting citizen suits against those who violate permit conditions or those who discharge without an NPDES permit, FIFRA has no citizen suit provision. As a result, beginning in the late 1990s, a series of citizen lawsuits were filed by parties, contending that an NPDES permit is necessary when applying a FIFRA-regulated product over, into, or near waterbodies. These cases generated several Court of Appeals decisions that created confusion and concern among pesticide users regarding the applicability of the CWA with regard to pesticide use.

As the litigation continued, concern and confusion grew among farmers, forest landowners, and public health officials, prompting EPA to issue interim, and later final,

interpretive guidance in August 2003 and January 2005, and then to undertake a rulemaking to clarify and formalize the agency's interpretation of the CWA as it applied to pesticide use. The Rule was finalized in November 2006 (*see* 71 Fed. Reg. 68483 (Nov. 27, 2006)), and was the culmination of a three year participatory rulemaking process that began with the interim interpretive statement in 2003 and involved two rounds of public comment.

The 2006 EPA Rule codified EPA's long-standing interpretation that the application of chemical and biological pesticides for their intended purpose and in compliance with pesticide label restrictions is not a discharge of a "pollutant" under the CWA, and therefore, that an NPDES permit is not required. The Rule clearly defined specific circumstances in which the use of pesticides in accordance with all relevant requirements under FIFRA is not a CWA "discharge of a pollutant," explaining in detail the rationale for the agency's interpretation.

When the Rule was finalized, environmental groups, as well as farm and pesticide industry groups, filed petitions for review of the Rule in several Federal Circuit Courts of Appeal. The petitions were consolidated in the Sixth Circuit. The Sixth Circuit ultimately vacated the rule on January 7, 2009 in *National Cotton Council v. EPA* (553 F.3d 927), concluding that the final rule was not a reasonable interpretation of the CWA's permitting requirements. The Court rejected EPA's contention that, when pesticides are applied over, into, or near waterbodies to control pests, they are not considered pollutants as long as they comply with FIFRA, and held that NPDES permits are required for all pesticide applications that may leave a residue in water.

EPA estimated that the ruling would affect approximately 365,000 pesticide applicators that perform some 5.6 million pesticide applications annually. The court's decision, which would apply nationally, was to be effective seven days after the deadline for rehearing expires or seven days after a denial of any petition for rehearing. Parties had until April 9, 2009 to seek rehearing.

On April 9, 2009, the Government chose not to seek rehearing in the *National Cotton Council* case. The Government instead filed a motion to stay issuance of the Court's mandate for two years to provide EPA time to develop, propose, and issue a final NPDES general permit for pesticide applications, for states to develop permits, and to provide outreach and education to the regulated community. Industry groups filed a petition seeking *en banc* review, asking the full Sixth Circuit to reconsider the decision from the three-judge panel.

On June 8, 2009, the Sixth Circuit granted EPA a two-year stay of the Court's mandate, in response to their earlier request. The Sixth Circuit denied the industry groups' petition for rehearing in August 2009.

Two petitions were filed with the U.S. Supreme Court in December 2009 by representatives of the agriculture community and the pesticides industry, requesting that the Supreme Court review the *National Cotton Council* case. A number of parties, including numerous Members of Congress, filed friend-of-the-court amicus briefs with the U.S. Supreme Court, in support of or opposition to the petitions. On February 22, 2010, the Supreme Court denied the petitioners' request without comment.

EPA Development of General NPDES Permit

With a two-year stay of the Sixth Circuit's mandate in place, EPA moved ahead with developing and issuing a final general NPDES permit for covered pesticide applications by the Court deadline of April 9, 2011. The permit covers four pesticide uses: (1) mosquito and other flying insect pest control; (2) aquatic weed and algae control; (3) aquatic nuisance animal control; and (4) forest canopy pest control. It does not cover terrestrial applications to control pests on agricultural crops or forest floors.

Despite being limited to these four uses, the new general permit for covered pesticides stands to be the single greatest expansion of the permitting process in the history of the NPDES program. EPA can expect approximately 5.6 million covered pesticide applications per year by approximately 365,000 applicators – virtually doubling the number of entities currently subject to NPDES permitting. With this unprecedented expansion comes real and tangible burdens; not only for EPA, but also for the states that will have to issue the permits, those whose livelihoods depend on the use of pesticides, and even every day citizens going about their daily lives.

EPA has said that it will be able to conform its current process to meet the 6th Circuit's mandate. Even so, much of the responsibility of developing and issuing general permits falls on the states. Forty-five states will face increased financial and administrative burdens in order to comply with the new permitting process. In a time when too many states are being forced to make difficult budgetary cuts, we cannot afford to impose more financial burdens.

The expanded permitting process also imposes enormous burdens on pesticide users who encompass a wide range of individuals from state agencies, city and county municipalities, mosquito control districts, water districts, pesticide applicators, farmers, ranchers, forest managers, scientists and others. The new and duplicative permitting process will increase both the administrative difficulty and costs for pesticide applicators to come into compliance with the law. Compliance will no longer mean simply following instructions on a pesticide label. Instead, applicators will have to navigate a complex process of identifying the relevant general permit, filing with the regulatory authority a valid notice of intent to comply with the general permit and having a familiarity with all the permit's conditions and restrictions. Along with increased administrative burdens comes an increased monetary burden. Estimates are that the cost associated with the EPA permit scheme to small businesses could be as high as \$50,000 annually.

In addition to the costs of coming into compliance, pesticide users will be subject to an increased risk of litigation and exorbitant fines. Applicators not in compliance face fines of up to \$37,500 per day per violation, not including attorney's fees. Given the fact that a large number of applicators have never been subject to NPDES and its permitting process, even a good faith effort to be in compliance could fall short. Moreover, the CWA allows for private action against individuals who may or may not have committed a violation. Thus, while EPA may exercise its judgment and refrain from prosecuting certain applicators, they remain vulnerable to citizen suits. Unless Congress acts, hundreds of thousands of farmers, foresters, and public health pesticide users will go into the next season under threat of lawsuits.

It is not only pesticide regulators and applicators who will be affected by new permitting requirements. Rather, the 6th Circuit's decision will affect everyday citizens, who rely on the benefits provided by pesticides and their responsible application. Pesticide use is an essential part of agriculture. Imposing a burdensome and duplicative permitting process on our nation's farmers threatens their ability to continue to provide the country with a safe and reliable food supply. Many family farmers and small applicators lack the resources to ensure compliance with a cumbersome and detailed permit scheme. Moreover, for those farmers who are able to comply, delays that are inherent in general permitting schemes are ill suited for prompt pest control actions necessary in agriculture. Failure to apply a pesticide soon after a pest is first detected could result in recurring and greater pest damage in subsequent years if a prolific insect were to become established in plant hosts. Secretary Vilsack himself has said that a permitting system is ill-suited to the demands of agriculture production.

Forest landowners will also suffer under the new scheme. EPA's permit scheme will result in a reduction in the use of forest pest control as a forest management tool, resulting in the acceleration of tree mortality and general decline in overall forest health. It will also erect barriers for the control of pests, such as Gypsy Moth and Forest Tent Caterpillar. This may result in a higher incidence of preventable tree kills and defoliated landscapes.

Finally, the 6th Circuit's holding could have significant implications for public health. The National Center for Diseases officially recognizes the following as a partial list of mosquito-borne diseases – Eastern Equine Encephalitis, Japanese Encephalitis, La Crosse Encephalitis, St. Louis Encephalitis, West Nile Virus, Western Equine Encephalitis, Dengue Fever, Malaria, Rift Valley Fever and Yellow Fever. EPA's permit program poses the possibility of critical delays in emergency responses to insect and disease outbreaks and will divert resources from controlling environmental pests to litigation and administrative burdens.

Draft Legislation

As a result of the concerns raised by stakeholders regarding the interrelationship between FIFRA and the CWA, and the concerns posed by the general permit, legislation is needed. The House Committees on Transportation and Infrastructure, and Agriculture, have sought technical assistance from the EPA to draft very narrow legislation targeted only at addressing the 6th Circuit's holding in *National Cotton Council*. It is intended to be consistent with EPA's final rule of November 27th, 2006. Effectually, the legislation drafted by EPA will return the state of pesticide regulation to the status quo – before the courts got involved.

WITNESS LIST

Panel I

Dr. Steven Bradbury, Director, Office of Pesticide Programs, U.S. Environmental Protection Agency, Washington, D.C.

Panel II

The Honorable John Salazar, Commissioner, Colorado Department of Agriculture, Lakewood, Colorado, on behalf of the Colorado Department of Agriculture and the National Association of State Departments of Agriculture

Dr. Andrew Fisk, Bureau Director, Land and Water Quality, Maine Department of Environmental Protection, Augusta, Maine, on behalf of Association of State and Interstate Water Pollution Control Administrators

Mr. Dominick V. Ninivaggi, Superintendent, Division of Vector Control, Suffolk County Department of Public Works, Yaphank, New York, on behalf of the American Mosquito Control Association

Accompanied by David Brown, Manager, Sacramento-Yolo Mosquito and Vector Control District, Elk Grove, California

Mr. Norm Semanko, Executive Director, Idaho Water Users Association, Boise, Idaho, on behalf of National Water Resources Association