

6th Circuit hears oral arguments against EPA aquatic pesticide rule

Pesticide and Toxic Chemical News
Monday May 05 2008

Attorneys representing environmental and industry groups presented opposing views of EPA's Nov. 2006 aquatic pesticide rule in federal court last week, with both sides arguing that the rule violates the Clean Water Act (CWA), but for different reasons.

The U.S. Court of Appeals for the 6th Circuit heard oral arguments April 29 in *National Cotton Council, et al. v. EPA*. The case centers on differing interpretations of whether and when CWA permitting requirements should apply to the application of pesticides over or near waters of the United States.

The debate over the application of pesticides to waters of the United States, and whether such applications trigger CWA permitting requirements, began with the case of *Headwaters, Inc. v. Talent* in 2001. In *Headwaters*, the U.S. Court of Appeals for the 9th Circuit held that residual materials from pesticide applications constituted "pollutants" and were thus subject to regulation under the CWA. But the court did not address whether the pesticide, as applied, constituted a pollutant under the CWA.

EPA attempted to clarify the issue with its Nov. 2006 aquatic pesticide rule, which says that CWA National Pollutant Discharge Elimination System (NPDES) permits are not required for pesticides applied in accordance with FIFRA's labeling requirements. Specifically, NPDES permits are not required when the pesticide is applied directly to a water of the United States to control pests and when the pesticide is applied to control pests that are over or near waters of the United States and it is unavoidable that the pesticide will be deposited in a water of the United States.

The rule is based on EPA's interpretation of the term "pollutant" and the agency's finding that pesticides applied in compliance with FIFRA labeling requirements are not pollutants and therefore not subject to the CWA's NPDES permitting requirements. In addition, even though pesticide residue resulting from applications may become a pollutant at a later time, a permit for the residue is still not required because the residual should not be treated as the type of pollutant subject to the NPDES permit requirements.

But such an interpretation is "nonsensical," Charles Tebutt, an attorney with the Western Environmental Law Center who argued the case on behalf of several environmental groups, told *Pesticide & Toxic Chemical News*.

Tebutt's statement is based upon EPA's acknowledgement that the residual components of pesticides, in certain instances, are pollutants, but that the pesticides, as applied, are not. Tebutt felt the justices agreed, or at least understood what he perceived as "nonsensical." Namely, during oral argument, the justices appeared perplexed by EPA's

willingness to acknowledge that residues of pesticides could constitute pollutants under the CWA but that the pesticides themselves did not.

In court, Tebutt reiterated arguments presented in the legal brief filed last year by the environmental petitioners who assert that EPA's aquatic pesticide rule violates the intent of the CWA to cover pesticides as "pollutants" subject to NPDES permit requirements. They argue that the application of pesticides and their residues to waters of the United States constitute discharges of pollutants within the plain meaning of the CWA.

Specifically, they argue that the CWA's definition of a pollutant is intentionally broad, and covers those substances, such as chemical pesticides and their residues, which may alter the chemical, physical, or biological integrity of the nation's waters. Moreover, they contend that compliance with FIFRA is irrelevant to determining compliance with the CWA.

Claudia O'Brien, an attorney with Latham & Watkins who argued on behalf of CropLife America, Responsible Industry for a Sound Environment, Illinois Fertilizer & Chemical Association, and Southern Crop Production Association, disagrees.

FIFRA sufficiently regulates pesticides, including pesticide residues, she told PTCN. During the FIFRA evaluation process, EPA evaluates not only the pesticide product as a whole, but also evaluates the pesticide's metabolites and degradation products. Therefore, when a pesticide is applied for its intended purpose, neither it, nor its residue, constitute a pollutant subject to regulation under the NPDES requirements of the CWA.

However, she was unable to gauge the justices' reaction to this argument. She told PTCN that, unlike her practice in the D.C. Circuit Court of Appeals, the justices in the 6th Circuit asked very few questions during oral argument.

Industry petitioners argue in their brief that the aquatic pesticide rule is too narrow and the exemption from CWA permitting requirements should be applied more broadly to other activities, such as aerial applications to land, whereby the pesticides, as applied, may end up in water.

They contend that EPA acted contrary to the CWA in mandating that a pesticide applied for its intended purpose is transformed into a pollutant simply because the applicator failed to comply with FIFRA requirements. If a pesticide is misapplied, it is a violation of FIFRA, not the CWA, they claim.

Furthermore, they contend that the requirement that an applicator comply with FIFRA in order to maintain an exemption under the CWA's NPDES permit program would serve no useful purpose and would not benefit the environment because regulating aquatic pesticides under two regulatory regimes leaves applicators in the unenviable position of guessing on which regulatory regime they must comply.

Alan Greenberg, the Department of Justice lawyer representing EPA, declined to comment. A decision in *National Cotton Council, et al. v. EPA* is anticipated in three to six months.

— Shawna Bligh

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