

NPDES Briefing – Mosquito and Vector Management District of Santa Barbara County, Board of Trustees Meeting, May 14, 2009, Agenda Section 8D

- Since the inception of the Clean Water Act (CWA) in 1972, aquatic pesticides have not been regulated.
- In 2001, the Ninth Circuit Court ruled in *Headwaters v. Talent Irrigation District*, that herbicides were considered a pollutant because they leave chemical residues in the water and thus required a permit under the CWA. The Court declined to decide whether a pesticide that leaves no chemical residue in the water is considered a pollutant.
- In 2002, the Ninth Circuit Court ruled in *League of Wilderness Defenders v. Forsgren*, that the aerial application of insecticides over national Forest land constituted a “point source” discharge requiring an NPDES permit. The court did not however address whether such insecticides are considered pollutants.
- In 2005, the Ninth Circuit Court ruled in *Fairhurst v. Hagener*, that insecticides intentionally applies to water bodies in accordance with the Federal Insecticide, Fungicide and Rodenticide Act of 1947 (FIFRA) and that produce no residue or unintended effects are NOT pollutants and therefore do not require an NPDES permit under the CWA.
- The Environmental Protection Agency (EPA) issued a ruling in 2006 which exempted aquatic pesticide applications in compliance with FIFRA from the CWA.
- In 2009, three judges of the Sixth Circuit Court ruled in *National Cotton Council v. EPA*, that the EPA did not have the authority to rule that pesticides were exempt from the CWA.
- The EPA requested a 24 month stay on the final ruling to give pesticide applicators the time to apply and receive a permit and the EPA the time to streamline the permitting process.
- The cotton industry filed a hearing en banc
 - Request for the entire panel of 24 Sixth Circuit judges to rule
 - At least one of these judges wants to hear the briefing
 - Briefing was due on Friday, May 8, 2009.
 - Court will rule on hearing en banc request before considering EPA stay request.
- Throughout the process of considering the en banc hearing and the stay request the Sixth Circuit Court ruling is not final, which means that the 2006 EPA rule is still in effect.
 - If Court denies both the en banc hearing and the EPA stay request, their decision becomes final in 7 calendar days.

- If the Court denies the en banc hearing but grants the stay request, their ruling becomes final 24 months (unless the court reduces the time frame) later.
 - If the court grants the en banc hearing, then the Cotton Council ruling is vacated and the process starts over from scratch.
- If the industry is not satisfied with the ultimate results of the Sixth Circuit decision they can request that the case be heard by the Supreme Court.
 - The Supreme Court is not required to hear the case and historically only accepts ~20% of the requests brought before them.
 - Even if the Supreme Court decides to hear the case, the Sixth Circuit Court ruling will remain in effect until such a time as the Supreme Court overrules.
- The VCJPA has selected and retained a law firm to handle all law suits brought against its member Districts in relation to the Sixth Circuit Court ruling. The firm is Archer Norris from Walnut Creek and the attorney is Peter McGaw.
- The MVCAC has been meeting with the State Water Board to fast track an adulticiding permit.
 - The earliest any of the 80 adulticides in use by Vector Districts could be used is Labor Day (this is very optimistic).
- Technically the MVCAC larviciding permit has expired; however, it remains in effect until the State Water Board replaces it.
 - This process typically takes 1-2 years.
- If Vector Districts are faced with the problem of not being able to apply pesticides and WNV becomes abundant, individual Districts can make use of their summary abatement powers to fine land owners who have breeding sources on their property.
 - The idea is that when legislators realize the consequences of handcuffing vector control they will work quickly to resolve the problem
- Congress is rumored to have plans to amend the CWA within the next year to make public health pesticide applications used in compliance with FIFRA exempt from CWA restrictions.