

EPA Poised to Wield a Heavier Regulatory Hammer

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Western water users are becoming increasingly concerned about the number of environmental policies that are currently being re-written by the new Administration. In particular, recent rule-making efforts at the Environmental Protection Agency (EPA) and the White House Council on Environmental Quality carry the risk of real potential harm for Western irrigators.

Two recent documents prepared by EPA have catalyzed these concerns.

A key reason for our recent concern is the June 2 public release by EPA of a draft National Pollutant Discharge Elimination System (NPDES) permit for point source discharges from the application of pesticides to waters of the United States. This permit is also known as the Pesticides General Permit (PGP). The PGP was developed in response to a decision by the Sixth Circuit Court of Appeals (National Cotton Council, et al. v. EPA). The court vacated EPA's 2006 rule that said NPDES permits were not required for applications of pesticides to U.S. waters. As a result of the Court's decision, discharges to waters of the U.S. from the application of pesticides will require NPDES permits when the court's mandate takes effect, on April 9, 2011.

EPA intends to issue a final general permit by December 2010. Once finalized, the PGP will be implemented in six states, Indian Country lands and federal facilities where EPA is the NPDES permitting authority.

One key concern with this draft general permit is that the definition of "Waters of the United States" looks similar to recent legislative efforts (Clean Water Act "improvements" suggested by U.S. Rep. James Oberstar and Senator Ross Feingold) that the Family Farm Alliance and other agricultural interests have opposed. The problem with using this definition is that it was used by EPA prior to some recent precedent-setting Supreme Court rulings and does not refer to any connection with "navigable waters", the jurisdictional term currently in the federal Clean Water Act.

Some of our members are concerned that this may be an attempt to set a precedent for EPA to begin using this definition again in other regulations. We are currently working with others in the regulated community to conduct additional legal review regarding the history of how this new definition got into the regulations.

Another document that provides a preview of further reliance by EPA on "regulatory management" is the draft EPA Strategic Plan for 2011-2016 that was recently released for public review and comment. Based on this document, it appears that EPA will place more emphasis on regulating greenhouse gases, setting nutrient standards for water bodies, environmental cleanup, chemical regulation, and enforcing environmental laws through "vigorous and targeted civil and criminal enforcement" actions.

While it may be difficult to get EPA and other Administration agency policy makers to back off on the approach they are taking, we can at least alert our members and other producers as to what is happening, and we can hopefully work with some Western Members of Congress to raise the issue with them. I encourage you to do the same.