



Application of Pesticides That May Impact Waters of the State Now Require LPDES Permit

The Louisiana Department of Environmental Quality (“LDEQ”) announced a final rule change, effective April 11, 2011, that deletes an exemption from water discharge permitting for pesticides applied directly or near waters of the state⁽¹⁾. The exemption, based on an identical exemption promulgated by the EPA under the NPDES program, allowed the use of pesticides in such locations if applied “in compliance with relevant requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).”⁽²⁾ See, 40 C.F.R 122.3(h) and LAC 33:IX.2315.A.8. However, the federal exemption from permit requirements was later held invalid and vacated by the U.S. Court of Appeals for the Sixth Circuit in *National Cotton Council of Am. v. U.S. EPA*, 533 F.3d 927 (6th Cir. 2009), cert. denied, 130 S.Ct. 1505 (2010).

The Sixth Circuit noted that prior to incorporating the exemption into federal regulation, “[t]he State of Washington had issued a general permit to allow the application of all aquatic pesticides in the State” allowing users of aquatic pesticides to “discharge those pesticides covered by the rule without obtaining a permit.”⁽³⁾ Further the court stated that “[o]nce the EPA or a state agency issues such a [general] permit, covered entities, in some cases, need take no further action to achieve compliance with NPDES besides adhering to the permit conditions.”⁽⁴⁾ In its Louisiana Register notification, LDEQ indicated that the Sixth Circuit decision compelled it to remove the equivalent LPDES exemption, but acknowledged that, in response to deleting the exemption, it was necessary “to issue a general permit for the application of pesticides.”⁽⁵⁾

In January 2011, the LDEQ published a draft general LPDES permit for pesticide application to fulfill this purpose and invited public comment (which ended on February 16, 2011).⁽⁶⁾ The draft general permit authorizes dischargers to discharge pesticides in accordance with four identified categories: mosquito and other flying insect pest control, aquatic weed and algae control, aquatic nuisance animal control and forest canopy pest control. Unlike most general permits, the proposed general permit does not require submission of a Notice of Intent (NOI) for coverage; however certain record keeping requirements exist to demonstrate authorization and compliance. The draft general permit “also authorizes the discharge of storm water runoff from facilities which handle or use pesticides . . . when handled and stored according to FIFRA instructions” unless the facility “qualifies for coverage under the Multi-Sector General Permit.” The general permit disallows the use of pesticides where they cause a violation of water quality standards or various other listed impairments; but does not require ambient water body testing by the pesticide user. LDEQ does conduct routine ambient monitoring through its water quality assessment division. According to the draft permit, the LDEQ “may deny coverage under the permit and require submittal of an application for an individual LPDES permit based on a person’s compliance record, ambient water quality data, or any other information relative to the application of pesticides.”



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With the withdrawal of the regulatory exemption, as of April 11, 2011, discharge of pesticides into or near waters of the state without a permit will be prohibited. Those planning to apply pesticides after that time should familiarize themselves with the details of the existing draft permit and ultimately any final general permit that may be issued by LDEQ.

- (1) 37 La. Reg. 588-89 (Feb. 20, 2011).
- (2) Application of Pesticides to Waters of the United States in Compliance With FIFRA, 71 Fed. Reg. 68483 (Nov. 27, 2006).
- (3) Id. at 931.
- (4) Id. citing S. Florida Water Mgmt. Dist. V. Miccosukee Tribe of Indians, 541 U.S. 95, 108 n. *(2004)
- (5) 37 La. Reg. at 589.
- (6) Public Notice, Draft of Reissuance of Water Discharge General Permit LAG870000, Discharge of Pesticides Into or Near Waters of the State, AI 169705 (Jan. 8, 2011) located at <http://www.deq.louisiana.gov/apps/pubNotice/> (last visited Feb. 21, 2011).