

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6315

Memorandum

To: Members, House Small Business Subcommittee on Agriculture, Energy and Trade
From: Committee Staff
Date: November 14, 2011
Re: Subcommittee Hearing: Regulatory Injury: Adrift in New Regulatory Burdens and
Uncertainty: A Review of Proposed and Potential Regulations on Family Farmers

On Thursday, November 17, 2011, at 10:00 a.m. in Room 2360 of the Rayburn House Office Building, the Subcommittee on Agriculture, Energy and Trade of the Committee on Small Business will hold a hearing to discuss possible ramifications for farmers and other small businesses of possible regulations by the Environmental Protection Agency (EPA). This hearing will focus on new National Pollutant Discharge Elimination System (NPDES) permit requirements under the Clean Water Act (CWA) for the application of pesticides and other chemicals that must be registered under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). In addition, the Subcommittee will address new National Ambient Air Quality Standards (NAAQS) for coarse particulate matter (PM) that may or may not incorporate dust.

The Subcommittee will hear testimony from Philip Nelson, Bloomington, IL on behalf of the Illinois State Farm Bureau; Leonard Felix, Olathe Spray Service, Inc., Olathe, CO; Ray Vester, Stuttgart, AR, on behalf of USA Rice Federation; and Carl Shaffer, Mifflinville, PA, on behalf of the Pennsylvania State Farm Bureau.

Clean Water Act¹

The CWA was enacted by Congress in order to establish a basic structure for regulating water quality by limiting discharges of pollutants into the waters of the United States. Under the CWA, it is unlawful to discharge any pollutant from a point source² into navigable waters³ unless

¹ 33 U.S.C. §§1251-1387.

² Congress defined a point source as “any discernible, confined, and discrete conveyance, including, but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft from which pollutants are or may be discharged.” *Id.* at § 1362 (14). The CWA does not define non-point sources of pollution. One can consider non-point sources of pollution to be the discharge of any pollutant from a source other than a point source. *National Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 166 n. 28 (D.C. Cir. 1982).

³ The CWA defines “navigable waters” as the “waters of the United States including the territorial seas.” 33 U.S.C. § 1362(7). The extent of EPA’s authority to regulate navigable waters is a complex subject beyond the scope of this memorandum. See *Solid Waste Agency v. United States Army Corps of Eng’rs.*, 531 U.S. 159, 167-70 (2001).

a NPDES permit is obtained by the discharger.⁴ NPDES permits are issued by states to dischargers who demonstrate that they meet EPA technology-based effluent limitations for a particular industry.⁵ Enforcement of the NPDES system rest first with the states, and then in some instances with the EPA.⁶ Finally, private citizens may bring litigation to enforce compliance with the requirements of the CWA, including NPDES permits.⁷

The Federal Insecticide, Fungicide and Rodenticide Act⁸

The original FIFRA was enacted in 1947 in order to provide potential users with some degree of certitude that the product is effective.⁹ Major amendments were made into FIFRA in 1972 that created the current regulatory structure governing the use and sale of pesticides.¹⁰ FIFRA prohibits the sale of any pesticide¹¹ unless the producer obtained a registration from EPA.¹² To obtain a registration, the producer submits substantial data about the chemical to EPA which will grant the registration if the agency finds that the chemical: 1) is effective for the claimed use; 2) is correctly labeled; and 3) will not cause adverse effects on the environment.¹³ Pesticides, to the extent that they enter navigable waters, do so from non-point sources of pollution (such as runoff from agricultural and silvicultural uses) and thus have not historically been subject to the CWA's NPDES permitting process.¹⁴

Clean Air Act (CAA)¹⁵

In 1970, Congress enacted the Clean Air Act “to protect and enhance the quality of our Nation’s air resources.”¹⁶ The CAA regulates both stationary and mobile sources of air pollution through a complex interrelated series of actions by both the EPA and states.¹⁷ Title I provides the basic framework for the regulation of air pollutants in the United States. It requires the EPA to establish ambient air quality standards (NAAQS) for pollutants that the agency determines to endanger the public health or welfare.¹⁸ The states are then required to develop implementation

⁴ 33 U.S.C. §§1311(a), 1342.

⁵ Pineles, *Cost-Benefit Analysis and the Federal Water Pollution Control Act Amendments of 1972: A Proposal for Congressional Action*, 67 IOWA L. REV. 1057, 1060 (1982).

⁶ 33 U.S.C. §1342.

⁷ *Id.* at 1365.

⁸ 7 U.S.C. §§ 136-136y.

⁹ M. Miller, *Pesticides*, in ENVIRONMENTAL LAW HANDBOOK 646 (Thomas Sullivan ed., 2003).

¹⁰ *Id.* at 650.

¹¹ Pesticides include a broad category of chemicals designed to: prevent, destroy, repel or mitigate any pest; or regulate, defoliate, or desiccate any plant. 7 U.S.C. § 136(u). Pests include, but are not limited to, insects, rodents, nematodes, fungi, or weed. *Id.* at § 136(t). The Administrator can name any other terrestrial or aquatic animal or plant as a pest pursuant to § 136(w)(c)(1).

¹² *National Cotton Council of Am. v. United States EPA*, 553 F.3d, 927, 931 (6th Cir. 2009), *cert.denied*, 130 S. Ct. 1505 (2010).

¹³ 7 U.S.C. § 136a(c)(5).

¹⁴ M. Miller, *Pesticides*, in ENVIRONMENTAL LAW HANDBOOK 701 (Thomas Sullivan ed., 2003).

¹⁵ 42 U.S.C. §§ 7401-7671.

¹⁶ *Id.* at § 7401(b)(1).

¹⁷ K. BRICKEY, ENVIRONMENTAL CRIME 146 (2008).

¹⁸ In the 1990 amendments to the CAA, Congress specified additional regulatory efforts under Title I aimed at six pollutants: ozone, carbon monoxide, small particulate matter, sulfur dioxide, nitrogen oxide, and lead. *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F. 3d 882, 887 (D.C. Cir. 2006) *cert. denied*, 552 U.S. 1140 (2008).

plans (called SIPs) that regulate activities within the state with expectation that such regulation will enable the areas within the state (called air quality control regions) to meet the ambient air quality standards. SIPs must be approved by EPA and the agency is authorized to sanction states that fail to develop adequate SIPs and, in certain cases of recalcitrant states, to promulgate a satisfactory SIP.¹⁹

One of the pollutants identified by EPA for regulation under Title I is airborne particulate matter of less than 10 micrometers (frequently referred to by the shorthand PM-10).²⁰ States then are required to develop implementation plans for PM-10 to ensure that the total amount of PM-10 in the atmosphere does not exceed the limits established by the EPA. The standards for PM-10, like all other pollutants identified under Title I, must be reviewed by EPA every five years.²¹

In addition to the development of NAAQS standards for the protection of individual public health, each pollutant identified by EPA under Title I also has a secondary standard designed to protect the public welfare.²² The public welfare generally has been interpreted to mean the environment, including visibility.²³ Although the two standards generally are the same, they need not be and the secondary standard, particularly with respect to visibility control issues, may require a more stringent standard than one designed to protect human health.²⁴

Once a region comes into compliance with NAAQS, the CAA requires states to implement a program to prevent the area from slipping into non-compliance. This program is deemed the Prevention of Significant Deteriorations or PSD.²⁵ Economic activity in attainment areas may be regulated through stricter emission limits and the issuance of permits to contrast new sources of air pollution.²⁶

Regions that are not in compliance with NAAQS are considered non-attainment areas.²⁷ The CAA then requires that the states submit plans for approval by EPA that will provide both a regulatory structure and timeframe for bringing these areas into compliance with the applicable NAAQS.²⁸ Non-attainment areas are subject to stricter regulation than areas in attainment even after consideration of an attainment area's PSD program.

¹⁹ 42 U.S.C. § 7410.

²⁰ E.g., *American Farm Bur Fed'n v. EPA*, 559 F.3d 512, 516-17 (D.C. Cir. 2009); *Vigil v. Leavitt*, 381 F.3d 826, 830 (9th Cir. 2004). Technically, the regulation of particulate matter is further subdivided between coarse particles less than 10 micrometers, but greater than 2.5 micrometers, and fine particulate matter for particles less than 2.5 micrometers. See Crutchfield, *More than Dust in the Wind: Regulations of Rural Coarse Particulate Matter*, 78 UMKC L. REV. 785, 786-87 (2010).

²¹ 42 U.S.C. § 7409(d).

²² *Id.* at § 7409(b).

²³ See *North Carolina ex. rel. Cooper v. TVA*, 615 F.3d 291, 299 (4th Cir. 2010); *American Farm Bur. Fed'n*, 559 F.3d at 528.

²⁴ *Id.* at 530-31.

²⁵ *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 471 (2004).

²⁶ *Sierra Club v. Leavitt*, 368 F. 3d 1300, 1302 (11th Cir. 2004).

²⁷ 42 U.S.C. § 7407(d)(1)(A)(i). A region may be in attainment for one NAAQS and not another.

²⁸ *Id.* at § 7502; see *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 483-84 (2001).

Possible Changes in the EPA Regulation of Pesticides and Dust

Pesticides and the CWA

As already noted, the application (as opposed to the manufacture) of pesticides was not treated as a point source pollutant under the CWA. This omission occurred despite the fact that EPA required pesticide label instructions prohibiting their discharge into water.²⁹ In 2001, the Ninth Circuit Court of Appeals became the first court to determine that a NPDES permit is required before the application of a pesticide.³⁰ The Ninth Circuit reaffirmed the *Headwaters* determination in *League of Wilderness Defenders v. Forsgren*.³¹ In that case, the court broadened its holding in *Headwaters* to require that pesticides are pollutants under the CWA and thus require applicators obtain NPDES permits.³² EPA tried to clarify the situation by issuing a memorandum that excluded FIFRA-regulated chemicals from the definition of pollutant.³³ Despite the “clarification,” more litigation, utilizing the CWA citizen suit provisions, ensued.³⁴

The EPA attempted to finally resolve this matter by issuing a regulation stating that the application of pesticides does not require a NPDES permit.³⁵ The rule was premised on two findings: 1) the registration process under FIFRA provided adequate water quality protection if applied in compliance with the pesticide’s label; and 2) pesticides did not constitute a pollutant under the CWA.³⁶ Although a challenge to the final rule was not surprising, EPA’s Solomonic effort to split the CWA/FIFRA baby failed to satisfy either environmental or industry groups. The Sixth Circuit found that the final rule was not supported by the text of the CWA; in short, the court held that pesticides can be pollutants under the CWA.³⁷ The court never reached the interaction between the CWA and FIFRA.

Given the vacation of the final rule by the Sixth Circuit, there are approximately 365,000 pesticide applicators that perform some 5.6 million pesticide applications annually that could be affected by a requirement to obtain a NPDES according to EPA.³⁸ Rather than seek further review in court, EPA decided to take another approach and develop a general permit³⁹ for the

²⁹ *National Cotton Council of Am.*, 553 F.3d at 931.

³⁰ *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 534 (9th Cir. 2001). The court reasoned that the approved label (which was silent concerning the need to obtain a NPDES permit) did not obviate the need to obtain a NPDES permit because pesticides could be pollutants under the CWA. *Id.* at 531-32. This finding contradicts the Sixth Circuit determination that EPA required pesticide labels to notify applicators of the need to obtain a NPDES permit. The conflict over the history of EPA pesticide labels need not be resolved since the outcome of the cases is the same from the perspective of those seeking to apply pesticides that may find their way into bodies of water.

³¹ 309 F.3d 1181 (9th Cir. 2002).

³² *Id.* at 1190.

³³ Rhatigan, *Honoring David Shapiro: Note: Legislation Overlap: Should the Clean Water Act or the Federal Insecticide, Fungicide and Rodenticide Act Prevail when Pesticides End Up in U.S. Waters*, 79 NOTRE DAME L. REV. 2183, 2191-92 (2004).

³⁴ *Id.* at 2195-204.

³⁵ Application of Pesticides to Waters of the United States in Compliance with FIFRA, Final Rule, 71 Fed. Reg. 68,483 (Nov. 27, 2006).

³⁶ *Id.* at 68,488-89.

³⁷ *National Cotton Council of Am.*, 553 F.3d at 940.

³⁸ http://cfpub.epa.gov/npdes/home.cfm?program_id=414

³⁹ Typically, a NPDES permit involves a particular applicant to demonstrate that they are in compliance with effluent limitations and thereby entitled to discharge material into water. In addition to these site and discharger

point source application of pesticides under the CWA. On November 7, 2011, EPA published a notice of its general permit for pesticide application in the Federal Register.⁴⁰ The EPA also sent out an email on November 1, 2011 stating that for the next 120 days the agency plans to focus on compliance assistance related to these permits, rather than enforcement.

Particulate Matter Regulation under the CAA⁴¹

As required by the CAA, EPA is currently conducting its five-year review of its 2006 PM standards, including PM-10. In April 2011, EPA released a "Policy Assessment for the Review of Particulate Matter National Ambient Air Quality Standards,"⁴² which recommends EPA either retain the current PM-10 standard⁴³ or revise it to a 98th percentile form and a level within the range of 85 ug/m³⁴⁴ down to 65 ug/m³. On July 1, 2011, a stakeholder coalition⁴⁵ submitted a report⁴⁶ to EPA concluding that, if the agency were to adopt the EPA's staff proposed alternative standard, it would cause many rural areas to exceed the standard or would bring them to the brink of exceedance of the standard—particularly in rural areas in the West, Southwest and Midwestern United States. The report includes a map⁴⁷ identifying areas especially vulnerable to county-wide or localized exceedances or nonattainment in areas that have been classified, due to the potentially revised PM-10 NAAQS.

Small Business Concerns

Pesticide Permits

The general 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. Significant confusion and uncertainty exist in regard to which pesticide applications fall under EPA's general permit, leaving agriculture producers and other users of

specific permits, potential dischargers may be able to obtain a general permit. General permits authorize all similarly situated dischargers in a particular geographic region to discharge if they submit a notice that they are going to discharge in accordance with the general permit. *See Northwest Env'tl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1086 (9th Cir. 2011). Although not specifically authorized in the CWA, the courts have been consentient in upholding the use of general permits under the CWA. *See Gaba, Generally Illegal: NPDES Permits under the Clean Water Act*, 31 HARV. ENVTL. L. REV. 409, 420 (2007) (noting that no federal court cases address power of EPA to issue general permits). General permits significantly reduce the burden associated with obtaining authority to discharge into water. *See South Fla. Water. Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 108 (2004).

⁴⁰ Final National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit for Point Source Discharges from the Application of Pesticides, 76 Fed. Reg. 68,750 (Nov. 7, 2011).

⁴¹ The material in this discussion relies heavily on a memorandum prepared by the staff of the Committee on Energy and Commerce for the Subcommittee on Energy and Power's hearing on H.R. 1633, the Farm Dust Regulation Prevention Act of 2011.

<http://republicans.energycommerce.house.gov/Media/file/Hearings/Energy/102511/memo.pdf>

⁴² <http://www.epa.gov/ttn/naaqs/standards/pm/data/20110419pmpafinal.pdf>

⁴³ That standard was upheld by the D.C. Circuit in *American Farm Bur. Fed'n*, 559 F.3d at 538.

⁴⁴ Micrograms per cubic meter

⁴⁵ The report was submitted to EPA by the Coarse Particulate Matter Coalition. Coalition members include the National Stone, Sand & Gravel Association, Kennecott Utah Copper, National Cotton Council, National Oilseed Processors Association, Corn Refiners Association and the National Cattlemen's Beef Association.

⁴⁶ <http://www.beefusa.org/CMDocs/BeefUSA/Issues/PM%20Final%20PM10%20Report%200711.pdf>

⁴⁷ <http://www.beefusa.org/cmimages/beefusa/dust-regulation-map.jpg>

pesticides concerned about the possibility of litigation under the new permit requirements. Since almost all users and applicators of pesticides have never been subject to NPDES and its permitting process, there are apt to be significant issues related to compliance--something EPA recognized when it notified users and applicators that the agency would focus on compliance rather than enforcement.

Uncertainty of the process to obtain a general permit and the potential cost remains a significant small business concern. Even if there is no confusion on how to apply for a permit and obtaining a general permit is relatively inexpensive, permittees still have questions whether the permit will protect them in citizen-suit litigation or enforcement action by the states or EPA. If the permit fails to address the potential need for emergency applications, delays in the permitting process are also possible which is particularly problematic for agricultural users needing to control a new pest infestation.

Given the reliance of agriculture producers on FIFRA-registered chemicals, confusion and concerns about their use could have significant detrimental impacts on farm output. Unless EPA further clarifies, agricultural producers will be operating at a higher level of uncertainty—something agriculture producers cannot afford.

As a result of the concerns with general permits required under the CWA, Rep. Bob Gibbs (R-OH) introduced H.R. 872, the *Reducing Regulatory Burdens Act of 2011*. This bill would amend FIFRA and would prohibit the Administrator or a state from requiring permits under the CWA for pesticide applications authorized under FIFRA. The House passed the bill in March 2011 by a bipartisan vote of 292-130. It was also passed by the Senate Agriculture Committee and was placed on the Senate legislative calendar on June 21, 2011.

Dust Regulations

The current statutorily-required review of the PM-10 NAAQS raises concerns with the agricultural (including ranching) and silvicultural communities. If the PM-10 standard was made more stringent (something that at least EPA staff have considered), it is conceivable that rural areas would no longer be in compliance with the NAAQS. Under the CAA, areas not in attainment with respect to NAAQS are subject to significantly stricter regulation in order to bring them into attainment. As a result, modification of the PM-10 standard may require significantly greater regulation of areas in the country that are not subject to significant regulation under the CAA.

On October 14, 2011, Administrator of the EPA, the Hon. Lisa Jackson, sent a letter to Senator Debbie Stabenow (D-MI), Chairman of the Senate Agriculture Committee, in an effort to remove any confusion concerning changes to the PM-10 standard and its implication for rural businesses, particularly agricultural and silvicultural operations. Administrator Jackson stated: "Based on my consideration of the scientific record, analysis provided by EPA scientists and advice from the Clean Air Science Advisory Council, I am prepared to propose the retention – with no revision – of the current PM-10 standard and form when it is sent to the [White House] for interagency review."⁴⁸ Despite this statement, some in the rural community remain concerned

⁴⁸ <http://www.epa.gov/pm/pdfs/20111014Stabenow.pdf>.

that the change in PM-10 standard could result in the regulation of agricultural activity in order to meet a more stringent coarse particulate pollution standard.

Rep. Kristi Noem (R-SD) introduced H.R. 1633, the Farm Dust Regulation Prevention Act of 2011. The bill prohibits the EPA from proposing, finalizing, implementing or enforcing any regulation revising the NAAQS applicable to coarse particulate matter for one year from the date of enactment. Also under H.R. 1633, “nuisance dust”⁴⁹ shall not be subject to regulation under the CAA, except to the extent that nuisance dust in a geographic area is not currently regulated by state, tribal or local law. The Administrator must also find that the nuisance dust is causing adverse public health concerns and that the benefits of applying standards under the CAA outweigh the costs. This bill was passed by the House Subcommittee on Energy and Power of the Committee of Energy and Commerce on November 3, 2011 and has been referred to the full committee.

⁴⁹ Nuisance dust is defined in the bill to exclude the type of dust typical of rural areas (i.e., unpaved roads and dust resulting from agricultural activities) from the NAAQS regulation targeted at harmful air pollutants.