

ADEQ Memorandum

Arizona Department
of Environmental Quality

Date: February 11, 2009
To: Linda Taunt, Water Quality Division Deputy Director, Acting Surface Water Section
Manager
Cynthia Campbell, Water Quality Compliance Section Manager
From: Joan Card, Water Quality Division Director 
Subject: Pesticide Application on, in and near Waters of the United States

In the case named *The National Cotton Council of America v. U.S. Environmental Protection Agency*, the United States Court of Appeals for the 6th Circuit issued an opinion overturning the EPA rule that exempts from the National Pollutant Discharge Elimination System (NPDES) permitting program pesticides that are applied to and near waters of the United States so long as the Federal Insecticide, Fungicide, Rodenticide Act (FIFRA) labeling requirements to protect water quality are followed. This rule is codified at 40 C.F.R. 122.3(h). In accordance with federal court rules, the 6th Circuit opinion is not in effect while the parties consider requesting a rehearing or appeal of the decision. The EPA exemption is still in place. ADEQ will continue to monitor the legal proceedings and is considering the appropriate response if the 6th Circuit opinion is finalized and the rule is no longer in effect. In the event it is required, the Water Quality Division anticipates preparing a general permit to provide Arizona Pollutant Discharge Elimination System (AZPDES) coverage for pesticide application on, in and near waters of the United States.

We do not know the timing of events that may lead to the requirement for AZPDES permit coverage for pesticide application to waters of the United States. However, in the event that occurs, ADEQ recognizes the need for a degree of regulatory certainty prior to the effective date of an applicable AZPDES permit. Accordingly, if and when 40 C.F.R. 122.3(h) is ordered no longer in effect (i.e. the 6th Circuit issues the mandate to overturn the rule) and no AZPDES permit coverage for pesticide application is available, ADEQ will exercise its discretion not to enforce A.R.S. § 49-255.01 for pesticide application on, in or near waters of the United States. However, if the following conditions are not met by the applicator/discharger, ADEQ may take an enforcement action:

- The applicator/discharger shall use FIFRA-compliant pesticides in accordance with the requirements of the label, and
- The applicator/discharger shall not violate the applicable water quality standards under A.A.C. Title 18, Chapter 11, Article 1.

Once AZPDES permit coverage is available, ADEQ may enforce the provisions of the permit and the provisions of this memorandum will no longer be in effect.

**This substantive policy statement is advisory only. A substantive policy statement does not include internal procedural documents that only affect the internal procedures of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules made in accordance with the Arizona administrative procedure act. If you believe that this substantive policy statement does impose additional requirements or penalties on regulated parties you may petition the agency under Arizona Revised Statutes section 41-1033 for a review of the statement.