

NATIONAL AGRICULTURAL LAW UPDATE

Week of March 28, 2011

H.R. 872 (legislation "fixing" the NPDES permit issue) will be on the suspension calendar in the House this Wednesday, March 30 (with a vote likely scheduled for some time Thursday morning). Because this legislation will be considered on the suspension calendar, we will need a 2/3 vote (at least 290) in support of the bill in order for it to pass. According to the latest whip count, we still need to secure approximately 20 additional yes votes. It is hoped that we can have a strong showing in the House (300+) to help jump start things in the Senate.

Background: In 2009 the Sixth Circuit Court ruled in *National Cotton Council v. EPA* that National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act (CWA) are required for pesticide applications to waters of the U.S. EPA and state regulators are currently developing NPDES permits to comply with the decision.

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) established an effective and comprehensive regulatory web to provide pesticide-related environmental and public health protection. FIFRA created an extensive pre-market approval process that includes rigorous examination of environmental data and health exposure assessments for pesticide products. Because this process specifically examines the product's potential impact on water, additional permitting requirements under the CWA are duplicative and will entail significant costs for state permitting authorities and pesticide users.

Congress never intended to require NPDES permits under the CWA for pesticides that have been reviewed and approved by EPA under FIFRA. Quite the contrary, Congress clearly intended for FIFRA-not the CWA-to regulate pesticide use and even explicitly contemplated FIFRA's role in protecting the quality of our nation's waters.

Congress must act to clarify that pesticides applied in accordance with FIFRA are not subject to NPDES permitting requirements under the CWA. If Congress fails to act, public health agencies, local governments, pesticide applicators, and agricultural producers will be significantly impacted:

Ø **Serious public health consequences:** Instead of providing environmental protection, the costly and burdensome permit requirements could actually deprive the public of vital mosquito control activities and invasive species control programs. If localities are impeded from controlling mosquitos for example, public health consequences such as increased West Nile Virus-related deaths could result.

Ø **Unfunded mandates and stress on state resources:** The resources required to process these new permits will strain the already scarce resources of state regulatory agencies. Conservative estimates from EPA predict that over 365,000 applicators making at least

5.6 million pesticide applications would fall under the new permitting requirements, representing a significant workload increase for state regulators.

Ø **Unrealistic Timing:** Currently, EPA and the states have until April 9, 2011 to finalize permits. In most cases, state permits will not be able to be finalized until *after* EPA's permit is final. In some instances, state legislatures may even have to change state statute in order for the state to comply with the court's decision. Even after permits are finalized, time will be needed to implement requisite applicator outreach and training prior to the beginning of the spring growing season.

Ø **Increased costs and threat of lawsuits:** The compliance and record keeping costs for pesticide users will be significant. EPA estimates that these costs could easily top \$50 million a year. By extending CWA requirements to activities already regulated by other federal and state laws, the court has placed farmers and other pesticide users in legal jeopardy under the CWA's citizen-action provisions.

Ø **Uncertainty on the scope of the permit:** Permitting pesticide applications under the CWA is further complicated by uncertainties over the extent of jurisdiction of the CWA. In addition, state law in some states requires state-issued permits to cover "waters of the state," dramatically expanding the scope of the NPDES permitting requirements.

Recent Congressional Action:

- **Upton/Inhofe Bill Passes House Committee.** The House Energy and Commerce Committee passed by a vote of 34-19 the "Energy Tax Prevention Act of 2011" (Upton/Inhofe bill) on March 15. Three Democrats—Mike Ross (D-AR), Jim Matheson (D-UT) and John Burrow (D-GA)—joined the panel's Republican members in supporting the bill, which is designed to repeal the authority of EPA to regulate GHG emissions under the Clean Air Act. Committee Chairman Rep. Fred Upton (R-MI) touted the bill as a way to create jobs and make the United States more energy independent. Rep. Henry Waxman (D-CA) criticized the bill as having unconsidered effects on a number of laws and including "radical" provisions. Democrats introduced a number of amendments to the bill, including three that asserted that climate change is real and caused by humans. These amendments, introduced respectively by Rep. Diana DeGette (D-CO), Rep. Waxman, and Rep. Jay Islee (D-WA), were all defeated along party lines. The Committee did adopt a "Sense of Congress" amendment proposed by Rep. Matheson that recognized "the established scientific concern over the warming of climate," described climate change as an international issue in which "the United States has a role to play," and called on the Congress to develop a policy addressing that role. The Matheson amendment was adopted, however, only after being amended by a second degree amendment offered by Rep. Charles Bass to state that the Congress should develop policies fulfilling that role "that do not adversely affect the American economy, energy supplies, and employment." The House plans to fast track the bill and will bring it to the floor this spring. The bill is available at <http://energycommerce.house.gov/media/file/PDFs/ETPA/ETPA.pdf>.

- **Senate Small Business Bill Serves as Vehicle for EPA Amendments.** S. 493, the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Reauthorization Act, a bill introduced by Sen. Mary Landrieu, has been a magnet for amendments aimed at various aspects of EPA rulemaking authority. Senate Minority Leader Mitch McConnell (R-KY) proposed an amendment that would essentially append the Upton/Inhofe bill to S. 493. Sen. Jay Rockefeller (D-WV) introduced an amendment that would delay EPA regulation of stationary source emissions of GHGs for two years rather than fully remove its ability to regulate GHGs. Sen. Max Baucus (D-MT) introduced an amendment that would essentially codify EPA’s “Tailoring Rule,” which limits, in the context of GHGs, the applicability of the Clean Air Act’s Prevention of Significant Deterioration (PSD) permitting requirements to new or modified sources that trigger PSD permitting as a result of their emissions of conventional pollutants and have GHG emissions above 75,000 tons CO₂e per year. Environmentalists are opposing provisions in Sen. Baucus’ amendment that they say would go beyond the scope of the Tailoring Rule by blocking reviews of land-use emission impacts for permitting purposes and effectively exempting from coverage large GHG emitters that do not also emit conventional air pollutants by limiting application of the PSD program’s GHG emissions requirements to sources that are otherwise subject to PSD permitting due to their non-GHG emissions. Amendments may be offered when the legislation returns to the Senate floor after the chamber reconvenes on March 28. The language of Sen. McConnell’s amendment is available online [here](#). The language of Sen. Rockefeller’s amendment is available online [here](#). The language of Sen. Baucus’ amendment is available online [here](#).
- **House and Senate Pass New Spending Measure That Includes EPA Cuts.** The President signed a new continuing resolution that keeps the government funded through April 8, by which time the House and Senate hope to have negotiated a comprehensive funding bill for the remainder of FY2011. The Continuing Resolution (CR), H.J. Res. 48, would cut \$238 million from EPA’s current spending levels, including \$25 million from climate change programs. EPA is currently operating on a FY 2010 budget level of \$10.3 billion. Any comprehensive funding bill for FY2011 is likely to contain further cuts for EPA.
- **Sens. Inhofe, Johannes Introduce Bill Requiring Economic Analysis of EPA Rules.** Sen. James Inhofe (R-OK) and Sen. Mike Johanns (R-NE) introduced on March 17 the “Comprehensive Assessment of Regulations on the Economy” (CARE) Act. The bill would require the Department of Commerce to lead an interagency Federal panel that would undertake a “cumulative economic analysis” of EPA regulations. In remarks introducing the bill, Sen. Inhofe stated that the panel must look at the impact on jobs, agriculture, manufacturing, coal, electricity, and gasoline prices. The bill is available at http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=311a691e-16b5-46d1-a0ff-5315e8e46a9e.
- **House Republicans Introduce New Energy Initiative.** House Republicans formally introduced on March 17 the “American Energy Initiative” during two House hearings—one with a House Energy and Commerce subcommittee and one with the full House Natural Resources Committee. House Speaker John Boehner (R-OH) previously announced the initiative on March 10. The program outlines a number of new energy proposals to be introduced by Republicans in the coming months, with a particular focus

on increasing production of domestic energy resources including natural gas, oil, and coal.

Inhofe, Johanns Introduce ‘Care Act’

Sen. James Inhofe (R-Okla.), Ranking Member of the Senate Committee on Environment and Public Works, and Sen. Mike Johanns (R-Neb.), introduced today the Comprehensive Assessment of Regulations on the Economy (CARE) Act, which requires the Environmental Protection Agency, in conjunction with other relevant federal departments and agencies, to determine the total cost of several major rules EPA is preparing to issue.

To date, EPA has refused to conduct an analysis examining the total economic impact of its rules on jobs; retail electricity rates and gasoline prices; power plant closures; state and local governments; small businesses; electric reliability and energy-intensive manufacturers.

Senator Inhofe: “EPA continues to propose and promulgate rules at a break-neck pace without a complete and accurate understanding of their impacts on consumers, jobs, and small businesses. EPA’s proposed utility MACT today could, by itself, shut down up to 20 percent of America’s coal-fired power capacity. When you add in all of the rules and regulations from EPA’s cap-and-trade agenda, the outlook for jobs and economic growth looks dire.

“This bill is about transparency: the public needs to know the full cost of these rules and the impacts when they fill up at the pump and flip the light switch. It will also help guide and inform Congress as it decides how best to deal with the unprecedented barrage of rules coming out of EPA.”

Senator Johanns: “This is a very simple effort to get the federal government to weigh the impact of EPA’s regulatory regime on job creation and the overall economy. It would infuse common sense into an agency that seems to be in dire need of it. Our country’s ag producers, families and job creators deserve to know the cost of the rules being aimed directly at them.”

Background

The CARE bill would establish a federal committee, led by the Department of Commerce, to conduct this analysis. The committee would include, among others, the EPA Administrator, the Secretaries of Agriculture, Energy, Defense, and Labor, the Chairman of the Federal Energy Regulatory Commission, as well as the Chief Counsel for Advocacy of the Small Business Administration. The committee would examine the economic impacts of several EPA regulations on:

- employment, including job levels in each segment of the economy and each region of the United States, including coal-producing regions;
- economic development, including production levels and labor demands in manufacturing, commercial, and other sectors of the economy;
- the electric power sector, including potential impacts on electric reliability, energy security, and retail electricity [rates](#);

- the domestic refining and petrochemical sector, including potential impacts on supply, international competitiveness, and wholesale and retail transportation fuels, heating oil and petrochemicals prices; and
- State and local governments, including potential impacts on governmental operations and local communities from any reductions in State and local tax revenues

The rules the committee would examine would include, among others:

- Maximum Achievable Control Technology (MACT) standards for power plants;
- National Ambient Air Quality Standards (NAAQS) for particulate matter and ozone;
- New Source Performance Standards (NSPS) for greenhouse gases covering utilities and refineries;
- Prevention of Significant Deterioration (PSD) preconstruction review permits for greenhouse gases;
- Cooling water intake structures under 316(b) of the Clean Water Act
- Regional Haze; and
- Coal Combustion Waste under the Solid Waste Disposal Act