

# WATER UPDATE

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## CONSTITUTIONAL AMENDMENT

- **Voters Adopt Clean Water Funding Amendment**

Minnesota voters adopted the Clean Water, Wildlife, Cultural Heritage, and Natural Areas amendment to the Minnesota Constitution in November 2008. Minn. Const., art. XI, § 15. The amendment includes a sales tax increase of three-eighths of one percent for 25 years. The amendment dedicates 33 percent of the funds to a clean water fund in the state treasury, which “may be spent only to protect, enhance, and restore water quality in lakes, rivers, and streams and to protect groundwater from degradation, and at least 5 percent of the clean water fund must be spent only to protect drinking water sources.” The money must be appropriated by the legislature and must supplement traditional sources of funding.

## UNITED STATES SUPREME COURT

- **Supreme Court Approves Cost-Benefit Analysis for Cooling Water Intakes**

On April 1, 2009, the U.S. Supreme Court ruled that § 316(b) of the CWA authorizes EPA to compare costs with benefits in determining the “best technology available for minimizing adverse environmental impact” at cooling water intake structures. *Entergy Corp. v. Riverkeeper, Inc.*, Nos. 07-588, 07-589, 07-597, 2009 WL 838242 (U.S. April 1, 2009). Among the major concerns addressed by § 316(b) are “impingement” and “entrainment” of fish and other aquatic life. When organisms are impinged, they become engaged with components of the intake structures, such as filters. When organisms are entrained, they are taken up in the water appropriated through the intake.

This case was a challenge to EPA rules for cooling water intakes at large, existing power plants. See 40 C.F.R. pt. 125, subp. J. The Second Circuit Court of Appeals found that cost-benefit analysis was inconsistent with congressional intent. See *Riverkeeper, Inc. v. United States Env'tl. Prot. Agency*, 475 F.3d 83, 98-99 (2d Cir. 2007). The Second Circuit held that EPA could not use cost-benefit analysis either in determining the best technology available or allowing site-specific variances. The court noted, however, that without engaging in cost-benefit analysis, the agency could still consider the most effective technology that could reasonably be borne by the industry and whether less expensive means exist for providing the same degree of protection.

The petitioners, a group of power plant operators, maintained on review before the Supreme Court that the Second Circuit erred because there is no presumption against cost-benefit analysis in the absence of express statutory authorization. Petitioners argued that consideration of costs and benefits was consistent with longstanding agency policy. Further, they asserted that § 316(b) authorized EPA to weigh costs and benefits. According to petitioners, the statutory phrase “best technology available for minimizing adverse environmental impact” included the potential for the consideration of costs and benefits.

Respondents, consisting of environmental groups and a number of states, insisted that the plain language of the statute did not authorize cost-benefit analysis and that, by adopting a technology-based standard, Congress prohibited the agency from weighing costs and benefits. According to respondents, there was no room for EPA to consider whether the benefits of implementing the best technology available justified the costs. They pointed to other sections of the CWA and argued that, when Congress intended EPA to use cost-benefit analysis, it used particular language to signal its intent.

Citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), Justice Scalia found in his opinion for the Court that EPA’s construction of the statute “governs if it is a reasonable interpretation of the statute – not necessarily the only possible interpretation nor even the interpretation deemed *most* reasonable by the courts.” He concluded that § 316(b)’s silence on the question of cost-benefit analysis “is meant to convey nothing more than a refusal to tie the agency’s hands as to whether cost-benefit analysis should be used and, if so, to what degree.” Accordingly, he found that the Second Circuit should be reversed.

In his separate opinion, Justice Breyer concurred in part and dissented in part. Justice Breyer agreed with the Court that the statute did not entirely rule out a comparison of costs and benefits but he stated that he would limit the application of this analysis to circumstances where the cost of a technology is “wholly disproportionate” to the benefit. Justice Stevens, joined by Justices Souter and Ginsburg, dissented, finding that EPA is not authorized to use cost-benefit analysis.

- **Supreme Court Hears Arguments on Regulation of Mining Waste**

On January 12, 2009, the U.S. Supreme Court heard arguments regarding whether all discharges into navigable waters must comply with the effluent limitations and performance standards of §§ 301 and 306 of the Clean Water Act (“CWA”), or whether discharges of “fill material” need not comply. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, Nos. 07-984, 07-990 (U.S. argued Jan. 12, 2009).

Under § 404 of the CWA, the U.S. Army Corps of Engineers (“COE”) has the authority to permit the placement of “fill material” in navigable waters. “Fill material” is defined by regulation to include material placed in a water body that has the effect of changing the bottom elevation of a water body. The regulations specifically contemplate the use of a § 404 permit for the placement of slurry, tailings, and other similar mining-related materials. Under CWA § 402, the United States Environmental Protection Agency (“EPA”) regulates the discharge of “pollutants” into navigable waters from point sources. Section 402 permits are explicitly subject to the effluent limitations and performance standards found in CWA §§ 301 and 306, but § 404 permits are not.

COE issued a § 404 permit to Coeur Alaska, which plans to operate a gold mine near Juneau, Alaska, and to use a lake as a settling pond for the process wastewater from its froth-floatation mill. Because the discharge of the wastewater would have the effect of raising the bottom elevation of the receiving lake, Coeur Alaska (and COE) took the position that wastewater should be regulated as fill material under § 404. Environmental groups, noting that the wastewater is acidic, contains significant amounts of aluminum, copper, lead, and mercury, and fails to meet the performance standards for a froth-floatation mill, objected on the basis that the discharge was prohibited by the effluent limitations and performance standards found in §§ 301 and 306. They also noted that placement of the “fill material” would kill all the fish and nearly all of the aquatic life in the lake.

The Ninth Circuit vacated Coeur Alaska’s § 404 permit, holding that the discharge of process wastewater was subject to effluent limitations and performance standards. *Se. Alaska Conservation Council v. United States Army Corps of Eng’rs*, 486 F.3d 638 (9th Cir. 2007). According to the Ninth Circuit, when EPA issues an effluent limitation or performance standard applicable to a relevant source of pollution, a § 404 permit cannot be used for that discharge—the applicant must instead obtain a § 402 permit, subject to the effluent limitations and performance standards.

Look for the Supreme Court to weigh in before the June recess.

## TMDLs

- **Minnesota Supreme Court Upholds MPCA Effluent Limitations in Absence of TMDL**

On April 2, the Minnesota Supreme Court issued its decision in the case *In re Alexandria Lake Area Sanitary District NPDES/SDS Permit No. MN0040738*, holding that MPCA has discretion to set effluent limitations for a reissued permit for discharges into an impaired water for which a TMDL has not been issued.

MPCA reissued a NPDES permit to the Alexandria Lake Area Sanitary District to operate and expand a wastewater treatment facility. The facility discharges into Lake Winona, which is impaired, in part due to high levels of phosphorus. The TMDL process is currently underway for Lake Winona, but is not complete. The reissued permit incorporated effluent limits based on MPCA's "phosphorus rule," which requires removal of phosphorus "to the fullest practicable extent."

The Minnesota Center for Environmental Advocacy ("MCEA") challenged the reissuance of the permit, claiming that the permit's effluent limit for phosphorus was too high, thereby violating 40 C.F.R. § 122.44(d)(1), which requires effluent limits that "will attain and maintain applicable narrative water quality criteria and will fully protect the designated use [of Lake Winona.]" MPCA and Alexandria Lake Area Sanitation District countered that the regulation does not mandate any particular time frame, and that protecting Lake Winona from further degradation until the completion of the TMDL process was a reasonable exercise of MPCA's discretion.

The Supreme Court agreed, finding that the lack of a specific time frame made the regulation ambiguous in this particular case. Applying the administrative law principles articulated in its recent *Annandale* decision, *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502 (Minn. 2007), the court then found that MPCA's interpretation of its own regulation was reasonable. Specifically, the court concluded that "the phosphorus limits in the permit will adequately control phosphorus in the lake until the TMDL study and implementation plan is completed." As a practical matter, the court appeared to reach this result because it did not see the alternatives—a moratorium on permits or judicial tinkering with numeric effluent limitations—as viable.

Given this follow-up to the *Annandale* decision, which allowed MPCA to issue a NPDES permit for a new facility if new discharges were offset by reductions from existing facilities (again, in the absence of a final TMDL), the court appears to recognize the practical difficulty facing MPCA when there is no final TMDL.

## WETLANDS

- **EPA and COE Issue Revised Guidance on CWA Jurisdiction**

On December 2, 2008, EPA and COE issued revised guidance on the implementation of *Rapanos v. United States*, 547 U.S. 715 (2006). The *Rapanos* decision addressed the definition of "waters of the United States" for purposes of wetland jurisdiction under § 404 of the CWA.

As summarized by the agencies, the major differences between the revised guidance and the 2007 guidance are that the revised guidance:

1. clarifies how to determine the reach of the “Traditional Navigable Waters (TNWs);”
2. clarifies the regulatory term “adjacent wetlands;” and
3. refines the concept of “relevant reach.”

The revised guidance is substantially similar to guidance that the agencies issued in 2007. Like the 2007 guidance, the revised guidance incorporates the rule for wetland jurisdiction articulated by Justice Scalia in his plurality opinion and the rule stated by Justice Kennedy in his concurring opinion. The guidance finds jurisdiction exists if either the Scalia or the Kennedy test is satisfied.

Under Justice Scalia’s plurality opinion in *Rapanos*, jurisdiction extends only to wetlands with a “continuous surface connection” to “relatively permanent” bodies of water connected to traditional navigable waters. Under Justice Kennedy’s concurring opinion, jurisdiction extends to wetlands with a “significant nexus” to traditional navigable waters, which is found “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”

After 15 years of litigation, John Rapanos settled EPA’s enforcement action against him on December 29, 2008. Rapanos agreed to pay a \$150,000 civil penalty and mitigate 54 acres of wetlands at an estimated cost of \$750,000. Rapanos will also preserve 134 acres of wetlands under the settlement. The wetlands are located on three sites in Bay and Midland counties of Michigan. The settlement does not affect the related criminal suit.

- **Federal Courts Address Jurisdiction Post-*Rapanos***

On December 1, 2008, the U.S. Supreme Court denied certiorari in a case that rejected the dual Scalia/Kennedy approach to jurisdiction in favor of the Kennedy significant nexus test alone. *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007), *petition for reh’g en banc denied*, 521 F.3d 1319 (2008), *cert. denied*, 129 S. Ct. 627, 630 (Dec. 1, 2008) (*McWane*).

In affirming criminal convictions for wetland violations, the Sixth Circuit found federal jurisdiction under both the Scalia and Kennedy tests. *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009). The court noted, however, that “[p]arsing any one of *Rapanos*’s lengthy and technical statutory exegeses is taxing, but the real difficulty comes in determining which—if any—of the three main opinions lower courts should look to for guidance.” The court summarized the Supreme Court’s ruling in *Rapanos* by saying that “[i]n its short life, *Rapanos* has indeed satisfied any ‘bafflement’ requirement.”

In his Order for Judgment in *United States v. Bailey*, 556 F. Supp. 2d 977 (D. Minn. 2008), U.S. District Judge Patrick Schiltz affirmed his earlier ruling in the case that CWA jurisdiction could be established under either the Scalia or the Kennedy tests. Judge Schiltz rejected Bailey’s argument that jurisdiction could only be established under the Scalia test, noting that no federal court to date has found a lack of CWA jurisdiction if Justice Kennedy’s test is met. In a related case, the Minnesota Court of Appeals affirmed the dismissal of Bailey’s claims for regulatory taking, breach of contract, and negligent and intentional misrepresentation against the MPCA, Lake of the Woods County, and the Minnesota Department of Natural Resources. *Bailey v. Minnesota Pollution Control Agency*, No. A07-2255 (Minn. Ct. App. Nov. 4, 2008) (unpublished opinion).

- **Ninth Circuit Rules Jurisdictional Finding Not Reviewable**

The Ninth Circuit Court of Appeals held that a COE jurisdictional determination is not a final agency action and not subject to judicial review. *Fairbanks N. Star Borough v. United States Army Corps of Eng'rs*, 543 F.3d 586 (9th Cir. 2008), *petition for cert. filed*, (U.S. Feb. 13, 2009) (No. 08-1052). The court found that a jurisdictional determination “is not an action . . . by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” Nonetheless, the court recognized that a negative jurisdictional determination (*i.e.*, a determination that the wetland is not regulated under the CWA) might be used by a landowner who relies on the negative determination to estop a subsequent enforcement action by the COE. A landowner who disagrees with a positive jurisdictional determination may have no choice but to apply for a permit and seek judicial review of the permit denial or to proceed without a permit and risk enforcement.

- **Oberstar Authors Jurisdictional Legislation**

Congress held hearings in April 2008 on Congressman James Oberstar’s proposed Clean Water Restoration Act, H.R. 2421 (110th Congress). This legislation seeks to clarify federal jurisdiction after *Rapanos* by amending the CWA to change the term “navigable waters of the United States” to read “waters of the United States.” Further, the term “waters of the United States” would be defined to include “all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, *to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.*” (Emphasis added.) Oberstar is expected to reintroduce similar legislation this year.

In December 2008, Oberstar and Congressman Henry Waxman released a report showing a decline in EPA and COE enforcement of the CWA under the Bush Administration. According to the report, confusion about the *Rapanos* decision has slowed federal jurisdictional determinations and resulted in less enforcement. This conclusion was based on an EPA memo that tallied a large number of enforcement cases that the agency dropped due to uncertainty about jurisdiction.

- **EPA and COE Issue Revised Definition of “Discharge of Dredged Material”**

On December 30, 2008, EPA and COE issued revised rules on the definition of “discharge of dredged material” for purposes of CWA regulation. 73 Fed. Reg. 79641 (Dec. 30, 2008) (amending 33 C.F.R. pt. 323 and 40 C.F.R. pt. 232). The revised rules are intended to conform to a court order that invalidated amendments to the definition adopted in 2001 known as the “Tulloch II” rule. *See Nat’l Ass’n of Homebuilders v. United States Army Corps of Eng’rs*, No. 01-0274, 2007 U.S. Dist. Lexis 6366 (D.D.C. Jan. 30, 2007). The Tulloch II rule stated that dredging and other earth-moving activity would be regarded by the agencies as resulting in a discharge of dredged material “unless project-specific evidence shows that the activity results in only incidental fallback.” Further, the Tulloch II rule defined “incidental fallback” as “the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal.” The December 30, 2008 revision returns the rule to its 1999 language. “Incidental fallback” is still exempted, but it is not defined in the rule. The revision relieves the potentially regulated party from proving in every case that the activity results in only incidental fallback, but the lack of a definition also places more discretion in the hands of the COE.

- **COE St. Paul District Issues Final Policy for Wetland Mitigation**

On January 24, 2009, the COE St. Paul District issued its Final St. Paul District Policy for Wetland Compensatory Mitigation (available at <http://www.mvp.usace.army.mil/regulatory/>). The St. Paul District Policy implements the COE's final mitigation rule published in the Federal Register on April 10, 2008 (codified at 33 C.F.R. pts. 325 and 332 and 40 C.F.R. pt. 230). Like the COE's final mitigation rule, the St. Paul District Policy emphasizes the watershed approach to compensatory mitigation and states a preference for the use of mitigation banking.

- **BWSR to Hold Hearings on Revised Wetland Conservation Act Rules**

Under state legislation passed in 2007, the Minnesota Board of Water and Soil Resources ("BWSR") has until August 5, 2009 to adopt revised permanent administrative rules for the state Wetland Conservation Act ("WCA"). The program is currently operating under exempt rules adopted pursuant to the 2007 legislation. BWSR will hold hearings on its proposed amendments April 30 through May 5, 2009 at a number of locations around the state. As summarized by BWSR, some of the major substantive changes include the following:

- Eliminate the existing two wetland credit system (new wetland credits and public value credits) used to allocate wetland replacement credits, and replace it with a single credit system in which all replacement actions are allocated one type of credit. In addition, provisions are proposed to convert existing credits to this new system.
- Simplify determining wetland replacement ratios and establish an incentive-based wetland replacement system that establishes a preference for replacement through wetland banking.
- Require financial assurance for all wetland replacement that is not conducted before the proposed impact, unless the local government waives the requirement if it determines it is not necessary to ensure successful replacement.
- Modify the actions eligible for credit to include: (1) establishing an upland buffer requirement for all replacement wetlands; (2) consolidating three different types of wetland creations into a single provision; and (3) allowing replacement credit for wetland preservation on state or local government land in greater than 80% areas of the state.

## **WATER TRANSFERS**

- **New EPA Rule, Bypassing Permit Requirement, Took Effect August 12, 2008**

Although CWA § 402 requires any person discharging a pollutant from a point source to comply with NPDES permit provisions, a new rule promulgated by EPA creates an exception for the transfer of water from one water body to another. 73 Fed. Reg. 33708 (June 13, 2008) (to be codified at 40 C.F.R. pt. 122.3(i)). The water transfer rule exempts activities that convey or connect water bodies "without subjecting the transferred water to intervening industrial, municipal, or commercial uses." Although this only applies to "benign" transfers—meaning that the transfer itself does not introduce pollutants into the water—a benign transfer could nonetheless introduce pollutants into the receiving water. Most commonly, this rule affects the movement of drinking water supplies, exempting municipalities from NPDES requirements.

- **Water Transfer Rule Immediately Challenged: Briefing Schedule Set**

Five suits challenging the water transfer rule were immediately filed and consolidated in the Eleventh Circuit. *Friends of the Everglades v. United States Env'tl. Prot. Agency*, No. 08-13652-C (11th Cir. filed June 27, 2008) ("Friends II"). The preferred handle is "Friends II" because a district court case mandating water transfers to be subject to NPDES requirements is already pending before the Eleventh Circuit ("Friends I"). The water transfer rule is also in tension with a Second Circuit case that also required water transfers to be subjected to NPDES requirements. *Catskills Mountains Ch. of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77 (2d Cir. 2006), *cert. denied*, 549 U.S. 1252 (2007).

## **BALLAST WATER**

- **Courts and Agencies Strengthen Ballast Water Regulation**

The regulation of ballast water continues to be a major area of judicial and regulatory activity, both nationally and in Minnesota. This topic will be addressed in detail in a breakout session. In brief summary, some of the major developments include the following:

- The Ninth Circuit held that an EPA regulation exempting ballast water discharges from permitting under the Clean Water Act was unauthorized and therefore ultra vires. *Nw. Env'tl. Advocates v. United States Env'tl. Prot. Agency*, 537 F.3d 1006 (9th Cir. 2008).
- Ramsey County District Judge Kathleen Gearin invalidated an MPCA rule for the NPDES program insofar as the rule exempted ballast water discharges by commercial vessels into Lake Superior. *State of Minnesota ex rel., Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, No. 62-CV-07-2224 (Ramsey Cty. D. Ct. Apr. 21, 2008).
- The Sixth Circuit held that a Michigan ballast water statute was not preempted by federal law and did not violate the dormant Commerce Clause. *Fednav, Ltd. v. Chester*, 547 F.3d 607 (6th Cir. 2008).
- MPCA issued a general permit regulating the discharge of ballast water into Lake Superior on September 24, 2008. In a case that has been briefed and is awaiting argument in the Minnesota Court of Appeals, MCEA challenges the general permit on grounds that MPCA failed to conduct nondegradation review of Lake Superior as an outstanding resource value water. *In re Request for Issuance of the SDS General Permit MNG300000 for Ballast Water Discharges from Vessels Transiting Minn. State Waters of Lake Superior*, No. A08-1828 (Minn. Ct. App. filed Oct. 22, 2008).
- EPA Issued a general permit for discharge of ballast water effective February 6, 2009. As a condition for its certification of the Vessel General Permit under § 401 of the CWA, MPCA imposed a number of additional permit requirements, including a requirement that vessels must obtain permits required by the State of Minnesota. In a case pending in the Minnesota Court of Appeals, environmental groups challenge MPCA's § 401 certification on grounds similar to MCEA's challenge to the state general permit. *Nat'l Wildlife Fed'n and Minn. Conservation Fed'n v. Minn. Pollution Control Agency*, No. A082196 (Minn. Ct. App. filed Dec. 17, 2008).

## **CAFO RULE**

- **New EPA Rule Revises CAFO Permit Requirements**

In November 2008, EPA promulgated a new rule relating to concentrated animal feeding operations (“CAFOs”). 73 Fed. Reg. 70418-86 (Nov. 20, 2008) (amending 40 C.F.R. pts. 9, 122, and 412). Under the 2008 rule, NPDES permits will now incorporate the terms of a nutrient management plan. While CAFO operators were required to develop such plans under EPA’s 2003 regulations, the new rule requires permitting authorities to review the plans and provide an opportunity for public comment, as well as include the terms of the plans as enforceable permit elements. Also, only those CAFOs that discharge or propose to discharge must apply for a NPDES permit. The rule, however, toughens certain standards for qualifying as a no-discharge facility. The rule also allows CAFO operators to obtain a limited safe harbor for operations that are not likely to cause a discharge. A “certification of no discharge” is available if:

1. production area design, construction, operation, and maintenance are designed for no discharge;
2. a nutrient management plan is in place; and
3. supporting documentation is kept onsite.

Certification creates a rebuttable presumption that the operator is not liable for failing to obtain a permit if a discharge happens to occur. (The operator is still liable for the unpermitted discharge, of course, just not for operating without a permit.)

This rule has limited applicability in Minnesota, as MPCA asserts greater statutory authority to regulate CAFOs than its federal counterpart. The rule, however, will tighten standards in some states (for example, where nutrient management plans were not mandatory) and in jurisdictions where only federal law is applicable such as on Indian land.

## **STORMWATER**

- **EPA Proposes New Rule for Runoff from Construction Sites**

In December 2006, the United States District Court for the Central District of California entered an injunction requiring EPA to establish technology-based standards for discharges from the construction industry. EPA had previously declined to do so on the basis that most construction sites were already regulated under general permits and additional regulation was not justified by its cost. In response to the court order, EPA published a proposed rule on November 28, 2008. 73 Fed. Reg. 72562 (Nov. 28, 2008). One can sense EPA’s reluctance from the proposed rule’s summary: “EPA estimates that this proposed rule would cost \$1.9 billion per year with annual monetized benefits of \$332.9 million.”

The rule would affect all existing state NDPEs programs by incorporating an extra layer of regulation into the states’ permits. All sites, regardless of size, would be required to use best management practices to prevent erosion and to control sediment levels. For larger construction sites the rule would require the use of sediment basins and may set technology-based turbidity limits for runoff depending on soil composition and expected rainfall energy. The comment period closed February 26, 2009. Given the Obama Administration’s requirement that all proposed regulations be

re-reviewed, there is no projected date for the final rule. (See Memorandum for Heads of Executive Departments and Agencies from Rahm Emanuel, Jan. 20, 2009.)

- **Minnesota Revises General NPDES Stormwater Permits**

**Construction program.** Beginning August 1, 2008, the general NPDES permit for construction sites requires new best management practices for owners or operators of “1 acre +” construction sites.

**Industrial program.** MPCA is currently developing a new general permit for stormwater runoff from industrial facilities. Most significantly, the new permit will likely require all industrial facilities to monitor stormwater discharges every quarter. More comprehensive monitoring will be required when runoff discharges into impaired waters. Industrial facilities may be able to avoid the permit requirements if all materials with “pollution potential” are kept under a weatherproof shelter. This pollution prevention will qualify a permit applicant for a “no exposure certification,” which must be resubmitted every five years. MPCA currently anticipates the public comment period on the new permit to begin in May 2009 and implementation to begin in 2010.

### **PESTICIDES RULE LITIGATION**

- **Sixth Circuit Vacates EPA Rule, Requires Permit for Pesticides**

In 2006, EPA issued a final rule that exempted the application of aquatic pesticides from CWA when the use complies with other applicable federal law—specifically the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). EPA reasoned that such pesticides are not “pollutants” at the time of discharge, and therefore no NPDES permit is required. In a consolidated appeal, the Sixth Circuit vacated the rule, holding that a permit is required in two particular situations even when applied in compliance with FIFRA:

1. When pesticides are applied to land or air, and the overspray enters a water body; and
2. When pesticides are applied to water, and some residue remains after application.

*Nat’l Cotton Council of America v. United States Env’tl. Prot. Agency*, 553 F.3d 927 (6th Cir. 2009). This result has been decried by industry groups as unworkable.

### **NONDEGRADATION**

- **Coming: Amended MPCA Rules on Nondegradation of Waters**

MPCA is engaged in a process to amend the state rules governing the nondegradation of waters (Minn. R. 7050.0180 and 7050.0185). MPCA adopted rules for outstanding resource value waters in 1984, and rules addressing nondegradation of all waters in the state in 1988. MPCA held stakeholder meetings on the new rules in fall 2008 and winter 2009. Preparation of the first draft of the rule is scheduled for 2009, with the rulemaking process getting underway in 2010, and the rule becoming effective in 2011. The new rules are aimed at balancing economic, social, and environmental needs in determining whether lowering water quality for a receiving water is acceptable or, alternatively, whether to require additional control measures beyond those required by effluent limitations and water quality standards.