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CWA RISK MANAGEMENT AND THE NPDES PERMITTING PROGRAM FOR PESTICIDES

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About John L. Fiveash

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- ◆ Significant experience in consulting multi-tenant facilities in storm water program development and management.
- ◆ Significant experience at representing multi-tenant facility directors and management in criminal and civil Clean Water Act investigations and court cases.

Today's Discussion:

CWA Regulatory Risk Management

How the Pesticide General Permit (PGP) Evolved

How PGP Affects Ports - Scope and Application

How to Deal with the PGP at your Port

Basics of CWA Regulatory Risk Management

The Government is Looking for:

1. Violations of your permits
2. Violations of your plan (SWPPP, etc.)
3. Violations of the CWA

Elevation to Criminal Charges

- Port management has no immunity (your job vs. your liberty)
- Under CWA (storm water only): Intentional and criminal negligence
 - Some inspections start off as criminal, others administrative
- The effort to “push” a criminal investigation back down to the administrative level
- Even if you are acquitted in a CWA criminal case, it is not over without a resolution of the administrative issues (parallel proceeding)
- Common cases where individuals get charged: Evidence of knowledge leading up to a violation and analytical tampering

How the Pesticide General Permit (PGP) Evolved

- CWA enacted in 1972
- Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) enacted in 1947
 - The historic relationship between CWA and FIFRA
 - In 2009 an appeals court did away with the CWA exemption
 - Final PGP released October 31, 2011
 - EPA compliance deadline was January 2, 2012
 - Current facility awareness is low
 - Exposes facilities to CWA private party lawsuits

How PGP Affects Ports - Scope and Application

- General permit and individual permits
- Federal general permits in six states only (AK, ID, MA, NH, NM, & OK)
 - Individual state managed programs elsewhere
 - Facilities cannot contract away liability
 - Covers activities “near” waters of the U.S.
- Specifically covers the following activities:
 1. Mosquito and other flying pest control;
 2. Weed and algae control;
 3. Animal pest control; and
 4. Forest canopy pest control.

How to Deal with the PGP at your Port

How close is “near”

1. If “[t]hat application is made such that a portion of the pesticide will be unavoidably deposited to waters of the United States...”
2. Appeals court did not define “near.” EPA does not define “near” in the PGP.
3. EPA’s interpretation: “[t]he unavoidable discharge of pesticides to waters of the United States in order to target pests in proximity to but not necessarily in such waters.”

How to Deal with the PGP at your Port

- Investigate (staff interviews, wetland delineations, endangered species areas, MSDS, state white papers, etc.)
 - Complete the Pesticide Discharge Evaluation Worksheet
 - File a NOI well in advance of application, if necessary
 - Develop SWPPP language
 - Incorporate PGP into your SWPPP training agenda
 - Develop facility-specific pesticide use BMPs

For a detailed article on the PGP:

http://www.llw-law.com/files/AWWA_Pesticide_Gen_Permit_Article_032013_00190452.pdf

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