

EPA's Draft Pesticide General Permit

Background

The Sixth Circuit Court of Appeals, in its ruling on *National Cotton Council et al. v. EPA*, vacated EPA's 2006 rule that said NPDES permits were not required for applications of pesticides to, over, or near U.S. waters when used in compliance with the FIFRA label. The court granted a two-year stay in order for EPA to develop a permitting program for these pesticide uses. On June 2, the agency released a draft permit for public review.

Scope of the Permit

EPA has identified four categories of pesticide uses which will fall under the court's ruling for a Pesticide General Permit (PGP):

- mosquito and other flying insect pest control
- aquatic weed and algae control
- aquatic nuisance animal control
- forest canopy pest control

Although the Court did not define the term "near" in the context of pesticide discharges, EPA interprets this term to refer to the unavoidable discharge to waters of the U.S. in order to target pests in close proximity to water, for example, treating weeds along the bank of a ditch through which water is flowing.

In 1987, Congress amended the Clean Water Act to exempt agricultural stormwater and irrigation return flow from NPDES permitting requirements. The Court's ruling does not affect these exemptions. EPA has repeatedly stated that this permit will not include pesticide uses for production agriculture. But, the clarity of these exemptions was blurred by the following statement in EPA's fact sheet: "However, any use patterns not covered by this proposed draft permit would need to obtain coverage under an individual permit or alternative general permit if they involve pesticide applications that result in point source discharges to waters of the United States." Environmentalists are already saying that the permit is not strong or broad enough. NCC expects further litigation from these groups and the potential exists for production agriculture to be permitted for pesticides application through court rulings.

Summary of the Permit

An 'operator' is any entity that falls under the scope of the permit and may be one of two different types - the person(s) responsible for deciding to conduct pesticide applications or the person(s) performing the pesticide applications under contract from any other parties.

EPA has decided to delineate between small and large applicators based on area treated. Only applicators exceeding the threshold will be required to file a Notice of Intent (NOI); however, small applicators are still subject to the conditions of the permit.

The annual treatment area threshold for controlling mosquitoes and other flying insect pests and for forest canopy pest control activities is 640 acres of treatment area. The annual treatment area threshold for aquatic weed and algae control and aquatic nuisance animal control is 20 acres of treatment area in water or 20 linear miles of treatment area at water's edge e.g. treatment of irrigation ditch bank for weed control (NOTE: 20 linear miles includes both sides of an irrigation canal; therefore, the threshold is reduced to 10 miles of canal and is cumulative over the season. Therefore, if the canal banks are treated twice for weeds, that makes the threshold 5 miles of irrigation canal, etc.)

An operator who has submitted an NOI will be authorized to discharge 10 days after EPA has posted its confirmation of receipt of the NOI on the internet and the PGP is good for five years. An operator who is discharging pesticides in response to a declared pest emergency situation is covered immediately (although the operator has up to 30 days after the emergency discharge has occurred to submit an NOI). Any operator who is eligible to discharge without submission of an NOI is authorized to discharge in compliance with the terms of the permit immediately commencing on the effective date of the permit.

In general, the PGP requires *all operators* to:

- minimize pesticide discharges by using the lowest effective amount of pesticide
- prevent leaks and spills
- calibrate equipment
- monitor and report any adverse incidents.

Operators who exceed the annual treatment area threshold must *also*:

- submit an NOI for coverage
- implement IPM practices to minimize the discharge of pesticides to waters of the U.S.
 - identify and assess the pest problem
 - assess pest management alternatives
 - follow appropriate procedures for pesticide use
- develop a Pesticide Discharge Management Plan
- submit annual reports
- maintain records of pest control practices.

Violations of the Clean Water Act are subject to penalties of up to \$37,500 a day.

Timeline

June 2: Draft permit released to the public

June 14: Public meeting in Albuquerque, NM

June 16: Public meeting in Boise, ID

June 17: EPA Webcast

June 21: Public meeting in Boston, MA

June 23: Public hearing in Washington, DC

July 19 Public comments due

December 2010: Release of final permit

April 9, 2011: Effective date of permit