

# Clean Water Act NPDES Pesticide General Permit: Real Burden, No Real Benefits

## The History

EPA issued a 2006 rule exempting applications of aquatic pesticides from Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permitting. However, in 2009, the 6<sup>th</sup> Circuit Court of Appeals' overturned EPA's rule and direct the agency to develop such a permit for certain applications by April 9, 2011. This one decision nearly doubles both the population of entities permitted under CWA as well as the obligations of state regulators. Affected by these NPDES pesticide-use permits will be state agencies, city and county municipalities, parks and recreation managers, utility rights-of-way managers, railroads, roads and highway vegetation managers, mosquito control districts, water districts and managers of canals and other water conveyances, pesticide applicators, farmers, ranchers, forest managers, scientists, many others.

## The Problem

Unrealistic Deadlines, Uncertain Liability - The court set a deadline of April 9, 2011, for EPA and delegated states issue a final permit, and for pesticide users subject to comply with that permit. Sadly, even with the deadline just a few weeks away, EPA continues to push off the expected release date for the final pesticide NPDES pesticide general permit (PGP). Many states have already conceded that they will not make the deadline, even if EPA releases the PGP before the deadline. Unless EPA requests an extension of the deadline from the court, or Congress intervenes to relieve the burden on states and users, the lack of an available permit from regulators will not excuse pesticide users from the legal obligation to comply with a permit once the deadline passes.

Compliance with the Endangered Species Act (ESA) further complicates final issuance of a reasonable NPDES permit for pesticides. Though the National Marine Fisheries Service (NMFS), the US Fish & Wildlife Service and EPA have initiated 'formal consultation' on the NPDES PGP aimed at ensuring the permits compliance with ESA. The deadline for completion of formal consultation is February 25, 2011, just six weeks before the final NPDES permit must be implemented by the states and complied with by the permittees. Stakeholders expect NMFS to require significant changes to the permit, on which neither the states nor the public will not be given an opportunity to comment before those changes become a final part of the PGP.

Thus far, indications are that EPA's final PGP will set out to cover applications of pesticides registered for aquatic use and applied to water or forest canopies into or over flowing or seasonal waters, and conveyances to those waters; it is not expected to cover pesticide applications registered and intended for terrestrial use. However, activists indicate that they believe most pesticide applications should be permitted if there is even a chance that the pesticide could come in contact with any water, either flowing water or seasonal drainage ditches that *could be a conveyance* to a water of the US. So, even though EPA may not hope to permit agricultural and other terrestrial pesticide applications, nothing in the CWA or the proposed permit protects against citizen suits against farmers and applicators for not obtaining a permit. This establishes an uncertain liability for farmers, ranchers, and users applying pesticides to golf courses and public utility rights of way, as well as private homes and businesses.

Tremendous Cost, Taxing Resources - The permit will add performance, recordkeeping and reporting requirements to 5.6 million pesticide applications per year. EPA estimates the potential number of permit applicants at 365,000 and estimates the annual time burden to be 1,033,713 hours for permittees, and 45,809 hours for the 45 'delegated' permit authorities in the states: EPA will directly implement the remaining non-delegated state and territorial programs. Annual costs for program are estimated at \$50.1 million for applicants and \$1.7 million for delegated authorities. Pesticide users and state regulator believe that even these high numbers drastically *underestimate* the actual time and money it will take permittees, states and EPA to actually implement and comply with the permit program.

Red Tape, Not Protection - EPA Pesticide reviews are already designed to protect both human health and the environment. EPA has even suggested, and most observers acknowledge, that issuing thousands of permits for pesticide applications will do very little to further protect the environment or human health.

## Quick Facts on Clean Water Act (NPDES) Pesticide Permits

- EPA and delegated states will issue Clean Water Act National Pollutant Discharge Elimination System (NPDES) general permits for certain pesticide applications; this is an unprecedented action that is the result of a misguided 2009 decision of the 6<sup>th</sup> Circuit U.S. Court of Appeals.
- EPA estimates that the Sixth Circuit's ruling will affect approximately 365,000 pesticide applicators nationwide that perform 5.6 million pesticide applications annually. It will cost \$50 million and require over one million hours per year to implement.
- These permits will have broad and severe negative impacts, without providing any identifiable additional environmental benefits.
- The permits' complex compliance requirements will impose tremendous new burdens on thousands of small businesses, communities, counties, and state and federal agencies legally responsible for pest control, and exposing them to legal jeopardy through citizen suits over paperwork violations.
- Ultimately, the permit could jeopardize jobs, the economy and human health protections across America as regulators and permittees grapple to implement and comply with these permits.
- EPA has yet to release a final permit on which the delegated states can rely, and we already know that many states will not meet the court's April 9, 2011 deadline for implementation of and compliance with these permits.
- Pesticide users nationwide will not have time to fully understand or come into compliance with the permits by the April 9 deadline, thus increasing their liability even more.
- Never in the 62 years of FIFRA or 38 years of the CWA has the federal government required a permit to apply pesticides "to, over or near" waters of the U.S. for control of such pests as mosquitoes, forest canopy insects, algae, or invasive aquatic weeds and animals, like Zebra mussels.
- Congress omitted pesticides in 1972 when it enacted the CWA NPDES program, and despite major rewrites since, never looked beyond FIFRA for the regulation of pesticides.
- Congress needs to take immediate action to relieve the tremendous costs, resources burdens and legal liabilities created by the new Clean Water Act pesticide permit for both state regulators and the pesticide users.

## **Practical/Environmental Consequences Of NPDES Permits for Pesticides**

Pesticides serve an important role in protecting the Nation's public health, waterways, forests and other resources. Over the 39 years the law has been in effect, , EPA never required a National Pollutant Discharge Elimination System (NPDES) permit for the application of Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) registered pesticides. EPA is being mandated to treat FIFRA-registered pesticides used for their approved purpose as “waste,” even when applied under conditions that EPA has found to prevent “unreasonable adverse effects on the environment.”

### Practical Consequences

- EPA’s own analysis suggests that the NPDES permits program for pesticides will result the single greatest expansion of the program in its history, covering approximately 5.6 million covered pesticides applications per year by 365,000 applicators.
- Those affected include state agencies, city and county municipalities, mosquito control districts, water districts, pesticide applicators, farmers, ranchers, forest managers, scientists and others.
- The majority of aquatic weed control treatments are performed by small businesses with fewer than 15 employees. Estimates are that the cost associated with EPA permit scheme to small businesses could be as high as \$50,000 annually.
- Many of these small businesses will not only struggle to cope with these costs but will face legal exposure to activists who want to eliminate all pesticides. (Applicators face fines of up to \$37,500 per day per violation, plus attorney’s fees.)

### Environmental Consequences

- The National Center for Diseases officially recognizes the following as a partial list of mosquito-borne diseases – Eastern Equine Encephalitis, Japanese Encephalitis, La Crosse Encephalitis, St. Louis Encephalitis, West Nile Virus, Western Equine Encephalitis, Dengue Fever, Malaria, Rift Valley Fever and Yellow Fever. Inadequate control of these pests threatens public health.
- EPA’s permit program poses the possibility of critical delays in emergency responses to insect and disease outbreaks and will divert resources from controlling environmental pests to litigation and administrative burdens.
- EPA’s permit scheme will result in a reduction in the use of forest pest control as a forest management tool, resulting in the acceleration of tree mortality and general decline in overall forest health.
- EPA’s permit scheme will reduce pesticide use and erect barriers for the control of pests, such as Gypsy Moth and Forest Tent Caterpillar. This may result in a higher incidence of preventable tree kills and defoliated landscapes.