



PPC

PESTICIDE POLICY COALITION
A Coalition Working for Sound Pest Management Policies

www.pesticidepolicy.org

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**Testimony of the
Pesticide Policy Coalition**

**Submitted to
United States House of Representatives
Committee on Agriculture, Subcommittee on Nutrition and Horticulture
And
Committee on Transportation and Infrastructure, Subcommittee on Water Resources and
Infrastructure**

Regarding

Hearing to Consider Reducing the Regulatory Burden Posed by the Case *National Cotton Council et al., v. EPA* (6th Cir. 2009) and to Consider Related Draft Legislation

The Pesticide Policy Coalition (PPC) is pleased to provide this testimony in support of this joint hearing on pesticide NPDES general permits. The PPC is a coalition of food, agriculture, pest management, and related organizations that support transparent, fair, and science-based regulation of pest management. PPC members include nationwide and regional farm, commodity, specialty crop, and silviculture organizations; cooperatives; food processors and marketers; pesticide manufacturers, formulators and distributors; pest- and vector-control operators; research organizations; and other interested parties. PPC serves as a forum for the review, discussion, development, and advocacy of pest management policies and issues important to its members.

EPA's Pesticide NPDES General Permit

The Environmental Protection Agency's (EPA's) final pesticide NPDES general permit (PGP) development effort is a result of the January 2009 decision of the 6th Circuit Court of Appeals in the case of *National Cotton Council et al., v. EPA*. 553 F. 3d 927 (6th Cir. 2009). To be finalized and fully implemented by April 9, 2011, the PGP will be enforced by EPA in several states and certain other areas, and its multitude of requirements is forming a template for permit development and enforcement by 44 other states. The PPC has previously provided public comments detailing its concerns with the draft PGP published in June 2010. Despite efforts by EPA to modify its PGP in light of public, state and federal comments, the PPC continues to have very significant concerns that the permit unnecessarily duplicates other, more appropriate statutes, and will impose untenable costs and legal jeopardy on thousands of permittees and others. We believe this is not what Congress intended for pesticide regulation and water quality protection. Before we describe these concerns, let us provide a brief overview of the extensive regulatory regime that has been in place for decades.

Congress Chose FIFRA for Pesticide Regulation and Water Quality Protection

Four months after Congress enacted the Clean Water Act (CWA) it enacted the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) to control all aspects of pesticide registration, sales and use. In the decades since, EPA has never issued an NPDES permit for the application of a pesticide made intentionally to target a pest that is present in or over, including near, waters of the US. Instead, EPA has been regulating these and all other types of

applications under FIFRA, as intended by Congress. Congressional intent to this effect was clearly spelled out in the House Committee Report for FIFRA in 1971:

“2. Statement of findings:

The Committee did not include in H.R. 10729 the statement of legislative findings as originally proposed in H.R. 4152. The Committee did not take this action in derogation of the basic intent of H.R. 4152, but did so to avoid cluttering the final statute with language which the Committee feels is interpretive of the other provisions of this legislation. It is therefore the Committee’s intent that:

*The Congress hereby finds that pesticides are valuable to our Nation’s agricultural production and to the protection of man and the environment from insects, rodents, weeds, and other forms of life which may be pests; but it is essential to the public health and welfare that they be regulated closely to prevent adverse effects on human life and the environment, **including pollution of interstate and navigable waters**; ...and that regulation by the Administrator and cooperation by the States and other jurisdictions as contemplated by the Act are appropriate to prevent and eliminate the burdens upon interstate and foreign commerce, to effectively regulate such commerce, and to protect the public health and welfare and the environment.” (Emphasis added)*

H.R. Rep. #92-511, 92d Cong., 2d Sess., 13-14 (1971)

The FIFRA registration process described by EPA in the Fact Sheet accompanying the Agency’s draft PGP in June, 2010 detailed the requirements for many dozens of environmental, health and safety studies to establish the conditions under which pesticides can be legally used in the United States. Many of these studies form the basis of EPA’s use restrictions incorporated into pesticide product labels, including for those product uses covered by EPA’s PGP. EPA’s 2006 final rule codified the Agency’s long-held exemption from NPDES permitting of pesticides applied into and over, including near, waters of the US when made consistent with the FIFRA label (71 Fed. Reg. 68, 483). However, this rule was widely challenged and in February 2009, the 6th Circuit Court of Appeals vacated EPA’s rule and required the development of a pesticide NPDES permitting program for these uses. The Court granted 2-year stay of its decision to April 9, 2011.

Unless Congress relieves them of the duty in the two months remaining to the end of the stay, EPA and states must complete and implement 45 different functional, achievable and defensible NPDES general permits for aquatic pesticide use.

Pesticide Testing & Registration Requirements

Pesticides and their timely application play an important role in protecting our food and water supplies, public health, natural resources, infrastructure and green spaces. All pesticides used in the United States for agriculture, lawn and garden, silviculture, mosquito control, aquatic invasive weed and animal control, and other pest control uses are thoroughly evaluated and strictly regulated by federal and state laws. Before pesticides can be manufactured, transported or sold, they must undergo nearly a decade of extensive research, development, testing, governmental review, and approval. More than 100 studies costing more than \$150 million are performed to determine a chemical's safety to human health and the environment; only one in more than 100,000 candidate chemicals successfully pass these trials and become registered pesticide products for the marketplace.

EPA regulates the testing and use of pesticides primarily under the authority of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).¹ Through FIFRA regulations, EPA controls pesticide testing, registration, manufacture, composition, packaging, labeling, transportation, use, storage, and disposal by applying a risk/benefit standard (“*will not cause any*

¹ The Federal Food, Drug, and Cosmetic Act (FFDCA) authorizes EPA to set tolerances, or maximum residue levels, for pesticides used in or on foods or animal feed, and authorizes other agencies to monitor for pesticide residues and enforce the tolerances. Within the Food Quality Protection Act of 1996, Congress amended FIFRA and FFDCA to establish additional safety standards for new and old pesticides and to make uniform requirements regarding processed and unprocessed foods. Other federal statutes may also affect pesticide registration and use, including the Endangered Species Act.

unreasonable risk to man or the environment, taking into account the [pesticide's] economic, social, and environmental costs and benefits...”). EPA may require additional data at any time, and suspend or cancel a product's registration for good cause. Pesticide product labels incorporate directions for use and specific use restrictions that are conditions of EPA's registration requirements. Amendments to FIFRA in 1988 introduced a further layer of regulation by directing EPA to conduct a comprehensive pesticide re-registration program – a complete review of the human health and environmental effects of pesticides first registered before November 1, 1984, to make decisions about these pesticides' future use. Pesticides that met current scientific and regulatory standards were declared “eligible” for re-registration, and any additional requirements for re-registration were summarized in Re-registration Eligibility Decision (RED) documents. The re-registration program was completed in 2008 and implemented a number of policy changes. Even before the re-registration program was completed, EPA began implementing reregistration review starting in early 2007.

Economics of EPA's PGP

The economic conditions of recent years have forced states, businesses and individuals across the country to face dire budget situations. This has caused everyone, including Congress, to tighten their belts, cancel plans for many new initiatives, examine expenditures and cut those that are unnecessary or unaffordable. We are convinced that EPA's PGP is both unnecessary and unaffordable. As the Honorable John Salazar, Commissioner, Colorado Department of Agriculture and former Member of Congress, states in his testimony for this Hearing, “*It is very*

difficult to justify diverting even more resources to manage paperwork for a permit that is duplicative of other regulatory programs and has no appreciable environmental benefits.”²

Last fall EPA published its statement of economic and time burden estimated to be levied by its PGP on private and public entities, in the form of an Information Collection Request (ICR).

Using EPA’s data, we have determined that EPA has significantly underestimated the true potential cost and burden of the PGP. For example, EPA’s November 2010 publication of the ICR anticipates that private permittees will spend nearly 1 million hours and \$50 million dollars annually to comply with the PGP, and federal, state and municipal permitting authorities will collectively spend nearly 46,000 hours and spend \$1.7 million implementing and enforcing the PGP. While those ICR estimates would be indeed significant burdens, we believe they don’t come close to the likely real cost in time and funds for both permittees and permitting agencies.

This underestimate is revealed when we examine the ICR in detail:

- EPA’s estimate of business-permittee burden is that 5.7 million aquatic pesticide applications are made to more than 100 million acres annually, and that 365,000 permittees will spend a total of 987,904 hours and \$50 million annually to comply with just the information collection requirements of the PGP. This translates to 2.7 hours/year and \$50 for each permittee.
- EPA’s estimate of the permitting-authority burden is that 44 states will spend a total of 45,809 hours and \$1.7 million annually to implement the program. This translates to 1,041 hours and \$38,636 per State.
- However, as Mr. Salazar testified at this hearing, the combined estimated annual costs for Colorado municipalities and commercial permittees for PGP implementation is over \$21 million. Certainly much more than EPA’s estimate.

² Congressional Testimony, February 16, 2011, Statement of the Honorable John Salazar, Commissioner, Colorado Department of Agriculture, before the Joint Hearing of the Committee on Agriculture Subcommittee on Nutrition and Horticulture, and Committee on Transportation and Infrastructure Subcommittee on Water Resources and Environment to Consider Reducing the Regulatory Burden Posed by the Case *National Cotton Council v. EPA*.

Permittees across the country – both public sector and private sector – will most assuredly face costs that are several orders of magnitude greater than EPA estimates. The PPC believes that the true cost of the PGP could exceed \$1 billion in the first year if EPA considers all permittees' costs and permitting authorities in all states. This estimate would include the true costs of:

- Studying the nuances of each permit, and identifying the compliance requirements for all states in which a permittee operates;
- Communication with staff, regulators, clients, and others;
- Research to collect data needed to complete the NOIs, PDMPs, etc.;
- Development of the PDMP, and keeping it current;
- Keeping records, filing NOIs, drafting reports and other records;
- Staff recruitment and training for PGP compliance;
- Awareness of, and compliance with, endangered species/habitat protections;
- Equipment upgrades, inspections; calibrations, preventative maintenance;
- IPM considerations, actions, recordkeeping, annual reporting;
- Monitoring, surveillance, compliance assurance;
- Possible adverse incident mitigation, 24-hour/5-day reporting; and
- Business insurance costs, possible legal costs

EPA estimated 40 hours would be necessary to develop a Pesticide Discharge Management Plan (PDMP), and at least 2 hours annually would be needed to update it. We agree that this figure is likely to be close to the average time it would take. However, EPA limits this burden for the PDMP to just 12,167 permittees (about 3% of the total 365,000 permittees) -- those EPA feels would likely exceed the annual acreage threshold for submitting an NOI. On this basis, EPA calculates that the burden for the PDMP alone would be just \$25.6 million for PDMP

development and \$1.0 million for PDMP maintenance. If instead, however, 10% of the total 365,000 permittees have to develop a PDMP (EPA's estimate of the percentage of permittees that will submit NOIs), then the total cost goes up to about \$80 million just for the PDMP (remember – EPA estimated the entire PGP would cost only \$50 million annually). If 20% of the total permittees have to develop PDMPs, the total cost might become \$160 million.

We believe EPA has overlooked many other important burdens and expenses too, for example the cost of:

- Studying the new state permits when they are final in all states where aerial applicators may work could easily take 24 hours the first year to accurately determine all legal responsibilities and timelines for compliance (EPA does not include these costs in the ICR).
- Communication with regulators, staff and contractors could take 8 hours annually (EPA does not include these costs in the ICR).
- Doing the research, writing an NOI, and mapping the watercourses could easily take 10-12 hours per state. It becomes more time consuming if a custom applicator, for example, has multiple clients and multiple states in which to operate. EPA estimates that it will take 2.0 hours the first time, 0.5 hours thereafter to do the research needed to write an NOI and submit it to regulators.
- Surveillance monitoring is currently a wild card, for it's not clear who would have to do what monitoring, and under what conditions. Depending on the scope of the monitoring, the time required and costs could become extreme. EPA estimated that 0.25 hours would be needed four times per year (1 hour total) for large site visual monitoring by all permittees. Further, EPA estimates that zero (0) hours would be needed for smaller site visual monitoring by all permittees. No estimate was given for costs associated with in-stream analytical monitoring, should that be required. Equipment maintenance, calibration, and other required actions could take 50 to 60 hours per year (EPA does not include these costs in the ICR).
- Because of the explicit requirement for extensive recordkeeping and documentation of actions, ongoing recordkeeping will likely require 4 to 5 hours per week (200 to 250 hours per year), and the hiring of additional staff to complete. Such recordkeeping will be absolutely necessary for PGP compliance and a critical protection from opportunistic citizen lawsuits. However, EPA estimates that it will take only 0.25 hours, four times per

year (1 hour total) to do all the recordkeeping of treatment areas and products used in the PGP.

- IPM data collection, decision making, recordkeeping and reporting could take 50 to 100 hours per year, or more, depending on the industry segment and intensity of pests (EPA does not include these costs in the ICR).
- Annual reporting, especially when there are multiple clients, multiple pests treated, and multiple states involved could take 10 or more hours (EPA estimates 2 hours in the ICR).
- Adverse incident response and reporting could take up to 20 hours if an adverse incident occurs (EPA estimates 2 hours).
- Custom applicators will find their annual report writing complicated by the many products, treatment areas, and varied customers serviced during the year. The time for each annual report (one for each state in which the custom applicator operates) would easily require 4 hours or more. EPA estimates that it will take 2 hours to write and submit an annual report.

Unknown Legal Jeopardy Awaits Permittees

Thousands of pesticide “operators” in the U.S. will soon have to comply with NPDES permitting requirements to which they have never before been subjected. With the deadline for completion and implementation set by the court less than 2 months away (and with only about half of the states having proposed draft PGPs), it is not unreasonable to expect that more than a few of the resulting permittees could soon (after April 9) find themselves either unable to continue to legally apply pesticides or be exposed to legal jeopardy from citizen suits or agency enforcement for minor paperwork violations that have no actual impact on environmental protection.

Currently CWA penalties are \$37,500 per day per violation, and EPA’s PGP has literally dozens of opportunities for someone to violate the CWA, sometimes more than once for the same infraction. This legal jeopardy is significant, and pesticide users and applicators may well have to defend themselves against trivial litigation.

Conclusion

While an objective of EPA's PGP is to "minimize discharges of pesticides," we believe it is truly an unintended consequence of the 6th Circuit decision that many cities, state agencies or individual companies may choose to abandon necessary pest control. This could hamper ongoing efforts to control invasive pests and reduce water quality as a result. Congress must act to clarify that pesticides applied in accordance with FIFRA product labels are not subject to Clean Water Act NPDES permitting requirements.

We appreciate your interest in this important national issue. Thank you for providing us with this opportunity to present this testimony to you.

Sincerely,



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