

Pesticide Regulation Under the NPDES PGP

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The U.S. Environmental Protection Agency (EPA) has recently promulgated a regulation that requires a National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit (PGP) in order to use pesticides¹ in specified ways. Various groups, including the agricultural sector, environmentalists, and the EPA itself have met this new policy with dramatic responses. The new permit requirement has been implemented it continues to face opposition since its implementation. This paper explores the regulation's history, purpose, and current issues.

A Brief History of Pesticide Regulation

Until 2011, the NPDES program did not regulate pesticides that were discharged directly into waterways or sprayed near a water source in order to control pests.² The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) traditionally controlled the discharges of pesticides through its labeling system, which provides information on these hazardous materials, including proper use and disposal.³ Another primary function of these FIFRA labels has been to provide the product's buyer with information regarding proper application practices which, if followed, would exempt the application from classification as "pollutants" by the EPA under the Clean Water Act (CWA) and would therefore not require permit for discharge.⁴ Unless pesticides

¹ It may be assumed that "pesticides" as discussed in this document includes both chemical and biological pesticides which leave a residue. *See generally* Nat'l Cotton Council of Am. v. EPA, 553 F.3d 927 (6th Cir. 2009) (discussing the difference between chemical and biological pesticides).

² *Background Information on EPA's Pesticide General Permit*, U.S. ENVTL. PROT. AGENCY, (Dec. 6, 2012, 2:03 PM), <http://cfpub.epa.gov/npdes/pesticides/aquaticpesticides.cfm>.

³ *See* 7 U.S.C. §§ 136-136(y) (2011).

⁴ *See* Amena H. Saiyid, *EPA Says Clean Water Permits Not Needed To Apply Pesticides Into, Over, or Near Water*, BNA NAT'L ENV'T DAILY, Nov. 22, 2006, at 1.

labeled were used in a way that violated the FIFRA label, they were considered sufficiently regulated under FIFRA and did not require an NPDES permit.⁵

The NPDES, a program under the CWA,⁶ is employed by the EPA in order to monitor water quality throughout the nation with the goal of reducing the “discharge of pollutants”⁷ from “point sources”⁸ into “waters of the United States.”⁹ Those substances under the category of “pollutants” now include, among others, pesticides.¹⁰ Thus the permitting program now regulates the use of pesticides, which allows the EPA and states to monitor any individuals or groups who necessarily use pesticides in, over, or near water to control plant or animal pests.¹¹

A Sudden Controversy

In 2001, Headwaters, Inc. and the Oregon National Resources Council Action brought action against Talent Irrigation District (TID), a private company that supplies water for the Bear Creek Valley area in Oregon.¹² TID operated irrigation canals, which used water from local creeks and streams.¹³ In order to control plant growth in the canals, TID applied an aquatic herbicide to its irrigation canals which was known to be potentially deadly to local fish and

⁵ *See id.*

⁶ *See* 33 U.S.C. §§1251-1387 (2011); *see also Clean Water Act*, U.S. ENVTL. PROT. AGENCY, (Jun. 27, 2012), <http://www.epa.gov/oecaagct/lcwa.html#National%20Pollutant>.

⁷ “Discharge” of a pollutant is defined by the statute as “(A) any addition of any pollutant into navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.” 33 U.S.C. § 1362(12) (2011).

⁸ The term “point source” means “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1367(14) (2011).

⁹ “Waters of the United States” include wetlands, intrastate lakes, rivers, streams, mudflats, that “would affect or could affect interstate or foreign commerce;” impoundments of water; tributaries of waters; territorial sea. 40 C.F.R. § 122.2 (2012).

¹⁰ *See Clean Water Act*, *supra* note 6.

¹¹ *See* INFORMATION ON THE PESTICIDE GENERAL PERMIT FOR AGRICULTURAL STAKEHOLDERS FACTSHEET, U.S. ENVTL. PROT. AGENCY 1 (Dec. 2011), *available at* http://www.epa.gov/npdes/pubs/pgp_agfactsheet.pdf [hereinafter *Information for Agricultural Stakeholders*].

¹² *See* *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 526 (9th Cir. 2001).

¹³ *Id.* at 528.

wildlife.¹⁴ Plaintiff groups alleged that TID was in violation of the CWA for introducing the pesticides to a water source without possessing an NPDES permit.¹⁵ TID contended that its application of the herbicide was consistent with the product's FIFRA label and that there was no requirement for an NPDES permit.¹⁶

The lower court agreed with TID's reasoning and ruled in favor of the company.¹⁷ The Ninth Circuit, however, reversed, finding that the FIFRA and NPDES were not to be used as mutually exclusive measures to control water quality:

[A] FIFRA label and a NPDES permit serve different purposes. FIFRA establishes a nationally uniform labeling system to regulate pesticide use, but does not establish a system for granting permits for individual applications of herbicides. The CWA establishes national effluent standards to regulate the discharge of all pollutants into the waters of the United States, but also establishes a permit program that allows, under certain circumstances, individual discharges. FIFRA's labels are the same nationwide, and so the statute does not and cannot consider local environmental conditions. By contrast, the NPDES program under the CWA does just that.¹⁸

The Court also found, using the scope of the NPDES as a guideline, that TID had in fact discharged a pollutant into a water source from a point source.¹⁹ On this basis the court reversed, holding that TID was obligated to obtain an NPDES permit in order to continue its herbicide usage.²⁰

Only one year later additional questions arose regarding the use of pesticides. In 2002, League of Wilderness Defenders and Blue Mountains Biodiversity Project filed suit against Harv Forsgren and the United States Forest Service (Forest Service) regarding the aerial application of

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 530.

¹⁷ *Id.* at 528.

¹⁸ *Headwaters*, 243 F.3d at 531.

¹⁹ *Id.* at 532 ("The only element not disputed by TID is that the Magnacide H flowed from a 'point source,' the hose that delivered the herbicide to the canals.").

²⁰ *Id.* at 534.

pesticides to trees.²¹ The Forest Service applied an insecticide to trees by spraying them from an airplane, which passed over streams while spraying.²² Plaintiffs were concerned with the potential consequences to local fish and birds and brought the suit alleging that the Forest Service violated the CWA by neglecting to obtain an NPDES permit before spraying pesticides.²³

The Forest Service contended that its activity was not in violation of the statute, not because the pesticide was not considered a pollutant, but rather because it believed the aerial spraying to be a “nonpoint source” pollutant, which would exempt it from the NPDES program.²⁴ The Ninth Circuit Court rejected this argument in holding that the Forest Service practice of aerially applying pesticide qualified as a point source under the statute, and was subject to the NPDES program.²⁵ The Court went on, to say, however, that the EPA did not reserve the right to “refine” the meanings of the terms “point source” and “nonpoint source” if they did so “in a way that contravenes the clear intent of Congress.”²⁶

These cases decided by the Ninth Circuit Court show that pesticides were not being regulated as strictly as many environmentally conscious groups desired. The EPA needed to take action to resolve the problem.

²¹ See *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1182 (9th Cir. 2002).

²² *Id.* at 1183.

²³ *Id.* at 1181.

²⁴ *Id.* at 1185.

²⁵ *Id.* at 1186.

²⁶ *Id.* at 1190.

The Final Rule and the Last Word

In 2006, responding to the request to further regulate pesticide uses (as illustrated in the cases above) and in an effort to reassure concerned pesticide users, the EPA released a final rule on aquatic pesticides (Final Rule).²⁷ The EPA intended to settle uncertainties surrounding the control of pesticide application through the use of permits for pesticides discharged directly into waterways and sprayed near waters of the U.S. with the promulgation of the Final Rule.²⁸ The Agency stated that pesticides discharged near, over or into waters did not require a NPDES permit because these pesticides were from nonpoint sources—an explanation it justified with the logic that the “waste” from the application of pesticides otherwise used according to FIFRA was the only true “pollutant” involved in such an application.²⁹ Under the rule, residue was not subject to NPDES permitting because by the time the residue became a “pollutant” under CWA’s definition the residue was no longer from a point source.³⁰ Furthermore, the EPA explained that the statutory framework of FIFRA guarded the environment effectively enough to protect health with regards to pesticide use.³¹

In 2009, however, two concerned interest groups, environmental and industrial, filed petitions challenging the rule.³² Environmental petitioners argued that the Agency overstepped its bounds by exempting pesticides from the definition of “pollutants” under the CWA.³³ The CWA defines a “point source” as “any discernible, confined and discrete conveyance”³⁴

The Sixth Circuit reasoned that any pesticide that may leave waste or residue must, necessarily,

²⁷ Application of Pesticides to Waters of the United States in Compliance with FIFRA, 71 Fed. Reg. 68,483 (Nov. 26, 2006).

²⁸ *Id.* at 68487.

²⁹ *Id.*

³⁰ *Id.*

³¹ See Saiyid, *supra* note 4.

³² Nat’l Cotton Council of Am. v. EPA, 553 F.3d 927, 927 (6th Cir. 2009).

³³ *Id.*

³⁴ 33 U.S.C. § 1362(14) (2011).

come from a discernible beginning source.³⁵ The court refuted the Final Rule's treatment of waste from pesticide applications as inconsistent with the CWA.³⁶ Although the court agreed with the EPA that waste left by pesticides applied to, over, or near water was designated a pollutant,³⁷ it held that excess and residual pesticides from processes such as aerial spraying that reached waterways should fall under the category of pollutants under the CWA.³⁸ The court ultimately vacated the Final Rule.³⁹

The Sixth Circuit's decision created a policy gap between the definitions in the CWA and EPA regulations. It would be problematic to require the regulation of pollutants from point sources and to hold that pesticides discharged into water were from point sources without regulating the discharge of pesticides from point sources. In order to provide adequate regulation the EPA implemented the NPDES Pesticide General Permit (PGP), which would be required by any entity using pesticides in, over, or near water.⁴⁰ The EPA requested that the court stay its order vacating the rule for an additional two years in order to provide time to prepare the pesticide permitting program for implementation.⁴¹

Agriculture groups were skeptical. They argued that many states already had regulations in place to control pesticides applied to water.⁴² The need to file permits would put strain on farmers, natural resource managers, and others.⁴³ The stricter regulations would open the door

³⁵ *Nat'l Cotton Council*, 553 F.3d at 940.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See 40 C.F.R. § 122.2 (2012).

⁴¹ See Bill Pritchard, *Agriculture, Forest Industries Seek Review Of Clean Water Permits for Pesticides Case*, BNA NAT'L ENV'T DAILY, Apr. 13, 2009 at 2.

⁴² See Patrick Ambrosio, *Experts Warn of Unintended Consequences From New NPDES Permit Requirements*, BNA NAT'L ENV'T DAILY, Apr. 9, 2012, at 2-3.

⁴³ See *id.*

for litigation, which would increase the cost of doing business.⁴⁴ These groups were concerned that increased regulation of the PGP would do more harm to the agricultural sector than the EPA intended. One researcher did acknowledge, however, that many aspects of the permit were acceptable.⁴⁵

In early 2011, some state water pollution regulators and agriculture officials submitted a letter to the EPA stating their concern that preparation for the new regulation, including education, infrastructure, and transitional programs, would not be complete before the permit requirement became effective on April 9, 2011.⁴⁶ The letter requested that the EPA seek a six-month extension on its deadline.⁴⁷ The EPA obliged, and the court postponed the permit's start date until October 31, 2011.⁴⁸

Scope of Permit

The NPDES PGP Rule, first implemented on October 31, 2011, is meant to provide the same protections against pesticide applications that the NPDES general permit already provides against other pollutants.⁴⁹ If a pesticide will be applied directly to, over, or near a water of the United States, the entity applying the pesticide is required to obtain a NPDES PGP in order to use the pesticide.⁵⁰ This permit extends the reach of the CWA; the EPA is able to assume more

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See Linda Roeder, *State Water, Agriculture Officials Seek Stay in Court Mandate for Pesticide Permits*, BNA DAILY ENVTL. REPORT, Feb. 10, 2011.

⁴⁷ *Id.*

⁴⁸ Final National Pollution Discharge Elimination System (NPDES) General Permit for Point Source Discharges from the Application of Pesticides, 76 Fed. Reg. 68,750 (Nov. 7, 2011) [hereinafter NPDES PGP Rule].

⁴⁹ See *Final National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit (PGP) for Point Source Discharges to Waters of the United States from the Application of Pesticides Fact Sheet*, U.S. ENV'T PROT. AGENCY (2011), http://www.epa.gov/npdes/pubs/pgp_final_factsheet.pdf (last visited Nov. 2, 2012).

⁵⁰ See generally *id.* (providing the litigation and regulatory history of the rule and an overview of the rule promulgated in Oct. 2011).

responsibility over the level of pesticide released into waterways through point sources.⁵¹

Although the PGP does not replace FIFRA, it does provide a safeguard that reaches further than FIFRA.⁵²

The EPA does not expect the agricultural sector to be widely affected by this program.⁵³ The permit is only required for those who have a need to use pesticides over, in, or near water.⁵⁴ An exemption remains under the CWA for “agricultural runoff” as well as “return flow,” which includes pesticides applied to crops not near water, to forest floors, and to range land.⁵⁵ This exemption includes many farmers, as well as some forestry-related activities.⁵⁶ However, many fully-aquatic farmers (cranberry farmers, for instance), who must by necessity apply their pesticides directly to a water source, are required to obtain one of these permits.⁵⁷

In North Carolina and other southeastern states, the EPA is concerned mainly with the direct application of pesticides to water necessitated by pest control efforts rather than aquatic agriculture.⁵⁸ The diversity of waterway types and pesticide species within the state, coupled with the unique warm, wet climate of the southeastern region, necessitate a program that fits to its individual needs.⁵⁹ The program in place must necessarily take into consideration a wider

⁵¹ *See id.*

⁵² *See, e.g., NPDES Frequently Asked Questions*, U.S. ENVTL. PROT. AGENCY, http://cfpub.epa.gov/npdes/allfaqs.cfm?program_id=0#476 (last visited Nov. 2, 2012).

⁵³ *See Information for Agricultural Stakeholders*, *supra* note 11, at 1.

⁵⁴ *See id.*

⁵⁵ *See* 33 U.S.C. § 1342(k)(1) (2011).

⁵⁶ *See Information for Agricultural Stakeholders*, *supra* note 1, at 1.

⁵⁷ *Id.*

⁵⁸ Letter from N.C. Dept. of Agriculture and Consumer Services to U.S. Environmental Protection Agency (July 19, 2010), *available at* http://www.ncmvca.org/NPDES/NCDA_Comments.pdf [hereinafter NC Letter to EPA].

⁵⁹ *Id.*

range of climates and activities, which could cause complications if the state did not make its own arrangements.⁶⁰

Some states may choose to model their own general permit program after the PGP.⁶¹ Most states, including North Carolina, have the authority to implement the NPDES PGP.⁶² The EPA granted Department of Environment and Natural Resources' (DENR) Division of Water Quality the authority to implement the NPDES PGP.⁶³

An Uncertain Future

The future of the NPDES Pesticide General Permit is uncertain. The EPA has made efforts to educate interested parties about whether or not they will be required to obtain a permit.⁶⁴ The permit has only been in force for a full year, so any attempted surveys of its effectiveness in improving water quality and safety are not likely to be probative as far as the extent of its true potential.

Many groups, however, still adamantly oppose the NPDES permit. CropLife America went so far as to deem the permit “duplicative and burdensome,” and the result of “an erroneous court ruling.”⁶⁵ The group noted the likelihood of litigation and heightened amount of paperwork, calling for a return to the FIFRA-only method of regulation.⁶⁶

⁶⁰ *Id.*

⁶¹ See Roeder, *supra* note 6.

⁶² See *NPDES History*, N.C. DEP'T OF ENV'T AND NAT. RESOURCES, <http://portal.ncdenr.org/web/wq/swp/ps/npdes/history> (last visited Nov. 2, 2012).

⁶³ See *id.*

⁶⁴ See *generally Pesticide Permit Decision Tool*, U.S. ENVTL. PROT. AGENCY, <http://cfpub.epa.gov/npdes/pesticides/prtool.cfm> (last visited Nov. 2, 2012) (useful in determining whether a permit must be acquired).

⁶⁵ Jay Vroom, *Beltway View: Beyond The Farm Bill*, CROPLIFE AMERICA (Sept. 5, 2012), <http://www.croplife.com/article/30811/beltway-view-beyond-the-farm-bill>.

⁶⁶ See *id.*; see also Ambrosio, *supra* note 422.

Nor, does it seem, are they alone in their desire. In July of 2012, the House Committee on Agriculture considered the Federal Agriculture Reform and Risk management Act or “Farm Bill,” which, if passed by the full Congress would effectively reverse the Sixth Circuit Court’s decision that brought about the permit.⁶⁷ If the Farm Bill passes with this provision, the EPA will be prohibited from requiring the new permit.⁶⁸

Conclusion

In response to a string of court cases that exposed a gap in the policy of the NPDES as it defined point sources and pollutants as compared to the language of the CWA, the EPA released its Final Rule.⁶⁹ In the EPA Final Rule, the NPDES definition of “pollutants” suggested that a pesticide used according to its FIFRA label was not in itself a pollutant, although any waste from such usage was considered a pollutant.⁷⁰ The NPDES, however, regulated only those pollutants released from point sources, and once waste or excess pesticide existed in a waterway from direct application to water or from a process such as spraying over or near the waterway, it was no longer from a point source according to the EPA in its Final Rule.⁷¹

A ruling from the Sixth Circuit Court striking down the Final Rule brought about the NPDES PGP, which has since been a source of contention for many agricultural groups.⁷² Some states are modeling their own general permits to the requirements of the Rule.⁷³

⁶⁷ See H.R. 6083 § 10017(b)(5), 112th Congress (2012); see also Amena Saiyid and Patrick Ambrosio, *House Agriculture Committee OKs Farm Bill With Ban on Permits for Pesticide Spraying*, BNA NAT’L ENV’T DAILY (July 3, 2012).

⁶⁸ See *id.*

⁶⁹ See NPDES PGP Rule, *supra* note 48, at 68,750; see also Saiyid, *supra* note 4.

⁷⁰ See NPDES PGP Rule, *supra* note 48, at 68,750.

⁷¹ *Id.*

⁷² See *Nat’l Cotton Council of Am. v. EPA*, 553 F.3d 927 (6th Cir. 2009) (striking down EPA’s rule exempting sources discharging pesticides from the NPDES program).

⁷³ See Roeder, *supra* note 466.

Most recently, Congress has considered the Farm Bill, which would forbid the EPA from requiring the PGP.⁷⁴ Many groups who do not wish to adopt new regulations of pesticides support this bill.⁷⁵ Were the bill to successfully ban NPDES PGP, there would be some policy concerns. In contrast to the worries of some groups, who believe that the PGP opens the agricultural and forestry industries up to large amounts of lawsuits,⁷⁶ loosening the requirement for a permit for pesticides discharged in, over, or near water could lead to decreased liability of these sectors. Citizens may be left with a weakened ability to hold those who have an obvious effect on general water quality responsible for adverse effects to the environment.

The NPDES pesticide permit has been consistently contested since its birth and is now in danger of being banned if the Farm Bill passes.⁷⁷ Should the permit be ended nearly as soon as it was begun, there would be no chance of knowing just how great its potential would be—or, indeed, whether it ever had any at all.

⁷⁴ See H.R. 6083 § 10017(b)(5), 112th Congress (2012).

⁷⁵ See Saiyid and Ambrosio, *supra* note 67.

⁷⁶ See Vroom, *supra* note 65.

⁷⁷ See Saiyid and Ambrosio, *supra* note 67. The Farm Bill did not pass during the 112th Congress, but an extension of the previous Farm Bill (2008) was passed, and the 113th Congress will most certainly revisit the issue. *Farm Bill Extension Frustrates Farm Interests, Evidence of Lost Congressional Clout*, WASHINGTON POST (Jan. 3, 2013), http://articles.washingtonpost.com/2013-01-03/business/36211270_1_money-for-livestock-producers-fiscal-cliff-farm-bill.