



NCC v. EPA and EPA's Pesticide NPDES General Permits

Questions & Answers

December 16, 2009

This Q&A is designed to provide insight to the most common questions we receive regarding the 6th Circuit decision and EPA's efforts to develop NPDES general permits for pesticide applications to, over or near waters of the US. The answers we provide represent our understanding of the situation at this time, based on numerous discussions with EPA officials and others. It will be updated as warranted, so that the answers provide a current understanding of the issue.

Q1: What is the EPA undertaking?

A1: As a result of a 2009 6th Circuit Court of Appeals panel ruling that "aquatic" pesticide applications are subject to the Clean Water Act ("CWA"), EPA is developing general NPDES permits to regulate those ("aquatic") pesticide applications made "to," "over" or "near" waters of the US.

Q2: What are the implications of subjecting aquatic pesticide applications to CWA NPDES permits?

A2: In addition to meeting the thorough requirements and review under FIFRA¹ and specific product labels, entities involved in these pesticide applications would be required to meet numerous planning, performance, recordkeeping and reporting requirements contained in CWA NPDES permits. Violations of the CWA's NPDES permitting requirements could subject an entity to overly burdensome civil and criminal penalties, and citizen suits. Fault is not required to support liability. Instead, enforcement of NPDES permits is based on "strict liability" (even if the permittee did not mean to violate its permit, it is liable for the results). For more information on enforcement, go to

<http://green-law.org/net/content/page.aspx?s=19506.0.101.19069>

Q3: What factors determine if an NPDES permit is needed for aquatic pesticide applications?

A3: The Clean Water Act (CWA) makes it unlawful to discharge a pollutant from a point source to waters of the US without an NPDES permit. Each of these underlined factors is legally defined and, for pesticides, has been the subject of

¹ Federal Insecticide, Fungicide and Rodenticide Act. See:
<http://agriculture.senate.gov/Legislation/Compilations/Fifra/FIFRA.pdf>

numerous court decisions. As a result of these decisions, applications of aquatic pesticides are considered “discharges,” the excess pesticides or residues that remain in the water after the product has performed its intended beneficial use are considered “pollutants,” the hoses, nozzles or airplanes that apply the pesticides are considered “point sources,” and the lakes, rivers, creeks and other jurisdictional waterbodies are “waters of the US.”

Q4: What have courts said about these four factors relative to pesticide applications?

A4: Several courts before the 6th Circuit have ruled on this subject. Their decisions focused on the four factors described in Q3:

- In 2001 the 9th Circuit in *Headwaters Inc. vs. Talent Irrigation District* [243 F.3d 526 (9th Cir. 2001)] ruled that pesticide residues remaining after the treatment of aquatic weeds in an irrigation canal were “chemical wastes” and when released to a water of the US were “pollutants” released from a “point source,” thus requiring an NPDES permit.
- In 2002, the 9th Circuit [*League of Wilderness Defenders, et al., v. Forsgren*. 309 F.3d 1181 (9th Circuit 2002)] ruled that the US Forest Service’s aerial application of insecticide to a forest canopy to control gypsy moths was a “discharge” from a “point source” and, assuming the applied insecticides that fell through the canopy into waters below would be “pollutants,” ruled that an NPDES permit is required.
- In 2002, the 2nd Circuit [*Altman v. Town of Amherst*. 47 Fed. Appx. 62, 67 (2nd Cir. 2002)] remanded a District Court decision holding that the Town of Amherst was not required to obtain an NPDES permit to spray mosquitocides over waters of the US, and urged EPA to resolve whether properly used pesticides can become pollutants.
- In 2005, the 9th Circuit [*Fairhurst v. Hagener*. 422 F.3d 1146 (9th Cir. 2005)] ruled that no NPDES permit was necessary for the MT Fish, Wildlife & Parks Department to apply a selective pesticide to a stream to eliminate pestilent fish as part of an effort to reestablish native trout because no “pollutant” residues remained in the river beyond the intended treatment period.

Q5: EPA’s 2007 aquatic pesticide rule was intended to clarify these policy issues and determine when pesticides could be classified as “pollutants.” What did that rule state?

A5: EPA’s promulgated final rule [71 Fed Reg 68.483 40 CFR Part 122. 11-7-07] sought to clarify that no NPDES permits were needed for pesticides when applied according to the EPA-approved FIFRA label. EPA ruled those pesticides were not “chemical wastes” or “pollutants” when applied directly “to,” or “over” including “near” waters of the US, where some of the pesticide could unavoidably enter waters of the US, on the basis that “they are products that EPA has evaluated and registered for the purpose of controlling target organisms, and are designed,

purchased, and applied to perform that purpose.” EPA also ruled that any excess pesticide or residues remaining in water beyond the intended treatment period are “nonpoint source pollutants,” for which no NPDES permit is required. Spray drift was not addressed by EPA’s rule.

Q6: On what basis did the 6th Circuit vacate that rule?

A6: On January 7, 2009, a 3-judge panel of the 6th Circuit [*Nat’l Cotton Council of Am. v. EPA*, No. 06-4630 *et seq.*, 2009 WL 30292 (6th Cir Jan. 7, 2009)] vacated EPA’s 2007 rule, stating that although pesticides when applied are not “pollutants,” NPDES permits are needed if any excess chemical pesticide or residues remain in the water after its intended use. The panel also concluded that all biological pesticides are, by definition, “pollutants.” The court rejected EPA’s argument that excess and residual pesticides resulting from application into, over, or near waters are “nonpoint source” pollution because there would be no “residue” or “excess” at the time the pesticide is discharged from the application equipment. The court said, but for the original pesticide application, there would be no residues or pollutants. So despite the time lag (a matter of seconds for some pesticide applications like mosquito adulticides, several days for many other pesticides) from application of pesticides until they became “pollutants,” the residues were discharged from a point source into waters of the US – and thus subject to NPDES permits. This “but for” test was a new and completely unique creation of the three-judge panel.

Q7: Congress has exempted from NPDES permitting agricultural stormwater runoff and return flows from irrigated agriculture. Were either of these affected?

A7: No, these remain exempted. In §402(I)(1), the CWA states, “*The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator, directly or indirectly, require any State to require such a permit.*” In §502(14), the CWA states, the term “*point source*” means *any discernible, confined and discrete conveyance...from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.*”

Q8: EPA didn’t challenge the rule, but asked for a stay – correct?

A8: EPA petitioned the court for a 2-year stay of the decision, during which the 2007 final EPA rule remains in effect, so that the Agency and States would have adequate time to develop and implement NPDES general permits for such pesticide applications. The stay will end in April, 2011.

Q9: What was industry’s response to the 6th Circuit decision?

A9: Industry’s request for an *en banc* rehearing by the entire court was denied. In early December, two *cert* petitions were filed with the Supreme Court. *CLA v. Baykeeper* was filed by CropLife America, RISE, BASF, FMC, Syngenta, Southern

Crop Production Association, and the Agribusiness Association of Iowa. *AFBF v. Baykeeper* was filed by the American Farm Bureau Federation, the American Forest & Paper Association, and the National Cotton Council. Amicus briefs were filed also by more than 30 organizations and 40 Members of Congress. The government's response is due early next year.

Q10: What is the scope of the 6th Circuit ruling if NPDES permits are required for all applications when pesticides enter and residues remain in waters of the US?

A10: While EPA is working to develop NPDES general permits for four aquatic pesticide uses, the potential scope of the 6th Circuit decision is much broader and will likely be resolved through lawsuits. NPDES permits may be required for:

- Control of weeds in and adjacent to canals, lakes and rivers
- Control of algae in canals and lakes
- Control of invasive fish, zebra mussels and other animal species
- Vegetation control along roads and highways
- Vegetation management along pipeline, railroad and electric transmission rights-of-way corridors
- Insect control in forest canopies
- Mosquito control in or over waters of US
- Golf course, park, and home & garden maintenance
- Aerial applications to crops grown in or adjacent to waters of US

Q11: What pesticide uses is EPA developing NPDES permits for?

A11: Currently EPA indicates it is developing general permits for:

- Pesticides used to control mosquitoes and other aquatic nuisance insects
- Aquatic weed and algae control pesticides used in and near waters, including canals and drainage systems
- Pesticides used in forestry programs for area-wide insect control
- Products applied to water to aquatic nuisance species (e.g., fish, mussels or other invasive aquatic species)

Q12: What are state-wide general NPDES permits, and how do they differ from NPDES permits issued to individual operations?

A12:

Q13: With the 2-year stay scheduled to end in April 2011, how is EPA working to have general permits by then?

A13: EPA's Office of Water (OW) is leading the effort to develop NPDES general permits, along with Office of Pesticide Policy (OPP) and Office of General Counsel (OGC). EPA also is consulting with other federal agencies, and has established task forces to help resolve policy issues with other Federal and State agencies. EPA will publish the draft general permits in April 2010 for public comments, and finalize the permits in December 2010. That will allow four months for communication and

outreach before the exemptions of the 2007 rule end with the Court's 2-year stay in April 2011.

Q14: Is EPA issuing a national general permit to replace its court-vacated 2007 rule?

A14: No, EPA's general permits will only apply to aquatic pesticide applications in MA, ID, NH, AK, and NM, Tribal lands, and US territories other than Virgin Islands.

Q15: What will be the status of pesticide general NPDES permits in the 45 other States?

Q15: Many States are working with EPA during its general NPDES permit development process and should also have their permits operational when the 6th Circuit's 2-year stay ends. EPA estimates that 26 States previously had some form of aquatic pesticide general permits that were developed as a result of earlier court decisions. Going forward, State general permit requirements must be at least as stringent as EPA's permit, and most will likely adapt EPA's model to their state-specific water quality requirements. Some States may produce general NPDES permits with much more stringent requirements than EPA's permits. Only waters of the US are covered by EPA and State NPDES permits.

Q16: What has EPA said about its expectations from the NPDES general permits?

A16: EPA reported in its October 7, 2009 nationwide webinar that it expects the permit to:

- Produce a database of pesticide treatments;
- Reduce applications to waters of US;
- Reduce applications to impaired and outstanding natural resource waters;
- Produce nationwide implementation of IPM and best management practices;
- Institute a system of post-application surveillance and immediate notification of adverse effects;
- Expand the scope for who must report adverse effects on aquatic ecosystems;
- Mandate applicator education and training

Q17: What entities are most likely to become NPDES permittees?

A17: Permittees are represented by two groups of entities: for-hire applicators of pesticides, and the decision-making organizations ("decision makers") that contract with the applicators. The decision-making entities could include:

- state agencies
- federal agencies
- municipalities
- water management districts
- mosquito control districts and health departments
- water resources control boards

- private companies
- utilities
- land owners

The for-hire pesticide applicators could be large or small organizations, and in some cases may be the decision-making entity itself (for example, the State of Delaware is responsible for mosquito control regulation as well as the actual pesticide treatment of mosquitoes. Thus it is the regulator and the permittee).

Q18: How would an entity gain coverage under a general NPDES permit?

A18: When issued by EPA or States, the state-wide general NPDES permit will have gone through public notice and comment, and the final permit posted on the agency’s website. Conditions for gaining coverage under the permit are also identified there. EPA has indicated that automatic coverage will be granted to many entities (primarily small organizations that are either for-hire applicators or decision makers, such as lakeside homeowner associations), assuming they comply with the terms of the permit. Municipalities and other large entities would gain coverage by submission of a Notice of Intent (NOI) to be covered if they exceeded, or expected to exceed, a threshold of pesticide application number or size. The NOI submission would be reviewed by EPA or State regulators, and the entity would be notified by mail of their coverage under the state-wide NPDES general permit. The notification process should be relatively short, perhaps 10 days, although EPA has indicated that its permit would allow emergency applications prior to submission of the NOI.

Q19: What information would be included in an NOI submission, and how often would they need to be submitted?

A19: EPA intends the NOI to be a source of data on who, what, when and where aquatic pesticides are to be applied. EPA has said that the NOI would be submitted at the start of the 5-year NPDES permit cycle, or annually, and could be updated as conditions listed in the NOI change. CLA has argued to EPA that only decision makers have the information needed to submit an NOI, and that for-hire applicators could be identified in the NOI submitted by the decision makers, or in periodic updates submitted electronically.

Q20: What’s likely to be included in an NOI submission?

A20: EPA has indicated the NOI will likely include:

- Contact information, entity description (i.e., agency, homeowner association, pesticide applicator);
- Type of discharge (forest canopy treatment, canal, etc.)
- Receiving stream(s) for which permit coverage is intended (anticipated during the period of the permit)
- Updated NOI information will be needed if operations differ from those identified in NOI. This can be submitted electronically.

Q21: Would NOI-submitting entities have different compliance responsibilities than those automatically covered by the general permit?

A21: EPA has indicated that NOI-submitting entities will likely have different planning, recordkeeping and reporting responsibilities than those smaller entities or for-hire applicators that don't have to submit an NOI because they fall below thresholds EPA plans to establish for segregating permittees. Those thresholds haven't been identified yet by EPA, although they are likely to include pesticide application frequency or size of treated area. CLA has suggested several thresholds to EPA for various aquatic pesticide treatment scenarios.

Q22: Has EPA indicated if general permits might be denied in some circumstances?

A22: Yes, the Agency has said an entity must obtain an individual (not general) NPDES permit for (a) pesticide applications to Tier 3 waterbodies, such as "Outstanding Natural Resource Waters" (ONRWs); (b) pesticide applications to waterbodies listed as impaired under § 303(d) "for that pesticide for any reason;" and (c) other uses not covered by one of the four general permits EPA is developing. This is an important distinction, for unlike obtaining coverage under a state-wide general permit automatically or simply by asking to be covered, obtaining an individual permit is generally a time-consuming, costly process in which an individual entity (and its attorneys) negotiates permit conditions with EPA or State regulators and the general public. No pesticide applications may be made to these areas until an individual permit is issued. This costly delay can be a significant obstacle for municipalities and others responsible for maintaining control of pests located on, over or near ONRWs (for example, control of brush, weeds and trees in utility or pipeline rights-of-way, roads or railroads that may pass through remote or mountainous regions where ONRWs may be encountered), § 303(d)-listed waters (for example, for control of adult mosquitoes with an insecticide over or near a waterbody that is listed as impaired due to nearby agricultural or horticultural use of the same insecticide). An individual permit may also be required simply because a state-wide general NPDES permit is not available for the intended uses. This could occur especially immediately after the 2-year stay granted by the 6th Circuit ends in April 2011 if (a) EPA can't complete its general permits in time (EPA must conduct § 7 Endangered Species consultations with Services² on hundreds of aquatic pesticides before it can issue its general NPDES permits; or (b) States don't complete their work on state-wide general NPDES permits (many states are simply watching EPA's efforts and will begin their 12- to 18-month process after EPA publishes its draft permit in 2010).

Q23: What technical performance requirements are likely to be included in EPA's general NPDES permit?

A23: The CWA requires NPDES permits to include requirements to implement technology-based effluent limits (TBELs). EPA has indicated its NPDES general

² US Fish & Wildlife Service, and National Marine Fisheries Service

permit's requirement for use of Best Available Technology will include much more than just the basic requirement to comply with the FIFRA product label. These will be based on: (a) professional BMPs (such as proper maintenance and calibration of application equipment, mixing and loading of pesticides, spill prevention and clean up, and disposal of properly rinsed containers), (b) requirements added by the Services as part of the ESA § 7 consultation, and (c) principles of Integrated Pest Management (IPM). The IPM requirements may vary for those intended for permits of decision makers versus those of for-hire applicators. They are intended to collectively minimize pesticide applications to water, such as:

- Use lowest amount of pesticide necessary;
- Consider non-chemical alternatives, such as biological or mechanical control;
- Consider if source reduction/habitat modification may significantly reduce pests without pesticides; and
- Identify/assess pest problem (locate breeding sites, know pest biology, set action thresholds, conduct pest surveillance).

Many of these will likely be requirements for NPDES general permits of decision makers rather than for-hire applicators (e.g., consideration of alternatives to pesticides, or modification of habitat).

Q24: What water quality effluent limits will be included in the NPDES general permit?

A24: The CWA requires NPDES permits to include water quality based effluent limits (WQBELs), including that pesticide applications must be made so that the residues in the water after the intended treatment ends will meet all applicable water quality standards (WQS). When issued by States, general NPDES permits will be tailored to state WQS, including narrative standards such as “no toxics in toxic amounts.” CLA has pointed out to EPA that the CWA allows reliance on TBELs’ Best Available Technology when numeric WQS are infeasible, which is the situation with potential residues following treatments.

Q25: Is EPA considering a requirement for monitoring?

A25: EPA has stated its NPDES general permit will require some form of monitoring. One form would be visual surveillance monitoring during and after pesticide treatment to look for adverse effects (e.g., visibly stressed or dead non-target organisms). EPA suggests this could be typically done during routine efficacy monitoring, either by the applicator or the decision maker. Analytical analysis of water samples before and after the intended treatment period to determine compliance with WQS is also under consideration in some circumstances. CLA has pointed out to EPA the tremendous costs, lost time and income, and difficulty of post-application monitoring. Even visual surveillance will be difficult when pesticide application is made aerially over large expanses of forests or waterbodies, where access and the sheer size of the treated area are considered.

Q26: If adverse incidents are observed, what will permittees have to do?

A26: EPA has indicated that adverse incidents must be identified and mitigated, although such mitigations are at present undefined. In addition, the general NPDES permit will require permittees (either the applicator or decision maker) to report the incident within 24 hours, detailing the incident and corrective actions taken and the results. Local agencies may also need to be alerted if the incident could affect water supplies outside the treatment area. A written report is to follow the verbal report within 24 hours. EPA has indicated that the written report must include a certification that the incident did or did not include a violation of the FIFRA label. All reports of adverse incidents would become public documents when submitted.

Q27: Are annual reports also required?

A27: EPA has indicated that NOI submitting entities (decision makers or pesticide applicators) must submit an annual report by February 15th that updates the submitted NOI with names of pesticides used and associated EPA registration numbers, quantity applied, pests targeted, and what waterbodies were treated. These annual reports will be available to the public.

Q28: Will all permittees have the same recordkeeping requirements?

A28: EPA has indicated the records required under the NPDES general permit will vary by the type of permittees (whether an NOI submission is necessary for general permit coverage). Those distinctions are likely to include:

- (a) Submitted to EPA/State by NOI filers:
 - Copy of NOI (made public);
 - Copy of acknowledgment letter for NOI (made public);
 - Copy of the pesticide general permit (made public);
 - Copy of any reports including corrective actions for adverse incidents (made public).
- (b) Kept on-site by permittees submitting NOIs:
 - Application plan
 - Pesticide application logs
 - IPM documentation
 - Copy of reports and all corrective actions submitted to EPA/States
- (c) Kept on-site by permittees not submitting NOIs:
 - Records of compliance

Q29: What are some of the most problematic issues facing permittees?

A29: There are a large number of potential problems emerging from a nationwide general NPDES permit as outlined so far by EPA. Like the States who are waiting to see EPA's draft permit, we will need to wait for the April 2010 publication to know how it will affect us. From discussions and meeting with EPA to date the following concerns have emerged:

- FIFRA label enforcement through CWA, plus numerous unnecessary additional requirements that add difficulty and costs, perhaps without additional natural resource protections;
- Meeting expectations for IPM use (e.g., “consider non-chemical alternatives” or “use lowest amount necessary;”
- EPA’s consultation with the Services may continue to be problematic, add burdensome ESA requirements, introduce costly delays in NOI approval, and require individual permits in many more situations than EPA envisions;
- Difficulty and costs to meet monitoring requirements;
- State permits may be more stringent than EPA’s permits;
- Implications for future changes to general NPDES permits of Congressional debate over increased CWA scope (“waters of the US”);
- Possible “near” waters of US regulation of terrestrial pesticide use (e.g., aerial pesticide applications to crops near streams, creeks, wetlands);
- Costs of defending against nuisance citizen suits that surely will arise.

Q30: What is industry doing during this NPDES general permit development period?

A30: CLA and RISE are working to help EPA assess the policy and economic implications of the concepts it has advanced, provided industry demographics and cost estimates, and raised to the Agency the concerns of our members and allies. For this we have assembled a team of experts on policy, legal options, state affairs, and communications, and developed numerous documents like this Q&A to help allies and other stakeholders, Members of Congress, and others gain a better understanding of the dynamics of the process and likely outcome. Don’t hesitate to contact us for more information.