

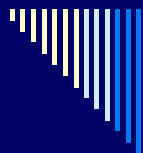
Idaho Weed Control Association

Idaho Weed Conference

NPDES Pesticides General Permit Update

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February 1, 2012

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The CWA NPDES Permit Program

- Purpose of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” (33 U.S.C. § 1251(a))
- NPDES = “National Pollutant Discharge Elimination System” (33 U.S.C. § 1342)
- Requires the application for, and receipt of, an NPDES permit prior to the “point source” discharge of “pollutants” to “navigable waters” or “waters of the United States.” (33 U.S.C. §§ 1311(a); 1342; 1362(14))



The CWA NPDES Permit Program (cont'd)

- Pollutants are “dredged spoil, solid waste, incinerator residue, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” (33 U.S.C. § 1362(6))
- The foregoing statutory list is not exhaustive, and the term is to be interpreted broadly. (*Rapanos v. United States*, 547 U.S. 715, 724 (2006))
- Point sources are any “discernible, confined, and discrete conveyance . . . from which pollutants are or may be discharged.” (33 U.S.C. § 1362(14))



The CWA NPDES Permit Program (cont'd)

The NPDES Permit program constitutes an exception to the CWA's prohibition against pollutant discharges into the Nation's waters. Consequently, if a person obtains a permit, the discharge of pollutants in accordance with the permit is lawful. Conversely, point source discharges of pollutants to waters of the United States absent a proper permit is punishable by criminal and civil penalties, including fines up to \$37,500 per day for negligent discharges, and more in cases of “knowing discharges” or cases of “knowing enlargement.”



Citizen Suit Provision

Essentially deputizes the public-at-large and authorizes them to bring suit against alleged violators of the CWA, including the EPA. Public citizens may also obtain the costs and fees expended if they prevail in the enforcement action.
(33 U.S.C. § 1365)



Exceptions

The NPDES program does contain various statutory exceptions, including the Agricultural Return Flow Exemption.
(33 U.S.C. §§ 1342(l)(1))

The agricultural return flow exemption covers/excuses permitting requirements for discharges “composed entirely of return flows from irrigated agriculture.”



Irrigation Facilities = Waters of the U.S.?

“Yes”

Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001): interconnected tributaries of waters of the United States.

Rapanos v. United States, 547 U.S. 715 (2006): “significant nexus.”

Joint Guidance of EPA and the Army Corps of Engineers (June 2007): perplexing in that it excludes CWA jurisdiction over “ditches,” but extends jurisdiction over non-navigable waters that flow “year-round” or have continuous flow at least seasonally (e.g., typically three months).”



The Pesticides General Permit

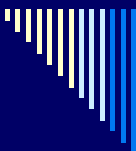
- How did we get here?
- What is it?



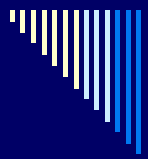
How Did We Get Here?

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

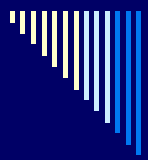
Aquatic herbicide residue constituted a “chemical waste” (*i.e.*, a “pollutant” under the CWA), and the point source application (*i.e.*, “discharge”) of aquatic herbicides requires an NPDES permit for discharges to waters of the United States. Application in accordance with the herbicide’s FIFRA label did not obviate the need for an NPDES permit.



While FIFRA and the CWA are complimentary in that they are both designed to protect the environment, the CWA is designed to protect water specifically on a local, case-by-case (NPDES Permit) basis.

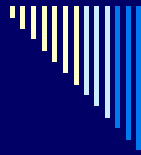


“FIFRA registration is a cost-benefit analysis that no unreasonable risk exists to man or the environment taking into account the economic, social and environmental costs and benefits of the use of any pesticide . . . In contrast, the granting of an NPDES Permit under the CWA is not based on a cost-benefit analysis, but rather on a determination that the discharge of a pollutant satisfies the EPA’s effluent limitations, imposed to protect water quality.”



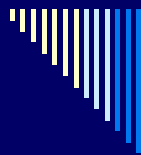
➤ *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002)

Aerial application of insecticides that includes drift and indirect deposition of the insecticide into waters of the United States constitutes a “point source” discharge requiring an NPDES permit. *Forsgren* did not specifically consider whether insecticides constituted “pollutants” under the CWA, the court simply assumed they were.



- *Fairhurst v. Hager*, 422 F.3d 1146 (9th Cir. 2005)

The intentional application of insecticides/ herbicides to waters of the United States, in compliance with the applicable FIFRA label, and that do not produce any lingering residue, degradate, or unintended effects is not the discharge of a pollutant under the CWA. Therefore, no NPDES permit is required. A pesticide/herbicide in its application state performs a beneficial and useful purpose; it is not “waste.”



EPA’s Aquatic Pesticide Rule (January 26, 2007)

Expressly exempted the application of aquatic pesticides from NPDES permitting requirements provided that the pesticide was applied in compliance with the applicable FIFRA label. The rule specifically addressed:

- (1) the direct application of pesticides to water; and
- (2) the application of pesticides to control pests present over or near water (*i.e.*, inevitable drift deposition).



EPA's Aquatic Pesticide Rule (con't)

The rule was predicated upon EPA's opinion that pesticides applied in accordance with their FIFRA labels were beneficial compounds, not wastes. Therefore, pesticides could not be considered "pollutants" under the CWA. Moreover, leftover pesticide residue from FIFRA label compliant applications did not trigger NPDES permit requirements because the left over residue did not exist at the time of point source discharge . . . only beneficial pesticide was point source discharged, the residue formed later in time, thereby constituting an NPDES program exempt non-point discharge.



EPA's Aquatic Pesticide Rule (con't)

- *Nat'l Cotton Council v. EPA*, 553 F.3d 927 (6th Cir. 2009)

"NOT SO FAST MY FRIENDS"

The EPA's Aquatic Pesticides Rule was not a reasonable interpretation of the CWA, and the court vacated EPA's final rule without addressing arguments regarding the relationship between the CWA and FIFRA.



EPA's Aquatic Pesticide Rule (con't)

- Though a 6th Circuit opinion, *National Cotton Council* applies across the board as the result of the consolidation of similar appeals in 11 circuit courts.
- The environmental petitioners argued that:
 - EPA exceeded its authority in deciding that pesticides were not “pollutants”;
 - EPA exceeded its authority in deciding that pesticide residue stemming from point source pesticide applications amounts to a non-point source discharge; and
 - FIFRA labeling does not preempt CWA jurisdiction.



EPA's Aquatic Pesticide Rule (con't)

- The court concluded:
 - Not all chemical pesticides are “pollutants” under the CWA—only those that leave a residue behind after performing the function for which it was applied; pesticides that leave no residue are not, and cannot be, “chemical wastes”;
 - Excess chemical pesticide (that beyond which is necessary to perform the desired function) and pesticide residue are “chemical wastes” (*i.e.*, “pollutants”) under the CWA, thereby triggering NPDES permit requirements for application;



EPA's Aquatic Pesticide Rule (con't)

- NPDES permit requirements can be triggered by: (1) the indirect (drift) deposition of excess pesticide or pesticide residue into jurisdictional waters; and (2) the direct application of excess pesticide or pesticide residue to jurisdictional waters;
- Biological materials-based pesticides and their residues are always “pollutants” triggering NPDES permitting requirements because “biological materials” are “pollutants” under the Act;



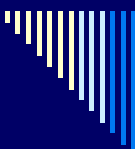
EPA's Aquatic Pesticide Rule (con't)

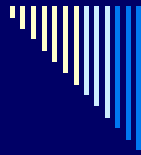
- Pesticide residues constitute point source discharges of pollutants; the CWA does not inject any temporal/timing requirements . . . the pesticide residues would not exist but for the initial point source discharge (application) of the pesticide residue precursor. EPA's timing contention is an artificial distinction that finds no support in the plain statutory language.



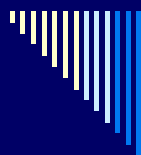
EPA and the Pesticide General Permit (“PGP”) What Is It?

In response to the *National Cotton Council* court’s vacating of its 2007 Aquatic Pesticides Rule, the EPA drafted, and released for public review and comment, an NPDES general permit governing the application of pesticides to waters of the United States (both direct and indirect application).

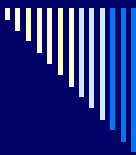
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- The PGP is an NPDES permit covering the application of aquatic pesticides in states (like Idaho) where EPA is the NPDES permitting agency.
 - Delegated states (those with NPDES program primacy) must enact their own permits/programs.
 - The EPA PGP regulates and authorizes the discharge of pesticide pollutants (residues, excess application, biological materials) to jurisdictional waters either through direct intentional application, or indirect drift (aerial application or nearby applications).

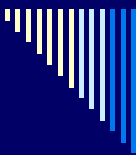


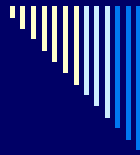
- The PGP covers four pesticide use/application patterns:
 - Mosquito and other flying insect pest control;
 - Aquatic weed and algae control;
 - Aquatic nuisance animal control; and
 - Forest canopy pest control.



- The PGP does not authorize coverage for either:
 - (1) the discharge of pesticides or their degradates to jurisdictional waters already impaired by the specific pesticides or degradates sought to be used; or
 - (2) discharges to outstanding national resource waters. These types of discharges require one to obtain a separate NPDES permit independent of the PGP.
- The PGP does not alter the need to continue to apply pesticides in accordance with their FIFRA labels.

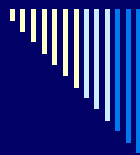
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- EPA accepted public comment on the draft PGP through July 19, 2010. The agency received approximately 750 sets of comments. If you are interested, the public comments can be viewed or downloaded at: www.regulations.gov, and then entering the PGP docket number: EPA-HQ-OW-2010-0257.

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- To be clear, the PGP does regulate discharges from pesticide/herbicide applications near jurisdictional waters (*i.e.*, ditch bank and ditch road weed control). Though EPA has not expressly defined the term “near,” the PGP is intended to cover discharges where drift or overspray into jurisdictional waters is “unavoidable.”
 - The PGP is not intended to regulate pesticide application to agricultural crops or forest floors. However, if such applications (*i.e.*, discharges) do threaten discharge to jurisdictional waters, such a discharge would be regulated and require a permit.

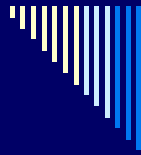


- “Operators” are those who are responsible for obtaining permit coverage. “Operators” are those who either: (1) control the financing for, or the decision to perform the pesticide applications (basically, the decision-makers who direct/order the application in the first place); or (2) the entity that has day-to-day control of the application area, or who performs on-the-ground oversight ensuring permit compliance.
- Both groupings of individuals need to file NOIs for coverage under the PGP if those people/entities who make up the groups are different from one another.

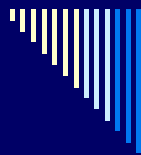
See 40 CFR § 122.2.



- Operators who know, or who reasonably should have known that their pesticide application activities will exceed one or more of the annual (calendar year) treatment area thresholds (as described in Part 1.2.2 of the PGP), must submit an NOI for PGP coverage. Those who otherwise meet the definition of “operators,” but whose applications do not exceed annual threshold levels are automatically covered by the PGP and need not submit an NOI.
- For-hire applicators (contractors) may need to file an NOI. For-hire applicators need to file an NOI when their total treatment area not already covered by another NOI, will exceed annual treatment area thresholds.



- When the PGP is finalized, EPA will implement an electronic (online) NOI application process similar to that which already exists with respect to the NPDES Construction General Permit. The NOI process will be available at the PGP general webpage: www.epa.gov/npdes/pesticides.
- The NOI contains information regarding the operator, and an overview of the treatment activity and locations. The NOI also requires the identification of impacted jurisdictional waters (which puts irrigation entities in an uncomfortable position . . .).
- By signing and submitting an NOI, the operator is certifying the accuracy and completeness of the information submitted.



- Application activities that will exceed threshold levels cannot occur until after EPA has posted its confirmed receipt of the underlying NOI via the internet. At present, EPA anticipates that NOI filing operators will be able to discharge no later than 10 days after posting of EPA receipt confirmation.
- Discharges under declared pest emergency situations are immediately covered, though operators are still required to submit an NOI. However, emergency applications can be covered by NOIs submitted after-the-fact (up to 30 days after the application of pesticide).
- Those operators who will not exceed PGP threshold treatment area requirements are authorized to apply upon the effective date of the PGP.



The Annual Treatment Area Thresholds

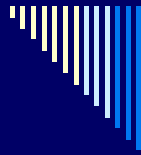
- Are cumulative, not application-by-application based;
- Measured by calendar year (365 days);
- Equal up to 640 acres for aerial pest control (both mosquito and forest canopy applications); and
- Equal up to 20 linear miles for aquatic weed, algae, and nuisance animal control at water's edge, and up to 20 acres in direct water treatment.

Cumulative applications within the same calendar year that exceed these thresholds requires coverage under the PGP.

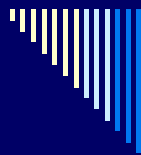


Simple Submission of an NOI Is Not the End of the Story

- Operators who exceed annual treatment area thresholds must also:
 - Implement integrated pest management practices (IPM);
 - Develop a Pesticide Discharge Management Plan;
 - Submit annual reports to EPA;
 - Maintain records of pest control practices; and
 - Sliding scale based upon operator "size."



- The foregoing suite of documentation and record keeping largely amounts to the development of Best Management Practices (BMPs) designed to effectively combat the target pest, while also minimizing the application/discharge of pesticide to effectuate the desired level of control. IPM practices include identifying and assessing the particular pest problem, considering and assessing the viability of pesticide application alternatives, and developing/following appropriate protocols for pesticide application.
- According to EPA, however, the PGP draft economic impact analysis predicts that PGP permit requirement burdens imposed upon covered entities and small business to be “minimal.”



- At present, the PGP does not require operators to monitor ambient water quality. Instead, operators are only required to conduct visual monitoring of application activities and effects within jurisdictional waters. Upon visual inspection, operators are required to immediately notify EPA of any observed “adverse incidents”; instances where a non-target organism or person suffers a “toxic or adverse effect” (effects not expected or otherwise described on the pesticide label, or adverse impacts to humans or local domesticated animals).
- EPA is, however, reserving the right to impose water quality monitoring requirements as it evaluates the effectiveness of the current PGP program.



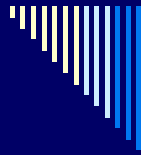
Failure To Secure Permit Coverage, or to Follow Permit Terms

- Civil and criminal penalties up to \$37,500 per day; and
- Citizen suit exposure.

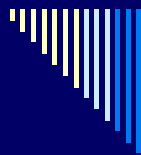


What About the Agricultural Return Flow Exemption?

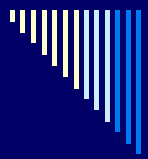
- According to EPA, the discharge of agricultural runoff and irrigation return flows that contain pesticides or pesticide residues to jurisdictional waters still does not require an NPDES permit. However, how can this be reconciled with the fact that the PGP expressly regulates the application of pesticides/herbicides into, above, or near water?



- The PGP expressly contemplates ditch bank and in-channel applications despite the existence of the CWA's agricultural return flow exemption; a statutory exemption not challenged by the court in *National Cotton Council*. This is particularly perplexing because of the CWA's citizen suit provision. Even if EPA were to take a relaxed approach to agricultural/irrigation entity oversight and enforcement (which is unlikely to begin with), whatever approach EPA may take has no bearing upon separate citizen suits, which will certainly seek utmost compliance with the CWA.



- OMB was expected to, and did, issue its final clearance of the Permit on October 31, 2011.
- 120-day enforcement stay and automatic coverage.
- PGP is in full force and effect by early January 2012 (Jan. 12, 2012).
- Post-January 12, 2012 coverage requires NOI.



**For Further Information or
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