

ADVISORY

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EPA Implements NPDES Permitting Program for Pesticide Uses Near U.S. Waters

INTRODUCTION

Following years of negotiations, litigation, and court orders, EPA recently released a final general permit governing the use of pesticides in and near lakes, rivers, and other navigable waters. As of October 31, 2011, farmers, forest managers, and public land administrators, who previously had no Clean Water Act (CWA) permit obligations, must now obtain a permit under the National Pollutant Discharge Elimination System (NPDES) program in order to apply pesticides to areas near U.S. waters. EPA estimates that the new permit requirements will add an additional 365,000 pesticide applicators and more than double the total number of permittees under the NPDES program. In those areas in which EPA holds NPDES permitting authority, EPA's general permit applies.¹ The other 90% of applicators across the country seeking coverage must obtain a general or individual permit via their state's EPA-authorized permitting authority.

BACKGROUND

In 2009, in *National Cotton Council v. EPA*,² the Sixth Circuit Court of Appeals invalidated EPA's contentious rule of exempting the discharge of pesticides from the CWA's § 402 NPDES program when those discharges occurred in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).³ In vacating EPA's rule, the Court in *National Cotton* held that the definition of "pollutant" found in the CWA unambiguously includes point source discharges of biological pesticides as well as chemical pesticides that leave a residue. To allow EPA and the states time to develop and issue appropriate general permits, the Sixth Circuit granted EPA's request to stay the decision until April 9, 2011. That stay was later extended to October 31, 2011.

In June 2010, in compliance with the *National Cotton* decision, EPA released a draft general permit for notice and comment.⁴ EPA released its final general permit on October 31, 2011.⁴

EPA'S FINAL PERMIT FOR PESTICIDE APPLICATIONS

EPA's final general permit covers the discharge of biological pesticides and chemical pesticides that leave a residue⁵ to U.S. waters in four categories of use patterns. Those categories include:

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(1) control of mosquitoes and other flying insect pests present in or above standing or flowing water; (2) aquatic weed and algae control, including in certain ditches and canals; (3) control of aquatic pests, such as fish, lampreys, insects, pathogens, and mollusks; and (4) applications to forest canopies overlying U.S. waters. The general permit also defines "operators" as either (1) an "applicator," which is anyone "who performs the application of a pesticide or who has day-to-day control of the application (i.e., they are authorized to direct workers to carry out those activities);" and (2) the "decision-maker," which is anyone "with control over the decision to perform pesticide applications including the ability to modify those decisions." Accordingly, a single discharge could create NPDES permit compliance obligations for more than one "operator." While the general permit assigns particular roles for each of these "operator" types, it does not preclude the possibility that an "operator" can act both as an "applicator" and a "decision-maker" and, therefore, be obligated to comply with all applicable requirements imposed on both types of "operators."

Generally, under the permit, "applicators" and the "decision-makers" are each assigned tasks related to the use of technology-based effluent limitations and other pest management measures in order to minimize pesticide discharges. Permittees are also obligated to monitor for and report any adverse incidents, maintain records, develop and implement corrective action procedures, and submit periodic reports to EPA on where, when, and how much pesticides are being discharged to waters of the U.S. In addition, some permittees are required to submit a Notice of Intent before beginning a discharge as well as to implement integrated pest management-like practices. Additional details and explanations related to the new permitting requirement, including the types of parties that are likely to fall into the above use categories, are available in EPA's Federal Register notice of the final permit⁶ and in EPA's fact sheet accompanying the permit.⁷

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If you require assistance interpreting the new regulations or obtaining a permit, please contact your attorney at Sullivan & Worcester or one of the attorneys listed in this advisory.

¹ Generally, EPA holds NPDES permitting authority in Alaska, Idaho, Massachusetts, New Hampshire, New Mexico, and Oklahoma, as well as Washington, D.C., most U.S. territories and tribal lands, and many federal facilities. *See* Pesticide General Permit (PGP) for Discharges From the Application of Pesticides, Appendix C – Areas Covered (and NPDES Permit Numbers), available at http://www.epa.gov/npdes/pubs/pgp_appc.pdf.

² 553 F.3d 927 (6th Cir. 2009).

³ FIFRA is the federal law that governs the labeling and use of pesticides. 7 U.S.C. § 136 et seq.

⁴ *See* Pesticide General Permit (PGP) for Discharges From the Application of Pesticides, available at http://www.epa.gov/npdes/pubs/final_pgp.pdf.

⁵ Absent evidence to the contrary, EPA's general permit presumes that all chemical pesticides leave a residue. EPA's Fact Sheet accompanying the general permit provides guidance on the use patterns of chemical pesticides that are covered by the permit. *See* http://www.epa.gov/npdes/pubs/pgp_final_factsheet.pdf.

⁶ EPA's Federal Register notice announcing the final general permit. *See* http://www.epa.gov/npdes/pubs/pgp_final_registernotice.pdf.

⁷ EPA's Fact Sheet accompanying the general permit. *See* http://www.epa.gov/npdes/pubs/pgp_final_factsheet.pdf.

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