

Disclaimer

NOTICE: This document is for informational purposes only. The information contained herein is based upon the pre-publication version of EPA's draft final Pesticide General Permit, and is subject to change upon finalization of the PGP.

Questions and Answers
Pre-publication Version of EPA's Draft Final NPDES Pesticide General Permit (PGP)
April 1, 2011

General

1. Why is EPA posting a draft version of its final permit on its website?

The Agency is posting a pre-publication version of a draft final permit to guide states in developing their own permits and to allow an opportunity for the regulated community to become familiar with these requirements before the permit becomes effective.

The Agency has completed interagency review on the terms of this pesticide general permit other than any additional or revised conditions that may result from Endangered Species Act (ESA) consultation with the federal resource agencies, which is currently underway. This posted version of the permit does not reflect any potential additional terms or conditions of the permit that may be incorporated or changed as a result of ESA consultation. Terms resulting from ESA consultation may be added to this posted version of the permit when the final permit is issued. Since states are not generally required to perform ESA consultation to issue their permits, this preview of the draft final permit will provide states with a complete picture of EPA's "pre-ESA consultation" permit requirements that may be used as a model to develop state permits.

To be clear, the final PGP may include additional or revised permit conditions following EPA's ongoing ESA consultation. Posting this pre-publication version is not a final agency action, and the PGP is subject to change before finalization.

The pre-publication version of the draft final permit can be found at:
www.epa.gov/npdes/pesticides.

2. Why are NPDES permits required for pesticide applications?

Section 301(a) of the Clean Water Act (CWA) prohibits any point source discharge of a pollutant to waters of the United States unless the discharge is in compliance with certain sections of the Act. Point sources are defined as "discrete conveyances including but not limited to any pipe, ditch, channel, or conduit from which pollutants are or may be discharged." One way a person may discharge a pollutant without violating the section 301 prohibition is by obtaining authorization from EPA to discharge under a section 402 National Pollutant Discharge Elimination System (NPDES) permit.

The requirement to obtain NPDES permits for point source discharges from pesticide applications to waters of the U.S. stems from a recent decision by the Sixth Circuit Court of Appeals. In its ruling in January, 2009 on *National Cotton Council, et al. v. EPA*, the Court vacated EPA's 2006 rule that said NPDES permits were not required for applications of pesticides in, over or near U.S. waters when in compliance with the FIFRA label, and determined

that pesticides are pollutants. Thus, point source discharges to waters of the U.S. from the application of pesticides will require NPDES permits when the court's mandate takes effect.

3. When will NPDES permits be required for pesticide applications?

NPDES permits will be required for discharges to U.S. waters from pesticide applications beginning on October 31, 2011.

To provide background, the U.S. Department of Justice (DOJ) filed on April 9, 2009, on behalf of EPA, a motion to stay the issuance of the Court's mandate in order to provide EPA and NPDES-authorized states time to develop, propose, and issue final NPDES permits, and to provide outreach and education to the regulated community. The Court granted a two year stay, which meant that the mandate would issue on April 9, 2011 (i.e., NPDES permits would be required for discharges from pesticide applications beginning on that date). A second motion to stay the mandate until October 31, 2011 was filed on March 3, 2011, which was granted by the Court on March 28, 2011. Thus, NPDES permits are not required for pesticide applications to U.S. waters until October 31, 2011.

4. Who issues NPDES permits for pesticide applications?

EPA is the NPDES permitting authority in those areas where states, territories, and tribes are not authorized to administer the NPDES program. For discharges to waters of the U.S. from pesticide applications, EPA is the authorized NPDES permitting authority in the following areas:

- Alaska
- Idaho
- Massachusetts
- New Hampshire
- New Mexico
- Oklahoma
- Washington, D.C.
- all U.S. territories except the Virgin Islands
- most Indian Country lands
- federal facilities in four additional states:
 - Colorado
 - Delaware
 - Vermont
 - Washington

A detailed list of the areas where EPA is the NPDES permitting authority is available at: http://www.epa.gov/npdes/pubs/pgp_geographic_coverage.pdf.

The remaining 44 states (and the Virgin Islands) are authorized to administer the NPDES permitting program and as such are responsible for developing and issuing their own state NPDES pesticide permits. EPA has been and will continue working closely with those states to develop their permits.

5. Are state permits required to be the same as EPA’s Pesticide General Permit?

EPA’s Pesticide General Permit (PGP) lays out the appropriate permit conditions necessary to meet the CWA and NPDES regulatory requirements for controlling discharges of pesticides resulting from the application of pesticides to U.S. waters. The permit includes both technology-based effluent limitations and water quality based effluent limitations. Since there are no national effluent limitation guidelines for such discharges, EPA developed the permit effluent limitations based on Best Professional Judgment necessary to meet the requirements of the CWA. State permit writers are to evaluate information specific to the activities and areas covered under their state permits and in many instances, a state may determine that different requirements are appropriate in their state to meet the CWA and NPDES requirements.

6. Which pesticide application activities are covered under the draft version of the final PGP?

As a result of the Court’s decision, NPDES permits will be required for any discharge of a pollutant to waters of the U.S. resulting from the application of a pesticide. This includes discharges from entities such as irrigation and mosquito control districts, certain Federal, State, and local governments, farmers, and for-hire applicators. Discharges resulting from agricultural stormwater or irrigation return flow are exempt from NPDES permit requirements under the Clean Water Act.

EPA is developing an NPDES Pesticide General Permit (PGP) in response to the Court’s decision in order to specify the conditions under which pesticide discharges to waters of the U.S. can be authorized in areas where the Agency is the permitting authority. This version of the PGP would cover “operators” who apply pesticides to waters of the U.S., from the following pesticide use patterns: (1) mosquito and other flying insect pest control; (2) weed and algae control; (3) animal pest control; and (4) forest canopy pest control.

NPDES-authorized states may choose to regulate additional use patterns under their general permits.

Extension Request

7. Why did EPA request an extension of the Court’s April 9, 2011 date?

The request for the extension was made in order to allow time for EPA to complete Endangered Species Act (ESA) consultation on its general permit and develop an electronic database to

accept notices of intent for coverage under the PGP. It also allows time for NPDES-authorized states to finish developing their state permits and for permitting authorities to provide additional outreach to stakeholders on pesticide permit requirements.

8. How do states fit into EPA's extension request? Does such an extension of the stay apply to all states "automatically"?

Discharges that result from pesticide applications affected by the Court's decision, whether they are to be covered under an NPDES permit issued by EPA or by an NPDES-authorized state, would not need NPDES coverage until the stay expires on October 31, 2011.

EPA's Pre-publication Version of the Draft Final Permit

9. What is ESA consultation and how could it potentially impact the final PGP?

The ESA requires federal agencies, such as EPA, to ensure—in consultation with the U.S. Fish and Wildlife Service and National Marine Fisheries Service (i.e., the Services)—that any action authorized, funded or carried out by such agencies is not likely to jeopardize the continued existence of species determined by the Services to be threatened or endangered, or result in the destruction or adverse modification of their critical habitat. The final PGP may differ from its current form as a result of consultation. For example, if the Services find that issuance of EPA's PGP, as drafted, would be likely to jeopardize the continued existence of threatened or endangered species or lead to destruction or adverse modification of their critical habitat, EPA may modify the terms of the PGP to eliminate the likelihood of such jeopardy or adverse modification of habitat.

Federal law generally does not require states to conduct ESA consultation on their pesticide general permits.

10. When does EPA anticipate concluding ESA consultation?

Any permit conditions that EPA determines should be incorporated into the PGP as a result of the consultation process will undergo interagency review. EPA expects formal ESA consultation to be completed shortly after interagency review and prior to the permit's anticipated publication date of July 30, 2011.

11. When does EPA anticipate publishing the final PGP?

As provided in EPA's 2nd Motion to Stay the Mandate, EPA plans to publish (i.e, issue) the final permit by July 30, 2011, with an effective date of October 31, 2011.