

Pesticide & Chemical POLICY

Quote of the Week:

“EPA has done a really good job making the best out of a bad situation, but there is widespread frustration because we shouldn’t be doing this.”

— Steve Dwinell, chair, State FIFRA Issues Research and Evaluation Group, on Clean Water Act permits for pesticide applications (see Page 1)



Weekly report on pesticides, toxic substances and general issues of regulation and legislation

EPA meets court deadline for pesticide general permit, industry still keen on legislative fix

By J.R. Pegg

EPA released its final National Pollutant Discharge Elimination System (NPDES) pesticide general permit on Monday, meeting its Oct. 31 court-ordered deadline for launching the controversial permitting regime.

The permit is the culmination of more than a decade of controversy and confusion about whether pesticides should be regulated under the Clean Water Act’s NPDES program, which requires permits for point source discharges of pollutants into lakes, rivers and other waterways.

EPA was required to develop the permit by a January 2009 court ruling from the 6th Circuit Court of Appeals. The court vacated EPA’s 2006 aquatic pesticides rule, concluding that pesticide residues

and biological pesticides are pollutants subject to the NPDES program.

The court ruling was a major blow for the pesticide industry and agricultural groups, who argue that FIFRA labels provide restrictions on pesticide use needed to safeguard human health and the environment, including waters protected by the Clean Water Act.

Congress “never intended” for the intersection of the Clean Water Act and FIFRA, says Beau Greenwood, executive vice president of CropLife America. “States will now be forced to implement and enforce duplicative regulations of pesticides, and divert limited resources from programs with an environmental benefit to a burdensome paperwork requirement for certain aquatic pesticide applications.”

Many state agencies agree with that sentiment, according to Steve Dwinell,

assistant director of the Florida Dept. of Agriculture and Consumer Services’ Division of Agricultural Environmental Services.

“The whole thing is absurd,” says Dwinell, chair of EPA’s State FIFRA Issues Research and Evaluation Group. “EPA has done a really good job making the best out of a bad situation, but there is widespread frustration because we shouldn’t be doing this.”

But environmental groups and other advocates of the permit disagree, arguing that FIFRA does little to protect the nation’s waterways from pesticide pollution.

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Judge rejects registrants’ challenge to first salmon BiOp

By Larry Pearl

A federal judge has upheld a biological opinion by the National Marine Fisheries Service that found continued use of diazinon, chlorpyrifos and malathion jeopardize the continued existence of endangered Pacific salmonids.

In a ruling issued Oct. 31, Judge Alexander Williams, Jr., of the U.S. District Court for the District of Maryland, rejected arguments by Dow AgroSciences, Cheminova and Makhteshim-Agan of North America that NMFS ignored the best scientific and commercial data

available when preparing the BiOp, as required by the Endangered Species Act

The case has been closely watched as a harbinger for potential challenges to other BiOps, completed or forthcoming, on the impacts of other pesticides and endangered and threatened species — BiOps that could lead to significant restrictions on pesticide use in certain parts of the country.

The three registrants sued NMFS in April 2009 claiming the BiOp violates both the Endangered Species Act and the Administrative Procedure Act and is arbitrary, capricious and contrary to law. After a detour to the 4th Circuit Court

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things,” says Charlie Tebbutt, an attorney who represented environmental groups in their challenge of EPA’s 2006 rule. “All FIFRA does is require registration. The Clean Water Act protects the environment.”

Permit patchwork

The new permit is required for four types of pesticide applications “to, over or near waters of the U.S.” — those aimed at controlling mosquitoes and other flying insects; aquatic weeds and algae; aquatic nuisance animals; and forest canopies.

Individuals and companies responsible for such applications — called “operators” — must take steps to reduce pesticide discharges by using the lowest effective amount of a pesticide and implement measures to prevent leaks and spills, such as calibrating equipment, while also monitoring for and reporting adverse incidents.

Operators who meet certain threshold levels and other conditions must also file notices of intent (NOIs) with EPA and compile pesticide management discharge plans, including a description of pest management options.

Upon announcing the final permit, EPA said operators would be automatically covered without submitting an NOI for any discharges prior to Jan. 12, 2012.

Furthermore, the agency has opted to delay enforcement and says for the first 120 days that the permit is in effect it will “focus on providing compliance assistance and education of the permit requirements, rather than on enforcement actions.”

Delayed enforcement comes as little relief to industry critics, who note that such a pledge is limited in scope.

EPA’s permit only directly covers the six states where EPA has NPDES permitting authority — Alaska, Idaho, Massachusetts, New Hampshire, New Mexico and Oklahoma — as well as Washington, D.C., most U.S. territories and Indian country lands.

The agency’s pledge to delay enforcement only extends to those areas and does not prevent liability from state actions or citizen suits, explains Tyler Wegmeyer, director of congressional relations with the American Farm Bureau.

“People still have the ability to put out notices of intent to sue,” he says.

EPA spokesperson Enesta Jones tells *P&CP* that 36 states had informed EPA their permits would be ready by Oct. 31. The remaining eight are expected

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to largely mirror the EPA permit and be completed shortly, but stakeholders remain concerned that a patchwork of NPDES pesticide permits will cover the nation.

A few states, including Louisiana, Texas and Indiana, have developed a permitting approach that “basically calls on operators to comply with FIFRA,” says James Skillen, director of science and regulatory affairs at Responsible Industry for a Sound Environment (RISE).

Others, notably California, Michigan and New York “have gone the opposite direction” and imposed permit regimes more strict than the EPA permit, Skillen tells *P&CP*.

“If you are an operator who works in several states, the rules can be very different,” he adds.

Skillen notes that some of the requirements in the EPA permit — such as those calling on operators to use the lowest effective amount of a pesticide — are vague and provide fertile ground for citizen suits.

“There is a lot that is open to interpretation, including the language to minimize amounts and minimize discharges,” he says. “We have very real concerns about who decides ‘the best amount’ and there are real fears applicators could end up in court. There are a lot of unknowns with this.”

Endangered Species Concerns

The provisions within EPA’s permit regarding endangered species are another area of concern to industry stakeholders.

The final permit includes language to protect endangered and threatened species that fall under the purview of the National Marine Fisheries Service (NMFS), including an array of imperiled salmon and steelhead species in the Pacific Northwest as well as the short-nosed sturgeon, an endangered species residing in Atlantic waters. These provisions only affect the states and areas where EPA is the permitting authority.

The Endangered Species Act (ESA) provisions within the permit allow NMFS to determine if applications within areas that contain the affected listed species or their habitat are eligible for coverage under EPA’s permit and also lay out restrictions on timing and size of such applications.

“We just don’t have a lot of experience with this level of consultation,” Skillen says. “EPA suggests that they are going to share [an NOI] with NMFS, and they are going to consult and get it back to you in 30 days. But how long that is really going to take is anybody’s guess.”

Furthermore, EPA has yet to complete its ESA consultations with the U.S. Fish and Wildlife Service (FWS).

EPA says in its announcement of the final permit that it “continues to be in consultation” with FWS, explaining that once consultation is completed it will modify the permit if different permit limits or additional conditions are warranted to protect listed species or critical habitat.

“Any such change would require public notice and an opportunity for comment,” according to EPA. “The current permit would remain in effect during those proceedings.”

In or Out

Environmental advocates argue that industry stakeholders are effectively crying wolf and overstating the impacts and uncertainty surrounding the new permitting regime.

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If anything, the permit does not go far enough, Tebbutt tells *P&CP*, because it does not require a “needs analysis” be conducted before a pesticide application is approved.

“Do pesticide users need to use the pesticides in the first place?” Tebbutt asks. “It has become spray first and see what happens later. You need to ask the questions first — why are these chemicals being used and why are they being used in the way they are? There are more often alternatives than not.”

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— James Skillen, director of science and regulatory affairs, Responsible Industry for a Sound Environment

Tebbutt adds that industry groups like CropLife America and the American Farm Bureau are “telling lies, lies and more lies” about the scope of the permit.

“The permit does not apply to farmers and ranchers,” Tebbutt tells *P&CP*.

EPA has failed to provide specific numbers on how many farmers may be affected by the permit, but it said in documentation accompanying the draft permit that it expects the burden on farmers to “be minimal in that the Clean Water Act exempts agricultural stormwater and irrigation return flow from NPDES permitting requirements.”

Wegmeyer argues that the permit offers vagaries that could pull farmers under its scope.

“EPA has said continuously that farmers won’t be affected if they don’t apply directly to water, but there are a tremendous amount who apply near

water,” he tells *P&CP*. “This is a grey area. You’ll have situations that occur every time they take the sprayer out of the barn that could be a discharge to a U.S. water.”

The ongoing effort by EPA and the U.S. Army Corps of Engineers to expand the definition of “U.S. waters” under the scope of the Clean Water Act could also potentially draw more users of agricultural pesticides under the NPDES umbrella, Wegmeyer adds.

“Ditches and ponds could fall under the scope of the law,” Wegmeyer says. “It is hard to say what that might mean.”

EPA and the states “have very carefully worded” their permits so as not to needlessly bring farmers and other agricultural pesticide users under the umbrella of the regime, adds Dwinell, but that doesn’t alleviate the broader worry.

“The concern agricultural groups have is that now the court has opened the door to regulating pesticide use under a completely different statute,” he says. “They fear they could get pulled in down the road.”

Congressional interest

Critics of the new pesticide permit have found sympathy on Capitol Hill for their concerns and have not given up on lawmakers addressing the issue.

The House approved legislation in March — H.R. 872 — that would exempt FIFRA-compliant pesticide applications from requiring discharge permits under the Clean Water Act. The Senate Agriculture Committee passed the bill by voice vote in June, but Sens. Barbara Boxer (D-Calif.) and Ben Cardin (D-Md.) subsequently put a hold on the legislation.

Sen. Pat Roberts (R-Kan.) was leading negotiations with Democrats to try and get a vote on the bill before the Oct. 31 deadline — allegedly more than 60 senators have express support for the legislation.

But the Kansas Republican called off those talks due to frustration with a possible deal that would have imposed a two-year moratorium on the new pesticide permit while requiring a national survey on pesticide contamination to better gauge whether the permit is needed.

The survey was the piece of the puzzle Roberts could not stomach, according to Sarah Little, the senator’s communications director.

The senator’s “first preference” would be to approve H.R. 872, but “in the absence of that, he was always in support of a moratorium,” Little tells *P&CP*. “Then [Democrats] insisted on a study. His position remains that a moratorium should be approved by the Senate so that agreements can be reached on studies or H.R. 872 can be passed.”

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Roberts this week failed in a bid to move legislation to suspend the permit for two years — a prior effort to attach such language to the fiscal 2012 agriculture appropriations bill was also unsuccessful.

James Aidala, vice president of policy and government affairs with Bergeson & Campbell, says he is “slightly surprised” Roberts didn’t take the deal.

“Clearly he felt a little cranked since he’s got sixty-plus votes, a House-enacted bill and still can’t get anywhere,” Aidala tells *P&CP*. “But if in 119 days the deal is still on the table, it might start to look a whole lot better.”

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