



PPC

PESTICIDE POLICY COALITION
A Coalition Working for Sound Pest Management Policies

March 11, 2016

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Gina McCarthy, Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460-0001

RE: Draft National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit for Point Source Discharges; Reissuance; Docket ID: EPA-HQ-OW-2015-0499

Dear Administrator McCarthy:

The Pesticide Policy Coalition (PPC or “the Coalition”) appreciates the opportunity to comment on the U.S. Environmental Protection Agency’s (EPA) proposed reissuance of its five-year National Pollution Discharge Elimination System (NPDES) Pesticide General Permit (PGP). The current PGP will expire October 31, 2016, and the proposed 2016 PGP would authorize continued or new discharges to, over, or near jurisdictional waters under the Clean Water Act (CWA) in Massachusetts, New Hampshire, New Mexico, Idaho, Washington, D.C., Puerto Rico and certain other territories, as well as Indian Country lands and federal facilities in many locations.

For many years the Coalition has been involved in the ongoing debate over whether PGPs should be legally required for applications of pesticides that are made in a manner fully consistent with EPA-approved label restrictions and the scientific parameters established for safe use of these products by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the Food Quality Protection Act (FQPA), and many existing state pesticide authorities. The Coalition agrees with many Congressional lawmakers; pest-control officials in federal, state, county, and municipal governments; and commercial and private interests that PGPs are duplicative, unwarranted burdens that do nothing to further environmental protection. Our comments on this proposed renewed PGP should in no way be considered an endorsement of the PGP, or the 2009 6th Circuit decision (*National Cotton Council v. EPA*) that overturned EPA’s 2006 regulation clarifying NPDES permits were not required for such pesticide uses.

COMMENTS

The Coalition is gratified that EPA proposed to reissue the 2011 PGP without significant change, and acknowledges in the Fact Sheet continued confidence in technology-based effluent limitations that are the standard operating practices of the pest control industry. For many years the pesticide industry, agribusiness allies, and others engaged in pest control throughout the country have placed a high value on proper pesticide handling, mixing-loading, calibration of equipment, accurate application, worker safety and environmental protection. The PPC is gratified that EPA acknowledges in the Fact Sheet the comprehensive, protective nature of FIRFA labels, and that Operator compliance with such pesticide labels will continue to serve as a key basis for satisfying the goals of the permit. EPA observes in the Fact Sheet that in the four years since the 2011 PGP was issued EPA has no evidence that the PGP has caused water quality problems.

While the proposal from EPA describes a 2016 PGP that would be nearly identical to the 2011 PGP, there are provisions and topics raised by the EPA that concern the Coalition. These include:

- 1. EPA should include the 2011 PGP's definition of "waters of the United States":** The draft PGP fails to indicate any legal limit to the reach of the permit's jurisdiction. The draft PGP does not include the 2011 PGP's definition of "Waters of the United States" from the permit language, Appendix A, and the corresponding Fact Sheet. The Coalition is concerned that a single footnote in the Fact Sheet (providing a link to an EPA web page advertising and promoting its contested 2015 Clean Water Rule (CWR)) serves as the Agency's proposed restatement of legal PGP jurisdiction. Absent the inclusion of the 2011 PGP's definition of what EPA means by "waters of the United States," the public could interpret the draft PGP requirements to restrict pesticide applications into, over, or near *any* ditch, dry wash, wetland or other waterbody *anywhere* in those four states and other included areas, without limitation. Likewise, potential permittees will be left to guess which pesticide applications would require a permit. This lack of clarity could result in litigation and ultimately the courts interpreting EPA's intent.

If EPA intends the 2016 PGP's jurisdictional scope to be defined by the CWR, this is problematic because the 6th Circuit Court of Appeals has imposed a nationwide stay on the CWR's implementation until the pending legal challenges are resolved. The 2011 PGP will expire October 31, 2016, most likely long before litigation over the CWR is resolved. It would be wholly inappropriate for EPA to issue as final this five-year PGP authorizing CWA enforcement through federal and third party actions without a clearly defined scope of jurisdiction *that is based on current law*. As proposed, the 2016 PGP is too vague for an Operator to determine what actions would be covered by the permit, and therefore it would not be enforceable. The Coalition urges EPA to reinsert the definition of "Waters of the U.S." stated in the 2011 PGP throughout the final 2016 PGP, in Appendix A, as well as in the Fact Sheet and on EPA's website.

- 2. EPA should provide additional notice and opportunity to comment if CWA jurisdiction changes:** The Coalition assumes the 2011 PGP will expire, and the 2016 PGP will be implemented, long before the litigation of the CWR is resolved. If the courts were to uphold

the CWR prior to the end of the 2016 PGP five-year cycle, the PPC believes EPA should either wait to integrate any new definition of “Waters of the U.S.” into the PGP until the next five-year cycle (2021), or announce the implications of this change to the PGP through another notice and comment period. That would allow any additional permittees newly subject to the PGP to have an opportunity to comment on the revised PGP. Otherwise new permittees may not even be aware that their pesticide application activities could be subject to CWA requirements and could be unknowingly exposed to third party litigation. It would not be appropriate for EPA to change the ground rules for the PGP midway into the five-year cycle.

3. **PGP enforcement should not apply to activities that do not involve pesticide discharges:** The Coalition remains concerned with statements made in the 2011 PGP and Fact Sheet, and retained in the draft 2016 PGP and its Fact Sheet, that CWA enforcement and citizen suit liabilities may apply to other activities that occur *outside of actual discharges* on, over, or near water, such as storage, handling and disposal of pesticides before and after applications. These statements imply EPA is signaling its intent to apply PGP enforcement beyond actual point source discharges of pesticides. The NPDES program regulates actual discharges to jurisdictional Waters of the U.S. and not the perceived potential to discharge (*i.e.*, storage of pesticides for future use). FIFRA labels include directly or by reference storage, handling, and disposal requirements, worker protection requirements, and applicator training and certification requirements. These activities rest solely under FIFRA jurisdiction and should not be addressed in the PGP. The Coalition urges EPA to omit language tying violations of FIFRA storage, handling and disposal requirements to violations of the CWA and the PGP in the final 2016 PGP. EPA also highlights FIFRA labels for selected products and the practices identified by those registrants, asking for comment on whether such additional practices should be included in the PGP. Such product label conditions are specific to individual products, approved uses and locations; as such the Coalition urges EPA not to consider specific label terms for inclusion in the PGP.
4. **EPA should resolve the pending Endangered Species Act (ESA) Section 7 consultation with the Services prior to PGP comment period closure:** In the Fact Sheet, EPA cautions that consultation with the Services (National Marine Fisheries Service and Fish and Wildlife Service) is ongoing and changes may be made to requirements of the final PGP as a result of the ongoing consultation. To the extent that the ESA Section 7 consultation results in inclusion of additional PGP requirements, EPA should incorporate such changes to the draft PGP only after publishing a notice of data availability (NODA) and providing the opportunity for additional public comment.
5. **EPA should eliminate the PGP’s joint and several liability provision:** The PPC continues to be concerned with the provision in both the 2011 and proposed 2016 PGPs that all involved Operators could be jointly and severally liable for any adverse incident or PGP violation, including any action or inaction of others that is beyond their control. The CWA does not include a statutory provision for attaching joint and several liability to CWA violations like the provision Congress expressly included in other environmental statutes (*e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)). While EPA indicates it will take into enforcement consideration the relative

roles of each party, the PPC urges EPA to revise the draft 2016 PGP to eliminate the joint and several liability provisions.

- 6. Potential to require WQBEL and BMP requirements from product labels:** In the Fact Sheet EPA requests comment on the appropriateness of including additional water quality based effluent limitations (WQBELs) in the 2016 PGP, and includes a summary of WQBELs included in the PGPs developed by a small fraction of states. The Coalition is convinced that additional WQBELs are totally unwarranted. EPA clearly noted that it has no evidence that in the past four years the PGP, which is largely grounded in technology-based effluent limitations, has not adequately protected water quality. Moreover, EPA cites to the 2006 United States Geological Survey (USGS) report on a ten-year assessment of water monitoring data for pesticides that concluded surface water and groundwater are not generally being adversely impacted by pesticide applications. The potential addition of WQBEL and best management practices (BMPs), including fish-tissue sampling and water quality monitoring would be unwarranted, would provide no additional environmental benefits, and would simply add unnecessary financial and legal burdens for Operators. A review of all 50 state PGPs indicates that the vast majority of states do not incorporate WQBEL into their respective state PGPs. The fact that a very small fraction of states has chosen to address their unique political and site-specific needs by adopting WQBELs in their state PGPs is not justification for EPA to adopt these in the PGP.

EPA also requests comments on whether to include BMPs identified in selected product labels reproduced by EPA in an appendix to the PGP. Such BMPs are generally product-specific and use-specific, and likely would not represent best practices for the range of pesticides that would be permitted under the PGP. Additionally, an Operator complying with FIFRA labeling requirements is already adhering to recommended BMPs included in the label.

The PPC appreciates the opportunity to provide these comments, and urges EPA to consider our recommendations as it finalizes the 2016 PGP.

Sincerely,



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