

# Summary of EPA's *Final* Clean Water Act National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit (PGP)

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## ***Background***

The Environmental Protection Agency (EPA) implemented its long-delayed clean water permit for pesticide applications on Monday, October 31, 2011. This satisfies a 2009 decision of the U.S. 6<sup>th</sup> Circuit Court of Appeals (*National Cotton Council of America v. EPA*, 553 F.3d 927 (6<sup>th</sup> Cir., 2009)) and ends the regulatory exemption of such pesticide applications established by [rule in 2006](#) (71 Fed. Reg. 68, 483. Nov. 27, 2006). Two successive court stays in 2010 and 2011 provided EPA time to develop the permit, and consult with the National Marine Fisheries Service (NMFS) and the Fish & Wildlife Service (FWS) on issues related to endangered and threatened species. EPA also requested this additional time to allow states not subject to EPA's PGP to develop their own permits. CLA and allies worked unsuccessfully to gain an *en banc* review by the entire 6<sup>th</sup> Circuit, a *cert* review by the US Supreme Court, and federal legislation to overturn the court's decision. Time ran out on October 31<sup>st</sup> when EPA implemented the PGP for the six states the agency has direct responsibility over (ID, NH, NM, OK, ME, AK), although Congressional legislative efforts continue. Forty-four other states have issued or will soon issue their versions of EPA's PGP.

From the outset, CLA positioned itself to simultaneously lead an effort to overturn or postpone the 6<sup>th</sup> Circuit decision and also to work to help EPA develop the least disruptive PGP as possible. EPA produced several versions of the PGP, and generally shared its thinking and questions freely with stakeholders. In a series of white papers, meetings, and written public comments, CLA provided EPA extensive legal, technical and economic recommendations, many of which were adopted by EPA in the final PGP. Areas of disagreement are detailed below. The October 31 final version is nearly identical to the April 1 version, although significant changes were made to the permit involving protections of federally-listed endangered or threatened species and/or their critical habitat required by the National Marine Fisheries Service (NMFS).

## ***Timeline for Compliance and Enforcement***

The final PGP was effective immediately upon publication, so to ease compliance burdens for the many thousands of affected parties who needed time to become acquainted with PGP requirements, the agency announced a phase-in of 120 days (through February 2012) during which it will focus on compliance assistance related to the PGP, rather than enforcement. EPA's

announcement does not mean it will not enforce violations, however, and CWA citizen suits may be filed at any time. General information on the PGP is available [here](#).

Most of the other 44 States will similarly phase-in compliance requirements and enforcement of their PGPs. These other states' PGPs vary widely, from very restrictive to minimally restrictive, and are in various stages of implementation. More than half of these state PGPs are designed to protect waters of the state, which are generally more expansive (e.g., include groundwater and most surface waters) than federal waters of the US. A chart comparing these state PGPs is available [here](#).

During the 120-day phase-in period, coverage under EPA's PGP is automatic for all Operators that qualify for PGP coverage, although government agencies and other Decision-making entities that are required to submit a Notice of Intent (NOI) must do so by January 12, 2012. In order to have uninterrupted PGP coverage beyond the deadline, Decision-makers that must submit NOIs should do so at least ten days prior (i.e. by January 2, 2012) to allow for EPA review (or, as described below, at least 30 days prior to planned discharges for areas with ESA-listed species and/or critical habitat to allow for NMFS review). EPA posted several electronic worksheets, including an eNOI form, intended to reduce time burdens and assist with compliance. They are available [here](#).

### ***Pesticide Uses that Qualify for Coverage***

EPA developed its PGP to cover the pesticide applications to, over or near waters of the US that had been previously exempted from NPDES permitting under its now-vacated 2006 aquatic pesticides rule. Those uses include: (a) mosquito and other flying insect pest control that develop or are present during a portion of their life cycle in or above standing or flowing water; (b) weed and algae pest control in water and at the water's edge; (c) animal pest control in water and at the water's edge; and (d) forest canopy pest control where a portion of the pesticide applied will unavoidably be applied over and be deposited into water. EPA has indicated in its Response to Comments (available [here](#)) that other pesticide uses not explicitly described in the PGP under these four categories, such as weed control in utility or transportation rights-of-way (ROW) and forest floor weed control, will also be covered under the "weed and algae pest control" category.

### ***Pesticide Applications Not Covered by the PGP***

The PGP does not cover pesticides applications that do not result in a point source discharge to waters of the US, such as for the purpose of controlling pests on terrestrial cropland and range lands – unless those uplands also contain jurisdiction irrigation ditches, drainage ditches, intermittent waterbodies, dry washes or other waters of the US that accidentally or intentionally receive treatment of weed or insect pests. The PGP also does not cover discharges to prior converted cropland or those discharges resulting from irrigation return flow or nonpoint source stormwater runoff, for these are exempted by the CWA from NPDES permitting. It

appears that the PGP plans to also cover pesticide applications that are outside the scope of the four categories of use, such as ROW or forest floors (EPA's Response to Comments suggests a broad interpretation of these categories). If other pesticide applications result in a discharge to a water of the US but are not covered by the PGP, they would still be subject to the CWA but the Operator would have to seek individual permit coverage.

Also not covered by the PGP are (a) spray drift; (b) applications of a specific pesticide to waters of the US if the water is identified as impaired by that pesticide, either as an active ingredient or as degradates of that specific pesticide. Impaired waters are those that have been identified by a state, tribe or EPA pursuant to section 303(d) of the CWA as not meeting applicable state or tribal water quality standards; (c) applications of a pesticide to Tier 3 waters unless the pesticide application is intended to restore or maintain water quality or to protect public health or the environment. The pesticide must not degrade water quality of only degrade water quality on a short-term or temporary basis; (d) pesticide applications that are covered by another NPDES permit or are included in a permit that has been denied, terminated or revoked by EPA in the past five years or is in the process of being denied, terminated or revoked; or (e) applications that are likely to adversely affect endangered or threatened species or critical habitat.

### ***For-hire pesticide applicators***

In one area of agreement with EPA, CLA strongly recommended that for-hire applicators, whether aerial, ground, or water-based, not be required to submit an NOI, for they generally do not have decision-making authority, and would not be privy to the information required to be submitted well in advance of actual pesticide applications. This recommendation was adopted by EPA in their final PGP.

Applicators are automatically covered by the PGP, and must comply with a less burdensome list of requirements than decision-makers. Because they do not submit an NOI, they are not required to certify compliance with the NMFS reasonable and prudent alternative checklist decision-makers must complete when they submit their NOIs. For-hire applicators must satisfy permit requirements having to do with equipment maintenance and calibration; proper pesticide handling, storage and application to minimize spills, mis-applications, and spray drift; assessment of weather conditions in the treatment area; and reporting of adverse incidents. For-hire applicators must also keep records that document pesticide application equipment maintenance and details of the pesticide application itself; documentation of equipment calibration; description of each treatment area (including location and size of treatment area and any waterbodies present); pesticide use pattern, target pests treated; weather conditions, quantity and name of each pesticide product used including the EPA registration number; application date(s); if visual monitoring was conducted, and if not, why not; and if any unusual or unexpected effects occurred to non-target organisms. Applicators need not develop a Pesticide Discharge Management Plan (PDMP), conduct integrated pest management practices, or submit an annual report. EPA defines "applicators" as any entity who performs the application of a

pesticide or who has day-to-day control of the application. Applicators may also be decision-makers, in which case the following requirements would also apply to them.

### ***Pest Control Agencies, Natural Resource Managers, and Other Decision-Makers***

EPA's PGP places most of the regulatory burden on public agencies and large entities that must submit an NOI for coverage and meet all of the other requirements of the PGP. Those entities routinely make decisions regarding the pest management program resulting in pesticide discharges, and include any agency for which pest management for land resource stewardship (e.g., national forests, national parks, water management districts, etc.) is an integral part of the organization's operations; mosquito control districts or similar pest control districts; irrigation and weed control districts, including canal operators, or similar pest control districts. These agencies are described in more detail below. Local governments or other entities (public or private) that exceed annual treatment area thresholds also must submit an NOI but have somewhat reduced compliance requirements. EPA no longer includes financial sources in the definition of decision-making entities.

### ***NOI Submission by Decision-Makers***

EPA uses the requirement to submit an NOI to distinguish between those entities that are automatically covered by the permit and retain compliance documents on site, from those larger entities that must submit an NOI in order to gain approval for coverage. Submitting an NOI also triggers a number of other requirements not required of those entities that are automatically covered. The categories of decision-makers that must submit an NOI to gain coverage by the PGP include: (a) those intending to discharge to a Tier 3 water (Outstanding Natural Resource Water); (b) those intending to discharge to waters of the US containing listed endangered or threatened species and/or critical habitat; (c) any Agency for which pest management is an integral part of the organization's operations (e.g., natural resource agencies, irrigation and weed control districts, mosquito control districts) and (d) those local governments or other entities that exceed the annual treatment area thresholds established by the PGP for each pesticide use class: 6,400 acres of mosquito adulticide treatment; 6,400 acres of forest canopy treatment; 20 linear miles or 80 acres (e.g., surface area) of water for treatment to control aquatic weeds, algae or animals in water or at water's edge during a calendar year. The thresholds differ somewhat by pesticide use category. For example, under the mosquito adulticide treatment and forest canopy treatment use categories the treatments are additive, such that decision-makers must count each application made, even repeat applications to the same acreage. Under the aquatic weed, algae and animal control categories, counting is done once for a particular treatment area covered by an NOI, regardless of the number of total times that area is treated in a calendar year. Treated acreage is calculated on a calendar year. Decision-makers self report, so it is up to that entity to determine when the threshold is or will be exceeded. It appears that the 2012 acreage does not start tallying until January 12, because no NOI is necessary until then no matter how many acres are sprayed before then.

## ***Joint and Several Liability for Permit Violations***

EPA's final PGP includes a provision that would make all parties to a violation – decision-makers, their employees, and even for-hire contract applicators – joint and severally liable for any permit violation. CLA strongly argued in white papers and public comments that this provision is unlawful, arbitrary and capricious. Imposing obligations on permittees for the actions or inactions of others over which they have no control is unlawful. The CWA imposes both civil and criminal liability for violations of NPDES permits. EPA's intent to impose these sanctions on all permittees for any violation of a permit would include many obligations that can be satisfied by only one part or another among perhaps a panoply of operators involved.

For example, implementation of pest management practices (similar to Integrated Pest Management), evaluations and decision making can only be effectuated by an NOI-filing decision-maker. Indeed, the decision to apply a pesticide product must have been accomplished by the time a for-hire (non-NOI-filing) applicator is tasked to perform the application. The for-hire applicator has no ability to control its customer's behavior but it appears that EPA nonetheless would make the applicator legally liable, including perhaps criminally, for IPM decisions and other compliance missteps by its decision-making customers. Similarly, NOI-filing permittees could be held to account for any failure of for-hire applicators to satisfy specific technology- and water quality-based effluent limitations in the permit that can only be satisfied by the actions of the applicator. It is true that decision-makers can and should contract for full compliance with the PGP terms when engaging for-hire applicators. It is not true, however, that decision-makers can so tightly control the performance of their subcontractors by contract as to guaranty compliance with PGP conditions that can only be honored in the field, at the time of application.

## ***PGP Requirements Resulting from EPA's Consultation with NMFS***

Added to the final PGP is the requirement that coverage under the PGP is available only for discharges and discharge-related activities that are not likely to adversely affect species that are federally-listed as endangered or threatened ("listed") under the ESA or habitat that is federally-designated as critical under the ESA ("critical habitat"). This PGP restriction is the result of NMFS' final BiOp, released in mid-October just prior to EPA's PGP release, found [here](#). The PGP offers options (at Part 1.1.2.4) for PGP coverage if applications of pesticides are planned to areas containing listed species or critical habitat as long as Decision-makers can certify that their discharges and discharge-related activities will not adversely affect listed species or critical habitat in areas covered by the PGP and under NMFS' jurisdiction and their eligibility under one of the following six criteria:

1. The pesticide application would not result in a point source discharge to waters of the US containing NMFS listed species or critical habitat identified by NMFS in its BiOp for this permit;

2. The pesticide application to waters of the US containing listed species and/or critical habitat would occur following a formal or informal consultation with NMFS under a separate federal action;
3. The pesticide application to waters of the US containing listed species and/or critical habitat would be preceded by NMFS' issuance of a permit under section 10 of the ESA to authorize any "take" that might occur;
4. The pesticide application to waters of the US containing listed species and/or critical habitat would only occur in response to a Declared Pest Emergency Situation;
5. The pesticide application to waters of the US containing listed species and/or critical habitat would occur following submission with the NOI of written correspondence from NMFS that pesticide applications performed consistent with appropriate measures will avoid or eliminate the likelihood of adverse effects to listed species and/or critical habitat. Coverage by the PGP under this criteria is contingent on approval of the submitted NOI by EPA and NMFS, and subsequently the Decision-maker following the measures described in correspondence from NMFS to avoid or eliminate the likelihood of adverse effects;
6. The pesticide application to waters of the US containing listed species and/or critical habitat would occur following submission of a demonstration by the Decision-maker that the application is not likely to adversely affect listed species or critical habitat (e.g., pesticides will be discharged that are known not to cause adverse effects or will be discharged at concentrations determined not to cause adverse effects; or listed species will not occur in the treated area during that time of year or due to the presence of the pest being controlled); or other considerations that demonstrate the application is not likely to adversely affect NMFS listed species and/or critical habitat; or that the pest(s) pose(s) a greater threat to the listed species or habitat than the pesticide application. Decision-makers must provide EPA (and NMFS) with their documentation demonstrating the basis for their finding.

Except for discharges made in response to a Declared Emergency Situation, any Decision-maker that plans to discharge pesticide pollutants into waters of the US containing endangered or threatened species and designated critical habitat under NMFS' jurisdiction must file an NOI to discharge at least 30 days prior to any discharge. The EPA will post those NOIs on the internet and provide NMFS a copy the same day. Within 30 days after receipt of those NOIs, NMFS will provide EPA with a determination as to whether the eligibility criteria necessary to meet eligibility criteria are met. EPA's new eNOI provides a check list of options for decision makers to identify conditions and certify their compliance. Any changes will require filing a new NOI under the same evaluation process. Any such approved Decision-maker must also file an annual report. State PGPs need not adopt the ESA provisions of the PGP, although some states may in fact do so.

For NOIs approved for pesticide applications to areas of listed species and/or critical habitat, EPA must summarize for NMFS within 60 days of NOI approval the current registered pesticide application rates, the expected environmental concentrations of pesticides in water resulting from those approved applications, and the toxicity information used to assess the risk to endangered and threatened species as presented in EPA's most recent FIFRA risk assessment documents for all pesticide uses to be authorized under the PGP. EPA must also provide to NMFS the original risk assessment documents from which these summaries were derived. Discharges made in response to a Declared Pesticide Emergency Situation are authorized in a 60-day initial discharge period; the decision maker must file an NOI no later than 15 days after beginning discharge. The NOI for such emergency discharges will be posted by EPA and reviewed by NMFS in the same manner as above for non-emergency discharges.

### ***Fact Sheet Review of FIFRA Risk Assessment and Results of Water Quality Monitoring***

Many critics of efforts to achieve a legislative alternative to the PGP suggest weaknesses in FIFRA's risk assessments, and refer to US Geological Survey NAWQA's detections in streams and lakes from 1992-2001. EPA's Fact Sheet ([available here](#)) that accompanies the PGP (pp. 92-104) contains a good description of FIFRA risk assessment methods and interprets the monitoring data in a realistic manner, and identifies the few instances where waterbodies are listed as "impaired" by specific pesticides (Table I, p. 102). EPA's Fact Sheet states (p. 102) that pesticide detections, both of currently registered products and generically-listed "pesticides" together "...account for 0.7% (479 of 71,323) of the total causes of impairments for 303(d) listed waters nationally."