



PPC

PESTICIDE POLICY COALITION
A Coalition Working for Sound Pest Management Policies

April 4, 2005

Water Docket
Environmental Protection Agency
Mailcode 4101T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

**Re: Pesticide Policy Coalition Comments on Proposed Rulemaking by
Environmental Protection Agency: NPDES Permits Not Required for
Certain Applications of Pesticides in Compliance With FIFRA**

EPA Docket No. OW-2003-0063, 70 FR 5093, Feb. 1, 2005

The Pesticide Policy Coalition (PPC) is pleased to furnish its comments on the subject proposed rule designed to make clear the inapplicability of the National Pollutant Discharge Elimination System (NPDES) permit requirement, established under the Clean Water Act (CWA), to certain pesticide uses authorized by registrations or other clearances issued under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

Introduction and Summary of Comments

The PPC represents food, agriculture, pest management and related organizations that support transparent, fair and science-based regulation of pest management. PPC members include: nationwide and regional farm, commodity, specialty crop, and silviculture organizations; cooperatives; food processors and marketers; pesticide manufacturers; pest- and vector-control operators; research organizations; and other interested parties. PPC serves as a forum for the review, discussion, development and advocacy of pest management policies and issues important to our members.

The PPC welcomes the Agency's decision to address through rulemaking the question of the extent of applicability of the NPDES program to the use of pesticides registered under FIFRA. The rulemaking document, which was published at 70 FR 5093-5100 (February 1, 2005), correctly makes the point that a pesticide being used in accordance with its FIFRA label is not a "chemical waste" being discarded and does not otherwise come within the definition of

“pollutant,” and thus does not require an NPDES permit because such a permit is only required where there is the “discharge of a pollutant.”¹ We agree with the Agency’s view on this point.

The proposed rule language states expressly that certain pesticide uses are not covered by the NPDES requirement, but deals with only two types of pesticide use:

(1) The application of pesticides directly to waters of the United States in order to control pests. Examples of such applications include applications to control mosquito larvae, aquatic weeds or other pests that are present in the waters of the United States.

(2) The application of pesticides to control pests that are present over waters of the United States, including near such waters, that results in a portion of the pesticides being deposited to waters of the United States; for example, when insecticides are aerially applied to a forest canopy where waters of the United States may be present below the canopy or when pesticides are applied over, including near, water for control of adult mosquitoes or other pests.

70 FR at 5100 (middle column).

The coverage of the final rule should be broadened considerably to make it clear that an NPDES permit is not required for the label allowed application of pesticides by other users or uses, for example, even if small amounts of the pesticide may reach off-site aquatic areas as a result of drift, windborne transport of soil particles, evaporation and subsequent condensation, or other incidental off-site transport that is analogous to runoff from treated fields. The stated logic of EPA’s Interpretative Statement fully supports such a broadening of the rule, and EPA has the legal authority to accomplish this without a second round of notice and comment. EPA should add these provisions in order to provide a timely and authoritative interpretation of the provisions of the CWA and limit the confusion and potential for chaotic interruption of important economic activities by citizen suits.

EPA also should place the new language in the definition of “discharge of a pollutant” in 40 CFR 122.2, instead of its currently proposed location in 40 CFR 122.3, so as to avoid potential problems with the characterization of EPA’s action.

DETAILED COMMENTS

Need for Coverage of a Broadened Range of Pesticide Use Patterns

This rulemaking is required because certain environmental activist groups recently have seized upon the NPDES provisions as a vehicle to try to make agricultural or institutional outdoor use of pesticides impossible or impracticable. These groups are represented by

¹ We are aware, of course, that the discharge to waters of the United States of residues of a pesticide as part of a point-source effluent stream, such as the outfall pipe from a factory that uses pesticide products in industrial process liquids or a factory that manufactures a pesticide, is subject to the NPDES permit requirement. The current rulemaking makes it clear that such discharges would not be affected by this rule, and our comments should not be understood to seek changes to this longstanding practice.

professional litigators who are in the business of bringing citizen suits against government agencies from which they can obtain attorney fees to finance their further endeavors. These groups and their law firms are attempting to take advantage of the Agency's failure to formalize its longstanding but tacit policy that the use of pesticides for their intended purposes does not constitute the discharge of pollutants and does not require an NPDES permit.² They are seeking to require the use of NPDES permits for outdoor pesticide users knowing full well that the NPDES system is ill-equipped to deal with these uses, and that obtaining NPDES permits will be extremely difficult, time-consuming, and expensive for farmers and other users. Instead of seeking legislation or rulemaking to change EPA's policy, they are using citizen suits to intimidate individual pesticide users, seeking penalties that can reach \$32,500 per pesticide application per body of water that may have been affected, for each day of pesticide use during the five-year period preceding the filing of the citizen suits.³

The proposed rule would state clearly EPA's position that the CWA does not require an NPDES permit for the application of a pesticide to water to cope with pests in the water, or to applications over or near water aimed at pests that are in the air or vegetation over or near water bodies. It thus appears to be EPA's attempt to address definitively the first wave of NPDES citizen-suit attacks—litigation aimed at government-sponsored irrigation-canal maintenance,

² The comments of several environmental activist groups in the OW-2003-0063 docket, including Californians for Alternatives to Toxics, Minnesota Center for Environmental Advocacy, and National Environmental Law Center/PIRG, all make the same incorrect and misleading argument, citing Policy and Criteria Notice 2180.1 and GR Notice 93-10, that EPA in the past has required all pesticides to bear a label statement concerning the need to comply with NPDES requirements. In fact, however, that type of language has only been required for pesticides likely to be found as components of industrial effluents otherwise subject to NPDES permitting, as shown by the notices themselves. For instance, P&C Notice 2180.1 (1984) contained a "Scope" section that states:

This policy applies to:

1. Products intended for manufacturing/formulating use only;
2. Products for manufacturing or industrial process end uses, such as cooling tower uses; pulp and paper mill, leather tanning, textile treatment, and wood preservative operations; and food processing operations, such as products for use in canneries, bakeries, breweries, sugar mills, etc. (This is not intended to cover products such as roach control products used in such facilities, but rather those used in the processes involved, that might be expected to be discharged in waste water streams from those processes.)
3. Products intended for large-scale commercial and institutional end uses, such as hospitals.

³ See, e.g., a portion of the requested relief on page 11 of the Complaint in *Saint John's Organic Farm et al. v. Gem County Mosquito Abatement District, et al.*, Civ. 04-087-S-BLW (USDC, D. Idaho):

F. Order Defendants to pay civil penalties of \$27,500 per day of violation for violations within five years and 60 days from the filing date of this complaint, for each violation pursuant to Sections 309(d) and 505(a) of the Act, 33 U.S.C. §§ 1319(d) and 1365(a), including those listed in Exhibit A and this Complaint, and violations committed subsequent to those identified in this Complaint.

G. Award Plaintiffs their costs, including reasonable attorney and expert witness fees, as authorized by Section 505(d) of the Act, 33 U.S.C. § 1365(d) ...

The 60-day notice in the same case states that "Dischargers are on notice that each day of discharge into each waterway constitutes a separate violation. Each violation is subject to penalties of up to \$27,500." The maximum penalty has subsequently been revised to \$32,500 per violation (69 FR 7121-7127, Feb. 13, 2004).

mosquito control, and forestry maintenance programs. While these provisions, if adopted, will be extremely helpful to pesticide users whose practices are addressed directly by the proposed rule, the final rule's coverage should be expanded and clarified to cover other types of outdoor pesticide uses that now are coming under attack, such as agricultural use of pesticides. A recent trade press article, quoting unnamed attorneys for environmental activist groups, shows why the final rule needs to be broader than the proposal:

Environmentalists have mounted a landmark challenge against a blueberry farmer for the aerial application of pesticides in what could be the first Clean Water Act (CWA) challenge to applications of pesticides over land that eventually drift into waters, attorneys say.

The suit follows EPA issuance of a rule exempting pesticide applicators from obtaining CWA discharge permits when pesticides are applied directly to waters to control pests present there, or when pesticides are applied to control pests present over waters and some of the pesticides end up in waterbodies.

...

Sources say the case represents environmentalists' attempt to set a precedent requiring applicators to obtain NPDES permits in all cases outside the exemptions EPA carved out in the proposed rule. The attorneys say the case could set a broad precedent because far more applicators engage in so-called agricultural spraying of pesticides over land with the potential to reach waterbodies than those who spray directly over waters.

"We believe this will set the appropriate precedent that pesticide spraying affecting waters is regulated under the Clean Water Act," one attorney says. "If EPA meant to carve out all spraying from regulation, [it] wouldn't have drafted such a narrow proposed rule."

A coalition of environmental groups has filed a notice of intent to sue Jasper Wyman & Son, a large U.S. supplier of wild blueberry products, for failing to obtain a NPDES permit prior to spraying pesticides over its blueberry fields in Maine. The groups argue that the company needs a NPDES permit—even though they are applying pesticides over land—because the pesticides eventually migrate into navigable waters.

The groups cite "drift studies" conducted by the Maine Board of Pesticides Control (BPC) as proving that the pesticides eventually reach navigable waters. "The BPC drift studies show that aerial spraying by Wyman resulted in discharges to navigable waters . . .

.The Citizen Groups believe that these discharges violated the [Clean Water] Act,” the groups say in their notice of intent to sue.

March 21, 2005, issue of *Inside EPA* magazine. This story demonstrates that pesticide opponents already are planning to take advantage of any gaps in the coverage of the final rule to argue in litigation that NPDES permits are required for routine farming operations.

EPA has said in the Interpretative Statement:

It has been and will continue to be the operating approach of the Agency that the application of agricultural and other pesticides in accordance with label directions is not subject to NPDES permitting requirements.

70 FR at 5098 (left column). However, the language of the proposed rule does not reflect fully this statement. EPA is on notice from the activists that, unless the final rule is broadened to cover agricultural uses, this litigation will continue, targeted against individual farmers who have had no reason to think they needed permits. To reduce the risk of harmful litigation results, the Agency needs to fully codify the “operating approach” into regulation.

The Logic of the Proposed Rulemaking Document Supports Extending the Use Patterns to be Covered by the Final Rule

The Interpretative Statement explains repeatedly that a pesticide being used in accordance with the product’s EPA-approved label instructions is being used purposefully and beneficially in a government-approved manner, and thus is neither a “chemical waste” nor a “biological material” as defined by CWA, and accordingly its use is not the “discharge of a pollutant.” Therefore, the NPDES requirements are simply inapplicable. These statements include the following:

As described in this Interpretive Statement, pesticides designed and registered for application to or over, including near, water are not considered to be pollutants requiring an NPDES permit under the CWA, regardless of whether the pesticides’ targets are in the water itself or over, including near, the water.”

70 FR at 5098, footnote 1.

EPA does not believe that pesticides applied consistent with FIFRA are “chemical wastes.” The term “waste” ordinarily means that which is “eliminated or discarded as no longer useful or required after the completion of a process.” Pesticides applied consistent with FIFRA are not such wastes; on the contrary, they are EPA-evaluated products designed, purchased and applied to perform their intended purpose of controlling target organisms in the environment.

70 FR at 5099 (middle column).

Where a pesticide is used for its intended purpose and its use complies with all relevant requirements under FIFRA, EPA has determined that it is not a chemical waste or biological material and, therefore, is not a pollutant subject to NPDES permitting requirements.

70 FR at 5099-5100.

Based on EPA's logic, one cannot distinguish between spraying over or near water to kill pests flying in the air or in trees or on other vegetation, on the one hand, and spraying to kill pests on crop foliage or in the soil, on the other hand.

- In each case the application is made for the beneficial purpose of pest control, in accordance with a government-approved label.
- In each case an unintended consequence may be that some portion of the pesticide ends up in water.
- In each case the Agency has reviewed data, prescribed use instructions and limitations as necessary, and concluded that the product can be used without causing unreasonable adverse effects on the environment (including the aquatic environment).

Indeed, to the extent there is a generalized difference between the already-included use scenarios and the treatment of agricultural crops, it would seem that there is *less* likelihood of pesticides reaching waters of the United States if the intent is to apply them to crops in fields or orchards (which may be considerable distance from water), rather than to apply them to or over water. Accordingly, any FIFRA-compliant application of a pesticide to a growing agricultural crop or other outdoor site meets the Agency's decision criteria supporting the use patterns in the proposed rule. Therefore, all approved use patterns should be similarly treated in the final rule.

Moreover, as has been discussed, there is an urgent need for inclusion in the *rule*, not in just the interpretative statement, of the Agency's broader policy conclusion that the FIFRA-approved use of a pesticide for a beneficial purpose, such as agricultural crop protection, right-of-way maintenance, or the like, does not constitute the "discharge of a pollutant." The virtues of rulemaking (as opposed to a mere policy statement) were set forth in the our 2003 comments on this topic and its attachment, the petition for rulemaking by the American Mosquito Control Association (document OW-2003-0063-0362 in this docket; PPC was then known as the FQPA Implementation Working Group). The only thing that has changed is that environmental activists no longer are restricting their NPDES-based challenges to aquatic uses of pesticides, but now are challenging all of farming on the premise that some molecules of pesticides applied to treat terrestrial crops might somehow find their way to water. It will be much easier to defend the Agency's overall characterization of FIFRA-approved pesticide use as not requiring NPDES permitting if the Agency's rule deals positively with all such uses. It will be hard to explain to

courts why an EPA rule says explicitly that FIFRA-approved applications to water do not require NPDES permits but does not say the same about FIFRA-approved applications to land.

Accordingly, we urge that in the final rule, the following comprehensive language be substituted for the language of the proposed rule:

The introduction to waters of the United States of a pesticide (or residues of a pesticide) that has been registered or otherwise approved for use by the Administrator under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) resulting from use of the pesticide in a manner consistent with all relevant requirements under FIFRA (*i.e.*, those directly relevant to protecting water quality), is not the discharge of a pollutant.

Or, in the alternative, substitute in Part 122;

(h) The introduction to waters of the United States of a pesticide (or residues of a pesticide) that has been registered or otherwise approved for use by the Administrator under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) resulting from use of the pesticide in a manner consistent with all relevant requirements under FIFRA (*i.e.*, those directly relevant to protecting water quality), is not the discharge of a pollutant in the following circumstances: DRAFT

(1) Application of the pesticide directly to waters of the United States in order to control pests, for example, applications to control mosquito larvae, aquatic weeds, or other pests that are present in the waters of the United States;

(2) Application of the pesticide to control pests that are present over waters of the United States, or present over land that is near waters of the United States, that results or may result in a portion of the pesticide (or its residues) reaching waters of the United States; for example, when insecticides are aerielly applied to a forest canopy where waters of the United States may be present below the canopy or when pesticides are applied over or near water for control of adult mosquitoes or other pests; or

(3) Application of the pesticide to control pests at any other agricultural or nonagricultural outdoor site that results or may result in a portion of the pesticide (or its residues) reaching waters of the United States.

Adoption of this language in a rule will provide pesticide users, pesticide manufacturers, state governmental bodies, and the general public a coherent and understandable interpretation of the

statute and should lessen considerably the potential for disruption of various social and economic sectors by citizen suits claiming newly discovered categories of NPDES violations.

EPA Is Authorized to Broaden the Coverage of the Final Rule Without Further Notice and Comment

Under the case law regarding informal rulemaking under the APA, EPA has authority to expand the exemption in the final rule. The basic test applied by courts is that a change in the language of a final rule can be made without a second round of public comment if the final rule is a “logical extension” of the proposal and the comments on the proposal. *South Terminal Corp. v. EPA*, 504 F. 2d 646, 658-659 (1st Cir. 1974). This language was recently explored in *Association of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1058-1059 (DC Cir. 2000) (citations elided):

Petitioners are correct that the final Phase IV Rule is not exactly the same as the proposed rules. But notice requirements do not require that the final rule be an exact replication of the proposed rule. If that rigidity were required, the purpose of notice and comment—to allow an agency to reconsider, and sometimes change, its proposal based on the comments of affected persons—would be undermined. Agencies would either refuse to make changes in response to comments or be forced into perpetual cycles of new notice and comment periods. Recognizing this, we hold that notice and comment requirements are met when an agency issues rules "that do not exactly coincide with the proposed rule so long as the final rule is the 'logical outgrowth' of the proposed rule." ... "The key focus is on whether the purposes of notice and comment have been adequately served... [A] final rule will be deemed to be the logical outgrowth of a proposed rule if a new round of notice and comment would not provide commenters with 'their first occasion to offer new and different criticisms which the agency might find convincing.'"

The proposed rule informs readers that the final rule will turn in part on the comments received, and states clearly that EPA is considering whether to state specifically that additional pesticide uses—including all agricultural uses—are not subject to the NPDES requirements. The Interpretative Statement says:

EPA will continue to review the variety of other circumstances beyond the two described above in which questions have been raised about whether applications of pesticides that enter waters of the U.S. are regulated under the CWA, including other applications over land areas that may drift over and into waters of the U.S.

Through a proposed rule in the *Federal Register*, EPA will solicit comment on incorporation of this Interpretative Statement in the NPDES regulations in 40 CFR Part 122.

70 FR 5098 (middle column).

Moreover, commenters on the proposed rule are on notice of the comments (filed in the same docket used for the proposed rule) responding to the Interim Statement and Guidance set forth in the August 13, 2003, *Federal Register*. Several of the comments on the 2003 document requested that the *Interim Statement and Guidance* be broadened and made the subject of a rule. See, e.g., the comments by the National Cotton Council, a PPC member, at OW-2003-0063-0373:

This guidance refers to two specific situations ... These two instances are similar to the application of crop protection products in agriculture and help reinforce that FIFRA determines the criteria by which the application of pesticides is governed. This is important to cotton farmers that use these products and clarifies confusion between federal regulations that has been introduced by some recent court decisions. Additionally, cotton grown in areas that contains wetlands might also be subject to these same vulnerabilities. Recent court cases, such as *U.S. v. Deaton* have attempted to establish wetlands, ditches, and other non-navigable waterbodies as “navigable waters” of the United States. In situations such as these, we believe that agriculture, in the appropriate situations, be subject to the same protections included in this guidance. Requiring NPDES permits of agricultural producers would place unbearable liability on growers and prevent them from making timely decisions regarding the application of their crop protection, resulting in the potential loss of their crop.

Finally, the changes that we seek in the final rule are not different in kind but only in degree from the provisions in the proposed rule. Absent are the types of problems discussed in cases such as *NRDC v. EPA*, 279 F.3d 1180 (9th Cir. 2002) (final rule based on recent key changes in state law, where there had been no opportunity to comment on effect of state law change on federal program) and *Fertilizer Institute v. EPA*, 935 F.2d 1303 (DC Cir. 1991) (system of administrative exceptions created in final rule without being discussed in proposed rule).

EPA Should Exercise Care to Place the New Provisions in the Proper Section of 40 CFR Part 122 to Avoid Problematic Judicial Inferences

Finally, we have a concern about the placement of the new language in 40 CFR Part 122. Several judicial decisions hold that EPA does not have any broad, general authority to exempt any activity that constitutes the “discharge of a pollutant” from a point source into waters of the

United States from the NPDES requirement. The Agency should be careful to avoid language that might provoke a court to set aside the rule as an attempt to make an unauthorized exemption.

EPA has proposed to add the new language at the end of section 122.3. As now written, that section is entitled “Exclusions” and purports to set forth various kinds of “discharges”—which 40 CFR 122.2 defines to mean “discharges of pollutants”—that for one reason or another are exempt from the need for an NPDES permit. These various exclusions are largely if not entirely based on specific statutory provisions that carve out certain kinds of discharges as regulated under CWA provisions other than the NPDES program, such as nonpoint sources, emissions from vessels, etc. But the new exemption would be based not on a specific statutory exemption but rather on the Agency’s conclusion that the approved application of a pesticide is not the “discharge of a pollutant” even if some of the pesticide subsequently may reach waters of the United States. To leave the placement of the new provision as proposed is to invite trouble.

A partial remedy would be to remove the word “discharges” from the introductory phrase in 40 CFR 122.3, so that it reads simply “The following do not require NPDES permits.” However, that still would leave pesticide use in a section labeled “Exclusions” rather than in a section that defines what specific activities do and do not fall within the coverage of the basic NPDES language. That problem perhaps could be remedied by also changing the title of section 122.3 to something generic, but the new provision still would be placed at the end of a list of activities several of which are in fact discharges of pollutants. If the language is left in section 122.3 EPA should make it clear that it is doing so merely as a matter of convenience, and not because it regards the pesticide uses in question as discharges of pollutants.

A preferable alternative would be to add the rule language to the end of the definition of “discharge of a pollutant” in current 40 CFR 122.2, substituting the following language to introduce the three numbered paragraphs set forth above:

The term “discharge of a pollutant” does not include the introduction to waters of the United States of a pesticide (or residues of the pesticide) resulting from use of the pesticide in a manner consistent with all relevant requirements under Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), (*i.e.*, those directly relevant to protecting water quality), in the following circumstances:

This approach would characterize the Agency’s action precisely and avoid any possibility that a reviewing court would misunderstand EPA’s intent.

* * *

The members of the Pesticide Policy Coalition deeply appreciate EPA’s willingness to address an issue currently threatening the economic stability of stakeholders who use pesticides responsibly and legally. We strongly encourage the agency to expand the rule to make it clear that label appropriate pesticide applications do not require an NPDES for any user or use.

The PPC looks forward to working with the EPA Office of Water, as well as the Office of Pesticide Programs, to further resolve challenges on this and other issues related to the safe pest management and water quality protection.

Please contact me directly at, 202-406-3663 or Rebeckah@fb.org, if you have any questions or concerns related to these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Rebeckah T. Freeman", with a long horizontal flourish extending to the right.

Rebeckah T. Freeman
Chair

CC: Stephen Johnson, Administrator, USEPA
Benjamin Grumbles, Assistant Administration, Office of Water, USEPA
Susan Hazen, Assistant Administrator (Acting), OPPTS, USEPA
Ann Klee, General Counsel, USEPA
Jon Scholl, USEPA
Jim Jones, Director, OPP, USEPA
Anne Lindsay, Deputy Director for Programs, OPP, UPEPA
Brent Fewell, Office of Water, USEPA
Chuck Conner, Deputy Secretary, USDA
Nancy Bryson, General Counsel, USDA
Burluson Smith, Office of Pesticide Policy, USDA