



PPC

PESTICIDE POLICY COALITION
A Coalition Working for Sound Pest Management Policies

www.pesticidepolicy.org

July 25, 2011

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460

Attn: Docket ID No. EPA-HQ-OW-2010-0257

RE: Comments on the Draft Reasonable and Prudent Alternative in NMFS' Draft Biological Opinion on the Proposed Pesticides General Permit, Docket No. EPA-HQ-OW-2010-0257

Ladies and Gentlemen:

The pesticide general permit (“PGP”) proposed by the U.S. Environmental Protection Agency (“EPA” or the “Agency”) under the Clean Water Act (“CWA”) is nearly final, lacking before issuance only decisions relating to consultations with the National Marine Fisheries Service (“NMFS”) and the Fish and Wildlife Service (“FWS”; collectively the “Services”) under the Endangered Species Act (“ESA”). In its consultation, NMFS has proposed significant and costly changes to the PGP in the form of a Reasonable and Prudent Alternative (“RPA”). EPA now faces a challenging decision – how much of these expected changes to incorporate into its final version of the PGP and how to interpret those changes to a watching nation, as the October 31, 2011 court deadline for implementation of the PGP approaches. The Pesticide Policy Coalition (“PPC”) is pleased to comment on the RPA and to recommend which aspects EPA should reject.

NMFS’ draft biological opinion (“BiOp”), issued June 17, 2011, concludes that EPA’s issuance of the PGP would likely jeopardize the continued existence of 33 endangered or threatened species under NMFS’ jurisdiction (“listed species”) and result in the destruction or adverse modification of habitat that has been designated as critical for 29 of those species (“designated habitat”). NMFS concluded that EPA would not likely know (a) where or when most of the pesticide applications it intends to be authorized under the PGP would occur; (b) whether these applications would result in exposures to pesticides in concentrations, durations or frequencies that

would cause adverse effects to listed species or designated habitat; or (c) whether the permittees were complying with the conditions of the permit designed to protect listed species and habitat from being exposed. From these conclusions, NMFS included in its draft BiOp an RPA intended to change EPA's draft PGP. The PPC has evaluated these changes (see Appendix A). NMFS believes that by incorporating the RPA into the PGP, EPA will more fully meet the requirements of ESA §7(a)(2) to protect listed species and their designated habitat from pesticide applications made in the range of NMFS' jurisdiction. Congress, industry and pest control agencies and others in affected states, counties, and cities are closely watching what aspects of the RPA that EPA decides to implement.

The PPC is an organization that 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, formulators and distributors; pest-control 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 its members. We appreciate the opportunity to provide the following comments:

PPC Comments on the RPA and Recommendations to EPA:

The PPC is very concerned that the RPA would unnecessarily burden PGP operators, decision makers (as defined by the PGP), and EPA with unwarranted and costly requirements that would unnecessarily prevent essential pest control activities of federal, state, interstate, county, municipal, and private entities in the range of listed species and in designated habitats. Even if ultimately allowed by NMFS, in consultation with EPA, programmatic activities in the range of listed species and in designated habitats would be significantly delayed, frustrating pest control priorities, increasing costs, and handicapping public health strategies. Some RPA expectations are more egregious than others.

Our specific concerns and recommendations to EPA are:

- It is excessively restrictive for the RPA to prohibit discharges in the range of listed species unless the pesticides used are known to not cause adverse effects to listed species or their surrogates. Registration and reregistration under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") involve extensive testing of numerous aquatic species, including surrogates of listed species, for potential effects. For potential risks beyond the margins of these tests, EPA applies safety factors to use directions on product labels and federally-approved use limits. This is true for all pesticides potentially covered for use by the PGP.

However, no tests, safety factors, or product-label use restrictions can fully anticipate all potential circumstances. Thus it is unreasonable for the RPA to eliminate use of FIFRA-approved pesticides unless it is known that, even at extreme dosages or circumstances, they would not cause an adverse effect to a listed species or its surrogate.

- The PPC is very familiar with the Services' interpretation of adequacy of data submissions and difficulty in meeting regulatory deadlines, and the PPC discourages EPA from involving NMFS in the determination of PGP coverage for ranges of listed species and designated habitats. For example, for any pesticide applications that would occur within the range of a listed species, NMFS would allow PGP coverage only if the operator could demonstrate to EPA, with technical consultation from NMFS, that certain other provisions were met. Furthermore, subsequent information submissions to EPA (and NMFS) would be needed, were an operator to seek PGP coverage for changes in the number of applications, specific amount of chemical used, location of the application, or approximate date of application. For all such technical decisions, NMFS expects to participate and states it will render decisions within 30 days from receipt of the operator's materials from EPA. NMFS' involvement would likely represent a very significant delay if EPA and NMFS disagree on any aspect of the proposed coverage. EPA's ecological risk assessment process is fully adequate for the Agency to make such determinations in a timely manner, without participation by NMFS. Delays of this nature would be especially problematic in situations of a declared emergency.
- The RPA's requirement that any qualified decision maker who plans to apply pesticides into waters of the US within range of listed species must file an NOI and Annual Report would expand the PGP's requirement for such submissions to include even the smallest decision makers, such as individual homeowners, housing developments, and small towns. They are unlikely to have the technical expertise or resources to satisfy the NOI requirements. The proposed PGP contains a tiered requirement for NOI submission and other requirements that, while an acknowledged burden to the majority of decision makers, provides realistic differentiation of responsibilities, based on the potential for impact on aquatic species in waters of the U.S. and on the capability of the decision makers to comply.
- It is extremely unreasonable for the RPA to expect that EPA's design and implementation of the PGP would help determine (a) the status and trends of listed species and designated habitat; (b) the demographic and ecological status of populations of those species given their exposure to pre-existing stressors in different drainages and watersheds; or (c) the physical, physiological, behavioral, sociobiological, and ecological consequences of exposing listed species or habitat to pesticides at concentrations, durations, or frequencies that are known or suspected to produce physical, physiological, behavioral, or ecological responses, given their preexisting demographic and ecological condition. Such ethological

expectations are the purview of NMFS and the U.S. Fish & Wildlife Service (“FWS”), not EPA.

- It is unrealistic for the RPA to expect EPA to launch within two years a program to monitor treated waters in PGP States that are under NMFS’ jurisdiction and determine if listed species and designated habitats are exposed to pesticides at concentrations, intensities, durations, or frequencies that produce physical, physiological, behavioral, or ecological responses with individual or cumulative adverse consequences for individual organisms or habitat. Perhaps the current appropriations cuts and future budgetary outlook have been overlooked by NMFS, but it is PPC’s opinion that EPA would be unlikely to undertake the RPA’s required water-quality monitoring and evaluation of listed species’ ecology in this administration or the next.
- The PPC assumes that the FWS has at least an equal stake in the consultation required by ESA for the PGP, given its responsibility shared with NMFS for listed species and their designated habitat in Idaho, Massachusetts, New Hampshire, New Mexico, District of Columbia, all Indian lands nationwide and federal lands. We have heard no official word regarding initiation, progress, or results of a corresponding consultation or BiOp from FWS. The PGP cannot proceed without resolution of this key step.
- Regulations implementing ESA §7 (50 CFR §402.02) define RPAs as alternative actions, identified during formal consultation, that, among other criteria, can be implemented in a manner consistent with the intended purpose of the action, and are economically and technologically feasible. NMFS has made no attempt to demonstrate that the proposed RPAs meet these regulatory requirements of economical and technological feasibility. EPA must insist that NMFS meets its regulatory obligations before accepting any proposed RPAs.
- The RPA would substantially increase the burden for decision makers and applicators responsible for pesticide application, as well as for federal and state regulators. It cannot move forward without reconsideration of the PGP by the Office of Management and Budget under a revised Information Collection Request.
- NMFS routinely criticizes EPA Office of Pesticide Programs’ methods as being underprotective of listed species, and did so again in this BiOp, yet there are numerous examples in the Pacific salmonid pesticide BiOps completed by NMFS from 2008-2011 of methods devised by NMFS that are overly protective without adequate documentation. For instance, shallow static floodplain habitat is described by NMFS as being extremely important to juvenile salmonids, but its characteristics and extent are not supported by data. Similarly, use of non-standard toxicity endpoints is not linked to effect assessment endpoints that are meaningful for population persistence. If concern over perceived inadequacy of EPA methods is such a significant issue rationalizing NMFS’ draft RPA, this BiOp and RPA should be left in draft form until after the National Academy of Sciences’ review panel completes its work and issues recommendations.

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The PPC appreciates the opportunity to comment to EPA on the proposed RPA from NMFS. We urge EPA to consider carefully the incorporation of any provision of the RPA into the proposed PGP.

If you have any questions or comments regarding this submission, please feel free to contact us.

Sincerely,

A handwritten signature in cursive script that reads "Rodney J. Snyder".

Rod Snyder
Chairman
Pesticide Policy Coalition

APPENDIX A

The RPA is comprised of three elements NMFS would require in order to assure (a) that no activities authorized by the PGP would result in any peak concentrations of pesticides in waters of the U.S. that might be expected to cause adverse effects to listed species, unless the pest being controlled poses a greater threat to the survival of those species than would the exposure to that pesticide; (b) that all operators who apply pesticides into waters of the U.S. within the range of listed species are identified; and (c) that all of those operators comply with the terms of the PGP. The RPA would:

1. Restrict Availability of PGP Coverage for Pesticide Applications in the Range of Listed Species: The RPA directs EPA to limit the scope of the PGP to cover only those pesticide applications that would:

- not occur in the range of any listed species; or
- include pesticides that are known not to cause adverse effects to listed species or to representative surrogate species; or
- include pesticides that at their maximum allowed use rates are not expected to result in aquatic pesticide concentrations that exceed the maximum No Observed Adverse Effect Concentrations or No Observed Adverse Effect Levels (“NOAEC/NOAEL”) for those listed species or for representative surrogate species.

All other provisions of the PGP would apply also. No other pesticide applications within the range of listed species would be authorized under the PGP according to the RPA, *unless* the operator(s) can demonstrate to EPA, with the technical assistance of NMFS, *one or more of the following*:

- no listed species will be directly or indirectly exposed to pesticides from the application (e.g., the species will not occur in the treatment area at that time of year); or;
- the application for a specific pesticide use is below the maximum use rate and will result in a peak concentration less than the NOAEC/NOAEL for those species or representative surrogate species; or;
- that a consultation between EPA and NMFS regional or field officials determined that the pest to be controlled poses a greater threat to the survival of the listed species than the pesticide to be applied.

NMFS would provide technical assistance and concurrence on any eligibility determination within 30 days from receipt of the operator’s materials from EPA. For any planned discharges determined to be eligible for PGP coverage under the preceding determinants, the operator must make the same demonstration in order to maintain PGP coverage for any change to a different pesticide product, the amount used, the location of the planned discharge, or the approximate date. All other planned applications must be covered by an individual NPDES permit to proceed.

2. Require all Decision Makers to File a Notice of Intent (“NOI”) and Annual Report for Any Discharge in the Range of Listed Species: The RPA directs EPA to require any decision maker that meets the eligibility for discharge under number 1 above and plans to discharge a pesticide into waters of the U.S. in the range of listed species to file an NOI that identifies the pesticide product to be discharged, the planned quantity and rate of discharge, the number of planned discharges, and the category of that discharge as identified in number 1 above. That decision maker must also file an annual report describing (a) the discharge in defined detail, (b) any adverse incidents as a result of any discharge, and (c) any corrective action. EPA must collect and summarize these reports for NMFS.

3. Require EPA to Develop and Implement Within Two Years a NMFS-Approved Water Quality Monitoring Plan: In addition to the current monitoring requirements of the PGP, the RPA would require EPA to implement an NMFS-approved monitoring plan for the presence of pesticides in habitats where listed species or designated habitat occur to ensure the pesticide discharges it authorizes under the PGP do not exceed any Water Quality Criterion or occur in concentrations that are likely to result in adverse effects to listed species or designated habitat. The sampling and analyses would also include non-target waters of the U.S. into which these discharges may flow. EPA is to submit a report to NMFS with all raw data and a summary.