

The NMFS BiOp and the NPDES Pesticide General Permit

Overview

On June 17, 2011, the National Marine Fisheries Service (NMFS) issued a biological opinion (BiOp) on EPA's proposed Clean Water Act (CWA) general permit for pesticide discharges to or near surface water (PGP). The BiOp concluded that issuance of the permit would likely jeopardize the continued existence of 33 endangered species and result in destruction or adverse modification of critical habitat for 29 of those species. To address these conclusions, NMFS included a reasonable and prudent alternative (RPA) in the BiOp to ensure that EPA modifies the draft PGP to more fully meet requirements of the Endangered Species Act (ESA). The RPA consists of three elements: (1) a restriction on PGP coverage in the range of the listed species, (2) a requirement that all decision makers file a Notice of Intent (NOI) to discharge and submit an annual report to EPA, which the Agency must summarize for NMFS, and (3) a requirement that EPA develop and implement a NMFS-approved water quality monitoring plan (in addition to the required PGP permittee monitoring plan).

On July 25, 2011, CPDA submitted comments on the BiOp through the Pesticide Policy Coalition. The comments first expressed the trade associations' general concerns about the burden that PGP permittees and EPA would incur from unwarranted and costly RPA requirements added to the permit. Nine specific comments about the RPA included (1) objection to the unreasonable restriction of pesticide applications in the ranges of species unless it is known they do not cause adverse effects, (2) EPA should retain the tiered requirement for NOI submission, (3) NMFS improperly shifts certain NMFS functions to EPA, (4) it is unrealistic to expect EPA to design and launch a water monitoring and species adverse effects assessment program within 2 years, (5) the PGP cannot proceed without FWS consultation, and (6) the RPA substantially increases the regulatory burden, and therefore OMB must reconsider the PGP under a revised ICR.

Update

EPA issued the final PGP by the court-ordered deadline of October 31, 2011. The permit and related guidance are now available on the Agency's website, but are not subject to further public comment (*see* http://cfpub.epa.gov/npdes/home.cfm?program_id=410). The basic PGP is identical to the April 1, 2011 version, except for modifications based on the NMFS RPA. The Fish and Wildlife Service (FWS) has not yet released its BiOp, so the final PGP may be modified after EPA receives the BiOp. EPA also noted that 36 of the 44 states authorized to administer the NPDES program have finalized their permits, which must now incorporate the specific ESA conditions included in the final PGP. Permittees will have until January 12, 2012 to submit a notice of intent (NOI) to discharge to waters subject to the CWA.