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VIA EPA Docket

Water Docket
U.S. Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Draft National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit for Point Source Discharges from the Application of Pesticides; 75 Fed. Reg. 31775 (June 4, 2010); Docket ID No. EPA-HQ-OW-2010-0275.

The Chemical Producers & Distributors Association (“CPDA”) appreciates this opportunity to comment on the above-referenced draft pesticide general permit (“PGP”). CPDA is the primary advocate on federal legislative and regulatory issues for generic pesticide registrants, adjuvant and inert ingredient manufacturers, and product formulators and distributors. We represent over \$7 billion worth of pest control products used on food, feed and fiber crops, and in non-crop segments of the pesticide industry. CPDA commends the U.S. Environmental Protection Agency’s (“EPA” or “Agency”) effort in developing a narrowly focused permit to address primarily the largest annual pesticide

applications to waters of the United States.¹ Our comments highlight the significant concerns we have about certain provisions of the PGP that need further clarification or are likely to unreasonably burden users of pesticide products.

Scope of Permit Coverage

The PGP covers four use patterns² for applications of biological pesticides and chemical pesticides that leave residues when applied directly to, over, or near waters of the U.S. For the most part, EPA has developed and proposed a reasonable permitting framework to implement the Clean Water Act (“CWA”)³ requirements mandated by the Sixth Circuit Court of Appeals.⁴ The pesticide applications (i.e., CWA discharges) are subject to the PGP based on an assumption that, for purposes of the PGP and the vacated 2006 rule, they will “make unavoidable contact with the water.”⁵ The draft PGP intentionally does not provide coverage for any other discharges to waters of the U.S., including terrestrial applications to protect crops that might directly or indirectly encounter wetlands, ditches, or other waters of the U.S. or their conveyances. CPDA agrees that these use patterns are appropriate for the PGP. They properly address the court’s ruling and properly exclude certain terrestrial discharges that, by law, are not required to obtain NPDES permit coverage.⁶

However, EPA also alludes to potential enforcement liability for other discharges by cautioning potential “operators”⁷ that “[a]ny point source discharges of pollutants to waters of the United States not covered by this or another general permit will need

¹ EPA defines “waters of the United States” expansively in 40 C.F.R. §122.2.

² The permit addresses pesticide applications to control (1) mosquito and other flying insects, (2) aquatic weeds and algae, (3) aquatic nuisance animals, and (4) forest canopy pests.

³ 33 U.S.C. §1251 *et seq.*; CWA §§101-607.

⁴ *National Cotton Council, et al. v. EPA*, 553 F.3d 927 (6th Cir. 2009), *cert. denied* (U.S. Feb. 22, 2010) (Nos. 09-533 and 09-547) (vacating EPA’s 2006 final rule exempting certain surface water-related pesticide uses from NPDES permit requirements).

⁵ *Draft [NPDES] Pesticides General Permit (PGP) for Discharges from the Application of Pesticides to or over, including near Waters of the U.S. - Fact Sheet* (June 2010) [“Fact Sheet”], p.18.

⁶ CWA §502(14). The statutory definition of “point source” excludes “agricultural stormwater discharges and return flow from irrigated agriculture.”

⁷ In essence, an “operator” is defined in Appendix A of the PDP as any entity that finances, decides to undertake pesticide applications, and/or has day-to-day control of or performs activities necessary for permit compliance.

coverage under an individual permit,”⁸ and solicits comments on possible PGP coverage for other use patterns. CPDA does not support inclusion of any other use patterns in the PGP at this time, but notes that any additional use patterns should be limited to those that are “over” or “near” CWA jurisdictional waters and consistent with an Agency determination that “a portion of the pesticide will unavoidably be deposited into the waters of the U.S.”⁹

In both footnotes to Table 1 of the PGP, EPA provides instructions on how to calculate the acreage and linear extents of pesticide applications to determine the need for filing a Notice of Intent (“NOI”). The instructions require that “conveyances with a hydrologic surface connection to waters of the U.S. at the time of pesticide application” be included in the calculation. Thus, it appears the Agency expects the PGP to apply at a minimum to jurisdictional waters that were addressed by the U.S. Supreme Court in Rapanos v. United States.¹⁰ However, potential operators need far more certainty than an oblique reference to conveyances with hydrologic connections. The Agency needs to provide answers to questions such as (1) Does “hydrologic surface connection” mean the presence of standing or flowing water when the pesticide was applied near the conveyance? (2) Would a dry swale in the middle of a field that could possibly convey water to waters of the U.S. be subject to the PGP or included in a NOI area threshold calculation? (3) How does the 2008 EPA-Corps of Engineers guidance¹¹ on determining CWA jurisdiction apply to these determinations?

There are certain conveyances that pesticide users encounter that may or may not have to be covered by the PGP or included in area threshold calculations. For example, much of western agriculture and horticulture is irrigated, foresters manage tree regrowth on logged mountain slopes where swales and erosional features occur, municipalities manage roadsides alongside which stormwater ditches are located, and other user groups routinely encounter upland ephemeral stormwater conveyances. Thus, there are various terrestrial user groups that must determine whether to seek PGP coverage of their pesticide uses and

⁸ 75 Fed. Reg. 31755, 31783 (June 4, 2010).

⁹ Fact Sheet, p. 13.

¹⁰ 126 S. Ct. 2208 (2006).

¹¹ *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States. & Carabell v. United States; USEPA and US Army Corps of Engineers (December 2008).*

would greatly benefit from a better explanation of EPA’s meaning of the word “conveyance” in this context. Therefore, CPDA asks that EPA clarify what “conveyances” are subject to the PGP by (1) providing specific examples of the most obvious conveyances that are covered or not covered and why, (2) describing how the 2008 jurisdictional guidance applies to PGP coverage and application area threshold calculations, and (3) providing a list of conveyances that would never be subject to the PGP.

Multiple Operators and Related Enforcement Liabilities

The PGP requires any operator meeting specified eligibility criteria to obtain permit coverage, which may be achieved (1) by filing a NOI if certain annual pesticide treatment area thresholds will be exceeded or (2) automatically if specific eligibility criteria are met.¹² However, EPA notes in section 1.0 of the PGP that “more than one operator may be responsible for compliance with this permit for any single discharge from application of pesticides,” and in the Fact Sheet, the Agency encourages operators to share responsibilities for implementing the PGP pursuant to a written agreement.¹³ Although this shared responsibility may be a desirable cost-sharing approach for complying with permit requirements, EPA needs to clarify its compliance expectations when multiple operators jointly share permit obligations. For instance, the Agency indicates that it considers all operators covered by the permit to be “jointly and severely” liable for any violations that occur, and that it “may consider a written division of responsibilities” when assessing an appropriate enforcement response.¹⁴ Does this consideration mean that, in some instances of non-compliance, the Agency would not bring an enforcement action against an operator relying in good faith upon a joint operator who did not meet its compliance obligations under a written agreement? Would this answer be different if the “innocent” operator was a non-profit organization that contracted with a now defunct commercial applicator that failed to comply with a written agreement allocating compliance with PGP requirements?

¹² PGP part 1.2.1.

¹³ Fact Sheet, p 11.

¹⁴ Fact Sheet, p. 12.

Additional ESA Requirements and Potential Need to Extend Compliance Date

EPA has concluded that issuance of the PGP is subject to requirements of the Endangered Species Act “(ESA)”¹⁵, and has initiated a section 7 consultation with the U.S. Fish & Wildlife Service and National Marine Fisheries Service (“Services”).¹⁶ The consultation has not been completed, and the Agency has inserted a placeholder in the PGP. CPDA has several significant concerns about EPA’s use of this placeholder during the public comment process. First, EPA states that the consultation “may result in addition of conditions to further protect listed species and habitat, but also those species proposed, but not yet listed as endangered or threatened, or habitat proposed, but not yet listed as designated critical habitat.”¹⁷ Such designations often change dramatically during the process of going from proposed to designated, and are often changed by court challenges. Second, based on its economic analysis, EPA concludes that the economic impact on covered entities, including small businesses, to be minimal.¹⁸ However, we are concerned that potentially severe and costly ESA restrictions will find their way into the NPDES permit prior to finalization. If this occurs, CPDA believes that EPA must repeat its economic analysis and then re-propose for public comment the permit in which those ESA restrictions occur. Third, the final PGP may well end up containing other additional burdensome and contentious requirements, and we believe there is a reasonable chance that the consultation will not be completed by the April 9, 2011 effective date of the PGP. In addition, we are concerned that many final state PGPs will not be available by this deadline, and that some operators making legal pesticide applications on April 8th would be unfairly forced to violate the CWA by making the same applications a day later in order to protect their crops. Therefore, we urge EPA to expedite state PGP review and to seek a commitment from the Court for a further extension should it appear in early 2011 that the April 9th deadline will not be met.

¹⁵ 16 U.S.C. §1531 *et seq.*; ESA §§ 1-18.

¹⁶ Fact Sheet, part III.10.F.

¹⁷ Fact Sheet, p. 103.

¹⁸ 75 Fed. Reg. 31755, 31784 (June 4, 2010).

NOI Requirements and Possible R&D Exemption

EPA has established annual treatment area thresholds for the PGP that would require operators to submit a NOI to gain PGP coverage if an annual threshold is expected to be exceeded. Although some entities would gain automatic PGP coverage by meeting the basic eligibility criteria, there are other operators, such as those engaged in pesticide research and development (“R&D”) that should be exempted from the NOI requirement. Some of the annual area thresholds are low enough that they could capture the cumulative R&D pesticide applications of major universities, experimental stations, pesticide manufacturers or other R&D entities engaged in scientific research. These studies are conducted by experts and their staff, and are generally limited to the funds, scope, and time allowed for implementing well-defined experimental procedures. Consequently, imposing the numerous burdens that exceedance of an area threshold would impose could sabotage the scientific research objectives of individual researchers or their employing university, research station, or pesticide registrant company. CPDA recommends that EPA specify that pesticide applications made to and over, including near, waters of the U.S. solely for the purpose of R&D, as defined in Appendix A of the PGP, would be covered automatically by the PGP but not subject to the NOI requirement and other requirements applicable to NOI filers.

Technology-Based and Water Quality-Based Effluent Limitations

CPDA agrees that narrative (i.e., non-numeric) technology-based effluent limitations are the only feasible approach for the PGP, and that EPA’s rationale for their use is sound and consistent with the Agency’s goal of minimizing pesticide discharges.¹⁹ EPA proposes to achieve this minimization by requiring use of “control measures” and “best management practices” such as using the lowest effective amount of a pesticide product and performing regular equipment maintenance. We also agree that the required specific technology-based effluent limitations are as stringent as necessary to meet federal

¹⁹ Fact Sheet, pp. 29-32.

and state water quality standards,²⁰ and that the following narrative water quality based effluent limitation set forth in the PGP is appropriate:

“Your discharge must be controlled as necessary to meet applicable numeric and narrative state, territory, or tribal water quality standards.

If at any time you become aware, or EPA determines, that your discharge causes or contributes to an excursion of applicable water quality standards, you must take corrective action as required in Part 6.”²¹

However, as part of the PGP’s requirement to minimize pesticide discharges to waters of the U.S., EPA specifies that pesticide application equipment must be calibrated to “...ensure that the equipment’s rate of pesticide application ...deliver[s] the precise quantity of pesticide needed to achieve greatest efficacy against the target pest.”²² (underline emphasis added). This enforceable effluent limitation sets operators up to fail and is contradicted by EPA’s statement in the Fact Sheet that “EPA understands that the appropriate application rates are variable depending on the conditions, and expects permittees to use their best professional judgment in combination with the label requirements in determining the appropriate amount of product needed to optimize efficacy of treatment (emphasis added).”²³ CPDA urges EPA to modify part 2.1.3 of the PGP, and related statements where they occur in the PGP and Fact Sheet, to something more achievable, such as:

“You must maintain, calibrate, and operate the pesticide application equipment so that the appropriate quantity of pesticide is delivered to best control the target pest consistent with the FIFRA label, manufacturers’ specifications for equipment precision, weather conditions on the day of application, and best professional judgment to minimize pesticide discharges to waters of the US.”

Costs

CPDA believes the multiple permit planning, performance, recordkeeping, and reporting requirements would significantly increase the workload of decision-making

²⁰ 40 C.F.R. §122.44(k)(3).

²¹ PGP, part 3.0.

²² PGP, part 2.1.3.

²³ Fact Sheet, p. 87.

entities and professional applicators (i.e., operators) during their busiest times of the year. For instance, operators subject to the NOI requirement have a significant burden of implementing integrated pest management (“IPM”) planning, monitoring, and recordkeeping that are likely to delay time-sensitive pesticide applications and increase direct costs of pest control and the basic costs of doing business. Contrary to EPA’s expressed expectation of minimal economic impact on covered entities, including small businesses,²⁴ we believe it is likely there will be many other costly consequences, including delays in crucial pesticide applications, inadvertent recordkeeping violations, and unwarranted citizen suits filed by those generally opposed to use of pesticides. This will be especially true if EPA’s ongoing ESA consultation with the Services results in stringent restrictions and performance requirements being added to the draft PGP prior to its finalization. Moreover, the Agency’s estimated annual costs to comply with the PGP apply only to the six unauthorized states and territories where EPA has NPDES permitting authority for pesticide discharges.²⁵ Furthermore, EPA admits that sufficient data on the number of entities potentially affected for all unauthorized areas and use patterns were not available, and that “more accurate information on the number of entities that would be subject to the draft PGP may substantially affect the cost analysis.”²⁶ Thus, the actual nationwide annual cost of compliance with state and federal pesticide NPDES permits will be considerably more than EPA’s likely underestimated costs for the unauthorized portion of the United States.

CONCLUSIONS

CPDA appreciates the difficulties EPA has faced in developing the PGP under strict time constraints and commends the Agency’s effort. However, we believe the Agency can improve the PGP by clarifying what conveyances are and are not subject to the PGP, and the compliance and enforcement expectations for operators jointly sharing permit obligations. EPA should also modify the unnecessary rigidity of part 2.1.3 of the PGP to allow pesticide applicators to minimize pesticide discharges through a more

²⁴ 75 Fed Reg. 31775, 31784 (June 4, 2010).

²⁵ PGP, Appendix C.

²⁶ *Economic Analysis of the Pesticide General Permit (PGP) for Point Source Discharges from the Application of Pesticides*, EPA, May 26, 2010, p. vi.

flexible approach, such as the example we provide. Moreover, EPA should be prepared to (1) revise its economic analyses to incorporate new data and any changes to the draft PGP resulting from the ongoing ESA consultations , and (2) work with the Court to extend the compliance deadline if it appears the PGP and state counterpart permits will not be available by the he April 9, 2011 deadline.

We would be pleased to provide assistance to the Agency as implementation of the permit begins.

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