



July 19, 2010

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

Attention: USEPA Water Docket ID No. USEPA-HQ-OW-2010-0257

The comments are submitted by the Wyoming Ag-Business Association (WABA), who appreciates the opportunity to submit these public comments on USEPA's proposed pesticide NPDES general permit for point-source applications of biological pesticides or chemical pesticides that leave a residue when the pesticide application is for one of several selected pesticide use patterns. WABA represents Wyoming's commercial fertilizer and crop protection dealers and applicators, and many of their suppliers; most of our members offer commercial application services and consequently have fundamental concerns with the effect and implementation of the Pesticide General Permit (PGP) as drafted. We believe pesticide applications by commercial applicators should not generally be subject to the CWA or this permit, and provide these comments to support this position.

Context of our Comments – The draft permit will be enforced in several states and certain other areas, including the Wind River Reservation, and forms a template for permit development and enforcement by at least 44 other states, including Wyoming. It is the Agency's preliminary response to the 6th Circuit Court of Appeal's decision¹ of February, 2009. The Court's decision marks a pre-emption of the Federal Insecticide, Fungicide and Rodenticide Act² (FIFRA) by the Clean Water Act³ (CWA) for the first time in the history of either statute. Despite USEPA's contention of no anticipated adverse economic impacts⁴ on applicators and decision makers ("operators"), we believe the implementation of USEPA's draft NPDES permit, as written, is most likely to trigger many costly unintended consequences. For example, NPDES permit requirements may require the hiring of Integrated Pest Management technicians; delay timely pesticide applications; layer burdensome planning, recordkeeping and reporting requirements on operators during the busiest time of the year; and expose professional applicators and land managers to unnecessary legal risks for citizen suits over potential paper work violations. The permit would link many thousands of operators in a legal web of performance, recordkeeping and

¹ *National Cotton Council of America v. USEPA*, 553 F.3d 927 (6th Cir., 2009)

² Federal Insecticide, Fungicide and Rodenticide Act, Pub. L. No. 92-516, 86 Stat. 973, 1972

³ Clean Water Act, 33 U.S.C. 1251 et seq., 1972

⁴ 75 Fed Reg 107, 31784 June 4, 2010

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reporting requirements that will expose them to “joint and several” legal jeopardy through citizen suits and agency regulatory actions. In many states, pesticide regulation and enforcement may now fall under two agencies, complicating the process and adding to the financial burden of state and local agencies, municipalities and operators.

CWA and FIFRA: Four months after Congress enacted the Clean Water Act (CWA) it enacted the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) to control all aspects of pesticide registration, sales and use. In the decades since, USEPA has never issued an NPDES permit for the application of a pesticide made intentionally to target a pest that is present in or over, including near, waters of the US. Instead, USEPA has been regulating these and all other types of applications under FIFRA, as intended by Congress. Congressional intent to this effect was clearly spelled out in the House Committee Report for FIFRA in 1971:

“2. *Statement of findings*

The Committee did not include in H.R. 10729 the statement of legislative findings as originally proposed in H.R. 4152. The Committee did not take this action in derogation of the basic intent of H.R. 4152, but did so to avoid cluttering the final statute with language which the Committee feels is interpretive of the other provisions of this legislation. It is therefore the Committee’s intent that:

*The Congress hereby finds that pesticides are valuable to our Nation’s agricultural production and to the protection of man and the environment from insects, rodents, weeds, and other forms of life which may be pests; but it is essential to the public health and welfare that they be regulated closely to prevent adverse effects on human life and the environment, **including pollution of interstate and navigable waters**;... and that regulation by the Administrator and cooperation by the States and other jurisdictions as contemplated by the Act are appropriate to prevent and eliminate the burdens upon interstate and foreign commerce, to effectively regulate such commerce, and to protect the public health and welfare and the environment.”*
(**emphasis added**) H.R. Rep. #92-511, 92d Cong., 2d Sess., 13-14 (1971)

The FIFRA registration process described well by USEPA in the Fact Sheet accompanying the pesticide NPDES general permit (PGP) includes requirements for many dozens of environmental, health and safety studies to establish the conditions under which pesticides can be legally used in the United States. Many of these studies form the basis of USEPA’s use restrictions incorporated into pesticide product labels, including for those product uses covered by USEPA’s PGP. USEPA’s 2006 final rule codified the Agency’s long-held exemption from NPDES permitting of pesticides applied into and over, including near, waters of the US when made consistent with the FIFRA label (71 Fed. Reg. 68, 483).

Background Considerations: In the decades since Congress enacted the CWA, USEPA has never issued an NPDES permit for the application of a pesticide made intentionally to target a pest that is present in or over, including near, waters of the US. Instead, USEPA has been regulating these types of applications through FIFRA, enacted by Congress to control all aspects of pesticide registration, sales and use. The FIFRA registration process includes requirements for many dozens of environmental, health and safety studies to establish the

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conditions under which pesticides can be legally used in the United States.⁵ The many scientific studies have contributed to a great wealth of knowledge about commercial pesticides and about their use in agricultural and non-agricultural pest control situations. Many of these studies are required by USEPA to establish the safety of pest control products use in aquatic situations. In 2006, USEPA finalized a rule⁶ codifying the Agency's long-held exemption from NPDES permitting of pesticides applied into and over, including near, waters of the US when made consistent with the FIFRA label. However, this rule was widely challenged and in February 2009, the 6th Circuit Court of Appeals vacated USEPA's rule, declared "pollutants" all biological pesticides and excess chemical pesticide residues persisting in water after completion of beneficial uses, and required the development of a pesticide NPDES permitting program. Although USEPA agreed with industry that the Court had misapplied *Chevron* principles⁷ in deciding the case⁸, the Agency opposed industry's 6th Circuit *en banc* and US Supreme Court *certiorari* petitions. In the few remaining months until the end of the 2-year stay of the Court's decision, USEPA and states must implement a functional, achievable and defensible NPDES general permit for aquatic pesticide use. This will be a difficult task for all involved. Our comments are designed to provide USEPA with insight into various key considerations, and we intend to submit the same comment to WYDEQ to inform them during the drafting of the Wyoming PGP.

Comments

Economic Impact: We would differ with the general tone of the economic analysis conducted as a part of the draft PGP, wherein the agency states: "At this time, information is not available to quantify or monetize any beneficial impacts of this permit."⁹ Accepting this statement as factual, the remaining analysis is thus specious at best. Further, there is no consideration throughout the analysis of any impact within the areas that will be covered by state issued permits. While realizing that in the strict construction of the effects of this USEPA draft PGP, there is minimal economic impact in the areas under jurisdiction of states issuing PDES permits, in reality, as this PGP is to serve as a 'template' for state-issued permits, the costs are at least in the neighborhood of hundreds of millions of dollars over

⁵ See our statement on the pesticide registration process in these comments under "Other Considerations"

⁶ 71 Fed. Reg. 68, 483. November 27, 2006. The rule revised USEPA's NPDES regulations to add a paragraph to the list of discharges in 40 C.F.R. 122.3 that do not require NPDES permits. 71 Fed. Reg. at 68,492. The rule covered the application of pesticides, "consistent with all relevant requirements under FIFRA (*i.e.*, those relevant to protecting water quality)," in the following two circumstances: (1) The application of pesticides directly to waters of the US in order to control pests. Examples of such applications include applications to control mosquito larvae, aquatic weeds, or other pests that are present in waters of the US. (2) the application of pesticides to control pests that are present over waters of the US, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters of the US in order to target the pests effectively; for example when insecticides are aerially applied to a forest canopy where waters of the US may be present below the canopy or when pesticides are applied over or near water for control of adult mosquitoes or other pests. *Ibid.* (40 C.F.R. 122.3(h)). USEPA further concluded that "if there are residual materials resulting from pesticides that remain in the water after the application and its intended purpose (elimination of targeted pests) have been completed, these residual materials are ... pollutants under CWA section 502(6) because they are wastes of the pesticide application." 71 Fed. Reg. at 68,487. USEPA explained however, that such applications "do not require NPDES permits" because, "while the discharge of the pesticide is from a point source (generally a hose or an airplane), it is not a pollutant at the time of the discharge... Instead the residual should be treated as a nonpoint source pollutant." *Ibid.*

⁷ *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)

⁸ Brief for the Federal Respondent in Opposition. USSC #09-533 and #09-547. *CropLife America et al., Petitioners v Baykeeper, et al.; American Farm Bureau Federation et al., Petitioners v Baykeeper, et al.*, On Petition for a Writ of Certiorari, U.S. Supreme Court.

⁹ Economic Analysis of the Pesticide General Permit (PGP) for Point Source Discharges from the Application of Pesticides, p. xii

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the five years of the permit¹⁰. Furthermore, we believe that the estimates in USEPA Economic Analysis are flawed, as the estimates for states similar to Wyoming (New Mexico and Idaho) are considerably lower than the estimates arrived at in Wyoming. WABA also wishes to call to your attention that no costs were assigned to Indian Country, either within Wyoming, or the other 43 states with permit authority.

We have assisted the Wyoming Department of Agriculture (WDA) and Wyoming Department of Environmental Quality (WYDEQ) in conducting analysis of their implementation and operating costs, and the costs to Wyoming's operators/applicators of compliance with the proposed permit. WYDEQ and WDA estimate the costs during the five years of the state permit to be over \$7.06 million dollars. Even the current WDA/WYDEQ estimates are flawed, as no estimate of the costs of individual permits is made, yet there is an entire county in Wyoming, Teton, with only Tier 3 waters, and this county treats over 30,000 acres in their mosquitoes control program each year.

We also believe that failure to obtain a final opinion from U.S. Fish and Wildlife Service (FWS), and the National Marine Fisheries Service (NMFS) is an actionable flaw in the economic analysis. No reasonable estimate of costs involved with this permit can be made unless the parameters of restrictions due to mitigation of Endangered Species are fully enumerated. While we believe that the Agency's current 'Bulletins Live' should fulfill operator obligations under ESA, we cannot support the 'blank check' issued in the draft PGP, for an incomplete consultation.

Meeting the Court's Timeline for Permit Issuance: The comment period on USEPA's proposed draft general NPDES permit closes July 19, 2010, and the Agency intends to finalize its permit in December 2010, about three months before the April 9, 2011 deadline established by the 6th Circuit Court of Appeals. This Court deadline applies not only to the 6 states, most territories and certain other areas regulated by USEPA's general permit, but also serves as a guideline to Wyoming, which will be developing its own NPDES general permit. Concerns have been expressed by Wyoming officials that they do not have sufficient time to complete their NPDES permits before the 2011 deadline. We share that concern, and are concerned that NPDES permits may not be operational in either the area of Wyoming covered by the USEPA PGP, or the state general permit that will cover areas outside of the Wind River Reservation when the 2-year stay ends and the protections of USEPA's 2006 rule are extinguished. If that happens, either critical pesticide applications will be curtailed or thousands of pesticide applicators and operators will be unnecessarily exposed to extreme legal jeopardy for simply continuing to do the jobs they've done legally for years. We urge USEPA to inform the Court now that there is a likelihood of this occurrence in 2011, and to seek a commitment from the Court for a further extension should it appear in early 2011 that the April 9 deadline will not be met.

Regulation of Pesticide Applications "Near" Waters of US: USEPA states that this draft permit is available to operators who discharge into or over, including "near," waters of the

¹⁰ Assuming that no state has costs lower than Wyoming. 44 States x \$7.065 million (for 5 years of the PGP) + \$16.443 million total annual costs for USEPA PGP x 5 years (from Economic Analysis of the PGP, EPA-HQ-OW-2010-0257-0151, p. 61) = \$393.075 million

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US from the application of biological pesticides or chemical pesticides that leave a residue when the pesticide application is for one of the following pesticide use patterns:

- a. Mosquito and other flying insect pest control applications in or above “standing or flowing water”;
- b. Aquatic weed and algae control applications in “waters of the US” as well as near “water’s edge,” including “irrigation ditches and/or irrigation canals”;
- c. Aquatic nuisance animal control applications in “water and at water’s edge”;
- and
- d. Forest canopy pest control applications made above the forest and where a portion of the pesticide will unavoidably be deposited to “water” below.

“Near” water pesticide applications are covered by the draft permit only when these four use categories are involved. In these cases, USEPA intends the pesticide treatment area and permit restrictions to include lands “near” applications to or over “waters of the US”¹¹ and to or over “conveyances with a hydrologic surface connection to waters of the US at the time of pesticide application” (e.g., to control pests at “water’s edge including irrigation ditches and canals”).¹² Since much of Wyoming agriculture and horticulture is irrigated, there could be confusion among operators as to the extent that permit coverage extends to pesticide applications made to and over, including near, “conveyances with a hydrologic surface connection to waters of the US at the time of pesticide application”.¹³ To clarify potential confusion between the nexus of this permit with the statutory exemptions for irrigation return flow and agricultural stormwater runoff,¹⁴ USEPA should further define “near.” Given the logistics of irrigation ditches and canals in Wyoming, if a given ditch only flows to an irrigated field, and does not directly return to a ‘water of the U.S.’ we assume that an application to such ditch or canal is exempt, as water flowing through such a conveyance would necessarily be irrigation return flow, and thus exempt from the CWA. We believe that USEPA is construing ‘waters of the U.S.’ too widely in this PGP, given prior decisions in state and federal courts.¹⁵

Permit Coverage for Other Pesticide Use Patterns: USEPA has intentionally not provided coverage to applications of pesticides made to areas of municipal, residential, recreational, agricultural, horticultural, silvicultural and other settings where terrestrial applications of pesticides might encounter directly or indirectly wetlands and upland ditches or similar

¹¹ 40 CFR 122.2 defines “waters of the US” for purposes of NPDES permitting program

¹² Footnote #2 draft PGP p. 3

¹³ USEPA instructs operators to include in their total annual treated-area calculations those applications made to, over or near “conveyances with a hydrologic surface connection to waters of the US at the time of pesticide application” when determining if they exceed USEPA thresholds for Notice of Intent (NOI) submissions and the various permit requirements triggered by NOI submission. We assume USEPA intends to include such conveyances under this permit.

¹⁴ 33 U.S.C. § 1342 (l) (1) (2006) (exempting from CWA discharges composed entirely of return flows from irrigated agriculture); 33 U.S.C. § 1362 (14) (2006) (exempting from CWA definition of point source explicitly agricultural stormwater discharges and return flows from irrigated agriculture);

¹⁵ Wyoming Act of Admission. *Merrill v. Bishop*, 74 Wyo.298, 287 P.2d 620, 1955 Wyo.LEXIS 37 (1955); *Mitchell Irrigation Dist. V. Sharp*, 121 F.2d 964, 1941 U.S. App. LEXIS 3370 (10th Cir. 1941), cert. denied, 314 U.S.667, 62 S. Ct. 129, 86 L.Ed. 534, 1941 U.S. LEXIS 241 (1941)

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conveyances. USEPA asks for comment if additional pesticide use patterns should be included in the general permit, and highlights the potential CWA legal jeopardy of such users by stating: “Any point source discharge of pollutants to waters of the United States not covered by this or another general permit will need coverage under an individual permit.”¹⁶ Each user group must determine for itself if the conditions of its pesticide applications would be subject to the CWA and warrant permit protection (and compliance obligations). USEPA has stated that neither the statutory exemptions for irrigation return flow and agricultural stormwater, nor off-target spray drift, are subject to the Agency’s CWA permitting. How sectors other than agriculture could be affected by the 6th Circuit’s decision is likely unknown at this time. Fortunately, terrestrial applicators can generally control their activities so as to avoid discharges to “waters of the US,” and as such would not need or benefit from NPDES permit coverage. We ask USEPA to clarify the status of pesticide applications made in areas that contain among pesticide application areas man-made or erosional features, such as upland ditches, swales or other ephemeral conveyances that do not maintain a hydrologic connection with waters of the US. Even after two Supreme Court decisions, the debate continues about the extent of CWA jurisdiction over such conveyances. These debates will continue over into enforcement of USEPA’s general permit and in citizen suits that are likely in the future. For making NPDES permitting decisions, USEPA typically applies 40 CFR 122.2 to define “waters of the US,” but applies its 2008 guidance¹⁷ with the Corps of Engineers regarding the Agencies’ interpretation of *United States v. Rapanos*¹⁸ for making wetlands and other 404 permitting decisions. Under that guidance, the agencies carefully segregated various “waters” into three categories: “jurisdictional, possibly jurisdictional, and not jurisdictional.” Significantly, this latter category includes swales and erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow) and ditches (including roadside ditches excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water) common to residential, recreational, agricultural, horticultural, silvicultural and other pesticide uses currently not covered by this general permit. We urge USEPA to provide increased jurisdictional clarity to help operators determine if their pesticide use(s) warrant inclusion under pesticide NPDES permits.

NOI Submission Thresholds and Automatic Coverage for Applicators: WABA believes pesticide applications by farmers and ranchers will generally not be subject to the CWA or this permit, and custom (for-hire) applicators working for farmers under farm/ranch contracts would not either. However, to the extent for-hire applicators also apply pesticides for other non-farm organizations into and over, including near, waters of the US (e.g., for mosquito control or forest canopy pest control), or scientists performing important pesticide research projects, we offer the following comments:

- a. **Custom Applicators:** To avoid double counting of the NOI threshold areas, USEPA states: “To determine whether an entity’s activities will exceed one or more of the annual treatment area thresholds, the entity should exclude from its calculation any

¹⁶ 75 Fed Reg 107, 31783 June 4, 2010

¹⁷ http://www.usace.army.mil/CECW/Documents/cecwo/reg/cwa_guide/cwa_juris_2deco8.pdf

¹⁸ 547 U.S. 715, 126 S. Ct. 2208 (2006)

Promoting and Protecting Agricultural Business

pesticide application activities conducted under another entity's NOI..."¹⁹ "For-hire applicators applying pesticides under contract from another party will include the acreage treated on behalf of the client in their annual total unless that client has submitted or has responsibility for submitting an NOI reflecting that treatment per the NOI requirements. If the client has already submitted an NOI for the area to be treated, the applicator does not need to include it in her NOI threshold calculation."²⁰ On this basis, we believe it likely that few for-hire applicators will have to file an NOI, regardless of the acreage they are hired to treat annually. Operators meeting the eligibility provisions but whose discharges are not subject to the requirement to independently submit an NOI are automatically authorized to discharge after April 9, 2011.²¹ Since most for-hire applicators will be operating under contracts (and the NOIs) of their client organizations, we conclude that most for-hire applicators should be covered automatically by USEPA's pesticide NPDES general permit, regardless of number of clients they have or acres they apply pesticides to during the year.

- b. **Pesticide Researchers:** USEPA states its intent to set NOI thresholds at levels that would capture only the largest operators – approximately 10% of the total – responsible for discharges under the four pesticide use patterns. However, some of the annual NOI thresholds at Part 1.2.2 of the permit are low enough that they could capture the research and development (R&D) applications of major universities, experiment stations, pesticide manufacturers or other R&D entities engaged in expert scientific research. These studies are conducted by experts and their staff, and are generally extremely limited in the funds, scope and time allowed for experimental procedures. Adding the numerous burdens that exceedance of an NOI threshold could cause a university, research station or pesticide registrant could sabotage the scientific research. USEPA should clarify that pesticide applications made into and over, including near, waters of the US solely for the purpose of "pesticide research and development" (R&D), as defined in Appendix A, are automatically covered by this permit and not be required to submit an NOI.

Meeting Technology-Based Effluent Limitations: USEPA has reached a logical and defensible position that numeric technology-based effluent limitations are not feasible for pesticide NPDES permits²² because (a) the permit regulates pesticide residues ("excess pesticide present outside the treatment area or within the treatment area once the pesticide is no longer serving its intended purpose") so the point in time or precise location in ambient water when a numeric effluent limitation would apply is unknown; (b) applications of pesticides are highly variable and from many different locations for which it would be difficult to establish a numeric limitation for each location; and (c) hundreds of active ingredients and thousands of pesticide products may be covered by this permit.

- a. **Control Measures:** Instead of numeric effluent limitations, USEPA requires a combination of pollution prevention approaches and structural management

¹⁹ Draft PGP p. 3

²⁰ PGP Fact Sheet p.22

²¹ Draft PGP p.2

²² PGP Fact sheet, p.29

Promoting and Protecting Agricultural Business

practices in Parts 2.1 and 2.2 to provide the protections desired by the Agency. These requirements take the form of control measures and best management practices (BMPs) or other activities that prudent operators implement to minimize discharges of pesticides to waters of the US. These control measures include the professional maintenance and operation of equipment and application of pesticides per the FIFRA label, their contracts, and in compliance with the Part 2.1 effluent limit of this permit. They: (a) carefully handle and store pesticide products to avoid leaks and spills; (b) promptly deal with spills following manufacturer recommendations; (c) comply with the FIFRA label requirements on products they are hired to apply; (d) properly mix and load pesticides into their aircraft; (e) properly rinse and recycle/dispose of empty pesticide containers; (f) properly clean their spraying system after application; (g) preventatively maintain those pesticide-application systems to avoid leaks; (h) calibrate their spraying systems so they apply the appropriate amount of pesticides; (i) properly identify and direct the application within the desired boundaries of the treatment area; (j) keep proper records of all regulated activities; and (k) timely communicate this information as required. Failure to complete these activities may constitute a violation of the permit.

- b. Unattainable Expectations for Technical Precision: As part of the proposed permit's requirement to minimize pesticide discharges to waters of the US, USEPA requires at Part 2.1.3 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;"²³ The key words are "**ensure... precise quantity... achieve greatest efficacy.**" As an enforceable effluent limitation, USEPA is setting operators up to fail. Remarkably, the Agency contradicts this expectation by stating: "USEPA 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."²⁴ These statements are conflicting. WABA urges USEPA to modify Part 2.1.3 and related statements wherever they occur in the Permit and Fact Sheet to something more achievable, for example, "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."
- c. Permit Requirements from the Services After Endangered Species Act (ESA) § 7 Consultation: USEPA stated it "... believes the issuance of the PGP may affect listed species and is thus subject to the ESA section 7(a)(2) consultation requirements,"²⁵ and such consultations with the US Fish & Wildlife Service and National Marine Fisheries

²³ Draft PGP p.8

²⁴ PGP Fact Sheet p. 87

²⁵ PGP Fact Sheet pp. 102-103

Promoting and Protecting Agricultural Business

Service (“Services”) are underway. It’s our belief that compliance with the FIFRA label would ensure a “*not likely to affect*” determination; the same registration process that USEPA described as justification for not including a numeric technology-based effluent limitation will produce FIFRA label requirements that are sufficiently stringent to protect listed species. Having undertaken the consultation, USEPA may not have it completed by the April 9, 2011 deadline established by the Court for permit implementation. USEPA expects the permit to provide protections for species listed as endangered, threatened, or even proposed to be listed as endangered or threatened. USEPA also expects the permit to protect both critical habitat and proposed critical habitat. Critical habitat designations often change dramatically during the process of going from proposed to designated, and are often changed by court challenges. USEPA’s current ESA placeholder provisions raise many questions, and provide little information on how requirements would be met. In its economic analysis, USEPA concluded that “*the economic impact on covered entities, including small businesses, to be minimal.*”²⁶ Based on past experiences with Services’ pesticide consultations and biological opinions, we fully expect potentially severe and costly additional restrictions will find their way into the NPDES permit prior to finalization. If so, USEPA must repeat its economic analysis and then re-propose for public comment the permit in which those ESA restrictions occur. If USEPA decides to retain a section on threatened and endangered species, then “Bulletins Live” (<http://www.epa.gov/espp/bulletins.htm>) via USEPA already covers this section as a result of over a decade of discussion between USEPA and FWS. Pesticide labels currently address ES issues; therefore imposing additional conditions in the PGP is redundant and unnecessary. We have encouraged WDA/WYDEQ to continue their current practice of making no mention of ES within WYPDES permits, when a draft Wyoming PGP is issued.

Meeting Water Quality-Based Effluent Limitations: We are aware that Title 40, CFR 122.44(k)(3) allows water quality-based effluent limitations to be implemented through BMPs if numeric effluent limits are infeasible. This was the position adopted by California’s Water Resources Control Board in its statewide NPDES permit for aquatic weed control.²⁷ WABA believes it is *infeasible* for USEPA to establish numeric effluent limitations for pesticide general permits because, (1) the regulated discharge is excess products and residues remaining after the effective period of beneficial use resulting from the pesticide application, but at what point the pesticide becomes a waste or residue is not precisely known and varies depending on many factors. Therefore, in the application of aquatic pesticides, the exact effluent is unknown; (2) it would be impractical to treat the numerous short-duration intermittent pesticide releases to surface waters from many different locations; and (3) treatment in many cases may render the pesticide useless for aquatic pest control. WABA agrees that the technology-based effluent limits described in Part 2 of the permit are as stringent as necessary to meet federal and state water quality standards and the Agency’s narrative statement in Part 3 of the permit addressing WQBELs is

²⁶ 75 Fed Reg 107, 31784 June 4, 2010

²⁷ California SWRCB. 2004. Water Quality Order No. 2004-0009-DWQ. Pp 9-11.

Promoting and Protecting Agricultural Business

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appropriate.²⁸ USEPA's conclusion not to require water quality-based effluent limitations is correctly reasoned and based on the cumulative effect of the following factors: (a) compliance with the FIFRA label is assumed; (b) national-scale monitoring has demonstrated that most pesticide detections are below ambient water quality criteria or benchmarks; (c) for the small number of pesticides found in monitoring data to be present above such benchmarks, USEPA and the registrants have imposed additional mitigation actions that are expected to reduce the levels of those pesticides in water; (d) the technology-based effluent limitations (BMPs) in Part 2 of the permit provide further protections beyond compliance with the FIFRA label; (e) the chemical-pesticide discharges covered by this permit are the residues after the pesticide has performed its intended purpose, and the residue will be no higher than, and usually lower than, the original concentration as applied; (f) the permit excludes applications to certain 303(d) and ONR waters; (g) states must certify that the permit will meet their WQBELs and may add further conditions to ensure that will occur; (h) any observed exceedance of WQBELs will trigger corrective action to ensure the situation is eliminated, and will not be repeated in the future; and (i) USEPA may require additional control measures as part of a specific permittees' requirements, or require operators to apply for an individual or alternative NPDES permit.

We also wish to note that the area within Wyoming covered by the draft USEPA PGP has no water quality standards, and here we quote from WDA/WYDEQ comments to this draft PGP: "It is one of the ironies of this proposed permit that the only lands in Wyoming to which this permit applies are on the Wind River Indian Reservation which has no approved water quality standards."²⁹

Monitoring Requirements: In Part 4 of the draft NPDES general permit, USEPA requested comment on the value, feasibility and safety of visual monitoring during application and of post-application surveillance. WABA agrees that it is critical for applicators to monitor the integrity of application equipment by calibrating, cleaning, and repairing equipment on a regular basis to reduce the potential for leaks, spills, and unintended/accidental release of pesticides to waters of the US;³⁰ this is the applicators' responsibility. However, all operators must monitor the amount of pesticide applied to ensure that the lowest amount needed to effectively control the pest is used, "... depending on conditions..." and balance pest control application rates with the need for efficacy and the avoidance of pesticide resistance development. We also agree with USEPA's determination that requirements for visual monitoring during pesticide application would not apply to applications made at night or when the applicator is the pilot of aircraft or watercraft, or operator of terrestrial vehicles, making pesticide applications.³¹ We agree with USEPA's requirement that operators conduct spot checks in the area to and around where pesticides are applied for possible and observable adverse incidents to the extent that they may be conducted (a) during any post-application surveillance or efficacy check that the operator chooses to conduct; or (b) during any pesticide application, when considerations for safety and feasibility allow.

²⁸ PGP Fact Sheet, p. 71

²⁹ Joint Comments submitted in reference to Docket ID No. EPA-HQ-OW-2010-0257 by the Wyoming Department of Environmental Quality and the Wyoming Department of Agriculture, dated July 19, 2010, p 6.

³⁰ Draft PGP, p. 14

³¹ PGP Fact Sheet, p. 87

Promoting and Protecting Agricultural Business

However, we are very concerned that USEPA is considering requiring largest pesticide “applicators” to provide ambient sampling data.³² The “largest” applicators, on an annual acreage treated basis, are aerial applicators that may treat more than 1000 acres in a day under contract with government agencies, municipalities, or private organizations. These are pilots, not biologists or hydrologists. It is illogical for USEPA to consider requiring aerial applicators to return to often distant locations to collect ambient water samples in the days following pesticide applications. Aerial applicators may travel hundreds of miles across state lines to fulfill a contract to apply pesticides for various clients. Many of these areas are remote, and without airports. USEPA requested comments on (a) how large an “applicator” would be appropriate for such a requirement; (b) should these data be used in assessing BMPs or compliance; (c) what types of monitoring requirements are appropriate for each of the four pesticide use categories covered under this permit; (d) what would be the cost of monitoring; (e) what are the best monitoring methodologies when sampling for the residues of chemical pesticides; (f) what sampling approaches accommodate issues of safety and accessibility; and (g) what timing and frequencies are best in these situations.³³ None of these questions are relevant to aerial applicators.

If, instead of “applicators,” USEPA meant to state that it is considering requiring the largest “operators” to conduct ambient monitoring, these would be generally state or federal forestry, water management, or health (e.g., mosquito control) agencies. It is likely that other parts of these same organizations already conduct ambient monitoring for either water quality research or CWA compliance purposes. Given the low thresholds for NOIs, we are also concerned that many of our members will be required to conduct ambient monitoring. WABA believes that ambient monitoring should be deleted from the permit, especially in light of similar monitoring currently being conducted by the U.S. Geological Survey. USEPA should explore efficiencies already present within current monitoring, before requiring additional ambient sampling by operators.

Pesticide Discharge Management Plan: USEPA states that a Pesticide Discharge Management Plan (PDMP) is required of any operator required to submit an NOI, that it is to be developed prior to the first application of a pesticide covered by the permit or prior to an operator exceeding the annual NOI threshold, that it is to be kept at the address identified on the NOI, and that it is a permit violation not to have a PDMP or keep it up to date. Upon first consideration, the PDMP described by USEPA at Part 5 of the draft permit seems to represent just the type of professional data and maintenance information that operators value – preventative maintenance plan, emergency response plan, and documentation of procedures, practices, products used, spray logs, reports and other documentation to support compliance with this permit and eligibility considerations under other federal, state and local laws. However, USEPA’s detailed description of a PDMP as described at Part 5.1³⁴ is so very detailed that it is likely to take several months to assemble and a considerable amount of time to keep up to date. Operators must have sufficient time to conduct applications, in addition to keeping records. USEPA’s deadlines are impractical, especially in

³² 75 Fed Reg 107, 31784 June 4, 2010

³³ *Ibid*

³⁴ PGP Fact Sheet, p.88-93

Promoting and Protecting Agricultural Business

2011. WABA believes that USEPA should either reduce the amount of information that USEPA requires in PDMPs or allow operators to complete their PDMP over several months without fear of violation or enforcement actions. USEPA states that the PDMP and all supporting documents (other than any properly asserted Confidential Business Information) must be readily available, upon request, to regulators. WABA urges USEPA not to make public copies of PDMPs or other information related to compliance with this permit, or to consider such information Confidential Business Information, for we are concerned that anti-pesticide activists will use access to these PDMPs for search for potential “paper violations” and harass pesticide operators with citizen suits.

Adverse Incident Documentation: USEPA requires permittees in Part 6 of the draft permit to identify, to the extent feasible, situations where adverse effects occur where pesticide applications also occur, and to take specific actions in response to identified adverse incidents that may have resulted from the permittee’s pesticide application³⁵. WABA has several concerns about this section of the permit:

- a. Definition of Adverse Incident: USEPA defines an “adverse incident” in Appendix A as “an incident that you have observed upon inspection or of which you otherwise become aware, in which: (1) a person or non-target organism **may have been exposed to a pesticide residue, and (2) the person or non-target organism suffered a toxic or adverse effect.**”³⁶ We recognize the difficulty of sorting out real from falsely-alleged exposure claims and adverse effects, however there is a long history of anti-pesticide activists making false claims. For example, recently senior Washington DC officials of USEPA met with and later published a petition from representatives the Oregon “Pesticide Poisoning Victims United.” Prior claims by this group have been investigated by the state of Oregon and dismissed for lack of evidence. We urge USEPA to raise the bar somewhat to help separate accidental exposure from intentionally alleged exposure. We urge USEPA to modify the definition of adverse incident to read, “an incident... in which: (1) **there is evidence that** a person or non-target organism **has likely** been exposed to a pesticide residue...”
- b. Five (5) Day Adverse Incident Written Report: USEPA requires that within five (5) days of a reportable adverse incident, an operator must provide a written report to the appropriate USEPA Regional office and/or to the State Lead Agency, and must include several items of information. Permittees are required to provide oral notice to USEPA within 24 hours (this is reasonable) and then follow-up with a detailed written report³⁷ within five (5) days of becoming aware of the adverse incident. Failure to report such incidents is a permit violation. WABA believes 15 days is more reasonable to expect the typical permit holder to be capable of obtaining the necessary information and getting it delivered to the appropriate offices. We view as

³⁵ PGP Fact Sheet, p. 96

³⁶ Draft PGP, Appendix A, p. 31

³⁷ Draft PGP, pp. 21-22

Promoting and Protecting Agricultural Business

particularly difficult the (a) identification to affected species without being, or recruiting, an expert; (b) determination magnitude and scope of affected area (square miles or linear distance); and (c) adverse effect determination (for aquatic plants this may be very difficult since permittees would have to know something about the status of the plants before the discharge; e.g., was it already exhibiting symptoms). However, WABA agrees with USEPA's statement that "some degree of detrimental impact to non-target species is to be expected and is acceptable during the course of normal pesticide treatment. USEPA expects operators to use their best professional judgment in determining the extent to which non-target effects appear to be abnormal or indicative of an unforeseen problem associated with an application of pesticides."³⁸ WABA agrees with USEPA that assessing and correcting adverse incidents may be complicated, and symptoms associated with adverse incidents are often vague or mimic other causes which may lead to incorrect diagnoses. We also agree that "observation of these impacts does not necessarily imply that a pesticide has been misused or that there has been a permit violation or an instance of noncompliance."³⁹ Reporting of adverse incidents should not be required under this permit if: (a) permittees are aware of facts establishing that the adverse incident was not related to their pesticide application or that incident information received is clearly erroneous; (b) an adverse incident occurs to pests that are similar in kind to pests identified as potential targets on the FIFRA label; or (c) USEPA notifies permittees that the reporting requirement has been waived for this incident or category of incidents.⁴⁰ We believe it will be important for applicators to keep on-site their records of all visual inspections and determinations, even for these situations, as legal protection against citizens' suits or USEPA actions.

Recordkeeping and Annual Reporting: The recordkeeping required by USEPA in Part 7 apply to any entity required to submit an NOI as well as any pesticide applicator hired by such entity to perform activities covered under this permit. USEPA requires records to be kept by the NOI-filing organizations, although for-hire applicators must keep records at their business site for equipment maintenance and calibration.⁴¹ All records are to be documented as soon as possible but no later than 14 days after completion of an activity, and kept for at least 3 years, and perhaps up to 8 or more years (given that a general permit is usually valid for no less than 5 years, and is often extended, due to rulemaking constraints with new general permits). WABA is concerned that for many organizations (decision-makers and applicators) these records will necessarily have to be recorded almost daily throughout the treatment season. For such operators, especially small for-hire applicators or farmers, this will require several hours per day either by the pilot or ground-rig operator, or the hiring of skilled record keepers. Such expenses may be unsustainable for small operators. WABA is also concerned that some of the required records will need to be duplicated by the decision-making entity and any applicator hired by that entity. USEPA appropriately segregates the equipment maintenance and calibration records to the for-hire applicators, but doesn't

³⁸ PGP Fact Sheet, p. 97

³⁹ *Ibid*

⁴⁰ PGP Fact Sheet, p. 96

⁴¹ Draft PGP, pp. 24-25

Promoting and Protecting Agricultural Business

similarly segregate other required records (e.g., pest density prior to pesticide application) to the decision-making organizations. USEPA requires all entities to submit an annual report to USEPA if they are required to submit an NOI. WABA interprets this to mean that decision-making organizations, and not custom or for-hire applicators, must submit the reports.

Other Considerations

Multiple Opportunities for Stacked CWA Violations and Citizen Suits: The various requirements of USEPA draft pesticide NPDES permit create numerous, overlapping opportunities for paper violations to be tacked onto a violation from a water quality exceedance or observance of an adverse incident. Such additional violations include the requirement for very timely control-measure mitigation, reporting, recordkeeping, PDMP update, and the update of other records and reports. WABA is concerned that each of these could be separate violations under the CWA, bringing many multiples of \$37,500 per violation per day penalties and creating a bonanza of paper violation opportunities for activists to file citizen suits. USEPA should eliminate such overlapping or stacked potential violations, or create a tiered approach with warnings followed by violations.

Pesticide Lists in Appendices A, B and C: Few of the pesticides listed the appendices are relevant to the scope of uses covered under the permit. We question USEPA's intent for including this irrelevant information.

Fact Sheet Discussion of Pesticide Registration: In its proposed permit, USEPA made several decisions about effluent limitations and other requirements that were based on logical, legal and scientific arguments. Some of these arguments are included in the Fact Sheet that accompanied the draft permit. One key argument, that the FIFRA registration process is robust, we strongly agree with. While not directly related to the NPDES permit conditions upon which we have commented above, we include comments here on the FIFRA fact sheet discussion to provide some feedback to the Agency.

a. Aquatic Toxicity Studies: On page 76 of the fact sheet it is noted that:

“... the current data regulations require studies that include but are not limited to a suite of aquatic toxicity studies for effects characterization. These test requirements are defined for each chemical class by use category (40 CFR Part 158 Subpart D; Wildlife and Aquatic Organism data requirements; http://edocket.access.gpo.gov/cfr_2007/julqtr/40cfr158.490.htm) and are performed on a limited number of laboratory test organisms in the following broad taxonomic groupings:

- *Freshwater fish;*
- *Freshwater invertebrates;*
- *Estuarine/marine fish;*
- *Estuarine/marine invertebrates, and*

Promoting and Protecting Agricultural Business

- *Algae and aquatic plants*

In addition to these broad taxonomic groupings, sediment dwelling invertebrates are commonly tested. However, the cited data requirements are under revision. The fact sheet indicates that when more than a single species test result is available, the most sensitive endpoint is typically used in assessment. It should be noted that this approach is very conservative. The existence of additional data increases the probability that a more sensitive species has been tested, and this should be reflected in the risk assessment. The availability of quality data for multiple species within a taxonomic grouping decreases uncertainty and should allow for more refined assessments.

The conservative nature of assessment is also highlighted in the description of the model system used for pesticides applied directly to water (e.g. rice). The lack of consideration of degradation or dilution in paddy water due to precipitation or release of water into a receiving water body are examples of processes not considered that are highly likely to result in lower residue estimates. It could also be noted that use of a rice paddy scenario for other systems is also a very conservative assumption, considering that the volume of water would likely be substantially greater than the rice paddy scenario and turnover greater in streams or other areas where applications are made for mosquito control, or herbicides are used to keep waterways open.

- b. Uncertainties: On page 77 of the Fact Sheet, USEPA refers to the US Geological Survey NAWQA work of Gilliom et al., 2006 and the conclusion that exposure to multiple pesticides was common. However, Gilliom et al., failed to note that in the vast majority of situations where mixtures occur the toxicity is determined to be additive, and risk assessment based on contribution of a single active is protective. It was stated that quantitatively predicting the combined effects of variables on mixture toxicity to any given taxon with confidence is beyond the capabilities of the available data without doing Whole Effluent Testing. Given that in the vast majority of situations where mixtures occur, the toxicity is determined to be additive, and risk assessment based on contribution of a single active is protective.
- c. Extrapolation from National-scale Ambient Monitoring Data: On pages 79-83 of the Fact Sheet, USEPA discusses the role of examination of national-scale ambient monitoring data to assess whether pesticide residues are currently present in waters at levels that would exceed water quality standards. Ambient water monitoring is used by USEPA as a "line of evidence" evaluated on a case-by-case basis. If monitoring data shows a higher confirmed detection than estimated by modeling, the higher monitoring value will be used in USEPA's risk assessment; otherwise it is ignored in favor of more conservative modeling estimates. The fact sheet notes that *when ambient aquatic monitoring data are available for a given pesticide, monitored concentrations are usually lower than modeled concentrations and in many cases substantially lower*. Uncertainties in monitoring data are captured on page 83, noting that monitoring data provides a 'snapshot'. This is somewhat incongruous with their

Promoting and Protecting Agricultural Business

description of NAQWA data as highly reliable, collected at weekly or twice-monthly intervals, and does indicate that low-flow and high-flow time periods are targeted as well as periods of highest pesticide use and runoff on page 79. Overly conservative estimates have a cost that should be considered and where highly reliable monitoring data exist it should inform the risk assessment process to a greater extent than simply affirming that the exposure estimates generated by models are very conservative.

We appreciate the opportunity to submit these comments on USEPA's proposed pesticide NPDES permit. We look forward to working with USEPA and WYDEQ during the 2010 finalization permit and 2011 implementation period to ensure an affordable, achievable, and defensible outcome.

Sincerely,

Keith Kennedy,
Executive Director

Cc: Senator Mike Enzi
Senator John Barrasso
Representative Cynthia Lummis
Governor Dave Freudenthal
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