



## **WSSA Comments on the NPDES Pesticide General Permit**

July 17, 2010

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

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

WSSA and Its Membership – The Weed Science Society of America (WSSA), and its affiliate societies (Aquatic Plant Management Society, North Central Weed Science Society, Northeastern Weed Science Society, Southern Weed Science Society, and Western Society of Weed Science) are dedicated to fostering an awareness of weeds and their impact on our environment. We provide science-based information to the public and government policymakers while promoting research, education, and outreach activities. Founded in 1956 as a nonprofit professional organization, WSSA and our affiliate societies have approximately 3,500 members from around the world. Members include academic, governmental, and private industry research scientists, students and educators, extension educators, and federal, state, county, and private land managers. As such, the US Environmental Protection Agency's (EPA) proposed pesticide NPDES general permit is very significant to our members. We appreciate the opportunity to comment on it.

Context of our Comments – Congress enacted the Clean Water Act (CWA) more than 30 years ago, adding and later updating the National Pollutant Discharge Elimination System (NPDES) permitting program several times since then. In the decades that EPA has administered the CWA, the Agency has never before issued an NPDES permit for the application of a pesticide to target a pest that is present in or over, including near, the water where such application results in a discharge to waters of the United States (US). Instead, EPA has been effectively regulating these types of applications through the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) for nearly 40 years. The FIFRA registration process includes requirements for years of environmental, health and safety studies to establish the conditions under which pesticides can be legally used in the US. Some of these registered pesticide uses are for pest control under aquatic conditions. The many scientific studies completed by WSSA members have contributed to the wealth of knowledge assembled on commercial pesticides and about their use in agricultural and non-agricultural pest control.

In 2006, EPA finalized a rule codifying the Agency's long-held exemption from NPDES permitting of pesticides applied into, over or near waters of the US when made consistent with the FIFRA label. However, this rule was challenged and in February 2009, the 6<sup>th</sup> Circuit Court of Appeals vacated EPA'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. Industry appeals to the 6<sup>th</sup> Circuit *en banc* and the US Supreme Court were denied. Overall, this decision marks a partial pre-emption of FIFRA by the CWA, layering numerous and burdensome requirements on legally-registered products that have wide value in society and exposing applicators and decision makers ("operators") to extensive legal jeopardy through citizen suits and agency actions. In many states

pesticide enforcement may fall under two agencies, duplicating the financial burden to the state. Without careful design and execution, the implementation of this pesticide NPDES general permit could have significant unintended consequences. Our comments are designed to provide EPA with expert insight into various aspects of the permit.

### **Comments**

FIFRA Label Not An Effluent Limitation: The Draft Fact Sheet (p. 32) states clearly and correctly that “...*the FIFRA label and labeling requirements are not effluent limitations.*” It is our understanding that this statement is consistent with the language of the draft NPDES general permit. WSSA and our affiliated Societies support the position that compliance with a product’s FIFRA label is not a requirement of the permit.

Meeting the Court’s Timeline for Permit Issuance – On June 4, 2010, EPA released its draft pesticide NPDES general permit, and intends to finalize the permit in December 2010, about three months before the April 9, 2011 deadline established by the 6<sup>th</sup> Circuit. This deadline applies not only to the 6 states, most territories and certain other areas covered by EPA’s general permit, but also to 44 other states that will be required to either adopt/adapt EPA’s permit or develop their own NPDES general permits. Concerns have been expressed by state officials that they do not have sufficient time to complete their NPDES permits before the 2011 deadline. We share that concern, and believe a national regulatory change of this magnitude should not force-fit into a 2-year period. When the 2-year stay ends and the protections of EPA’s 2006 rule are vacated, tens of thousands of pesticide applicators and operators will be unnecessarily exposed to legal jeopardy and other critical pesticide applications curtailed if EPA and/or states fail to fully implement their permits. These curtailments will most likely impact the control of mosquitoes,

and protection of forests from damaging insects and aquatic ecosystems from invasive plants. As a result, there may be large health, environmental and economic burdens placed on individuals, businesses, and government agencies. **We urge EPA to inform the Court now of this likelihood 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.**

Minimization of Pesticide Discharges: WSSA and our affiliated Societies agree with EPA that, consistent with reducing the potential for development of pest resistance, growers should use the lowest effective amount of pesticide product per application at the optimum frequency necessary to control the target pest. This lowest rate is fully incorporated in the allowable range of applications rates permitted by the FIFRA label. A very substantial amount of work is conducted by the industry and third-party researchers to establish efficacious and environmental protective rates for pesticide products prior to registration; these rate recommendations are tested and further refined within each state's Agricultural Extension Service function through the Land-Grant and State University System to fine-tune uses to different circumstances, and specific rate recommendations are published at the state level for each product on each pest of interest. Extension recommendations are virtually always integrated into product labeling in a continuous iterative process. Agricultural Extension recommendations are always made for the lowest practical rate of a pesticide product and for use within an Integrated Pest Management system. **The EPA's objective of minimizing discharges can be best met by directing the applicator to follow the EPA-approved, research-based FIFRA product, rather than expecting research-based judgments the applicator is unqualified to make.** It is inappropriate for EPA to bypass the FIFRA registration process and replace the extensive scientific knowledge incorporated in product labels with arbitrarily selected

low use rates. The NPDES process was designed to reduce negative impacts from the effluents of manufacturing plants and other sources and is very useful for that process. However the application of this process to pesticide applications is inappropriate because it does not reflect the fact that (1) pesticides are *intended* to be carefully and properly released into the environment to mitigate pest impacts, protect the environment, food and fiber and human health, and (2) because pesticides are expressly designed and tested under strict EPA standards so that their proper use will not cause harm, or that any adverse effects are temporary and acceptable. This contrasts sharply with typical “wastes” that are by-products of manufacturing or other processing operations and that are usually released from pipelines mainly for convenience of the operation and operators that generate them.

We also note that in Section 5.1.4.1 (Control Measures Used to Comply with the Effluent Limitations in Part 2.1.1) EPA states that, consistent with reducing the potential for development of pest resistance, operators must document in the Pesticide Discharge Management Plan (PDMP) the procedures they use for determining the lowest effective amount of pesticide product per application and the optimum frequency of pesticide applications necessary to control the target pest. **The only PDMP documentation the Agency should require to determine the lowest effective application rate is the notation that applications of pesticide products are made per their label instructions for the applicators’ pest control objectives.**

The EPA correctly notes in the NPDES Pesticide General Permit (PGP) Fact Sheet (page 34) that application to a limited treatment area and rotation of pesticides with differing modes-of-action are useful resistance management techniques (Board on Agriculture. 1986. Pesticide Resistance: Strategies and Tactics for Management. The National Academies Press. 472 pp.). However, **the Agency is incorrect that reduced pesticide use rates are effective for**

**resistance prevention.** If a grower employs suboptimal rates, there will be a resistance-section driven population shift towards weeds or insects that are less sensitive (hard to control species), as weeds or insects only slightly resistant to the pesticide product will be allowed to escape control, reproduce and spread. This situation can also lead to resistance that's based on metabolism; in this case, resistance may be based on the enhanced activity of one or more metabolizing enzymes that may detoxify several families of pesticides, leading to the difficult situation of multiple resistances. The EPA should require the NPDES permit holder to follow the science-based experimentally validated label and not recreate untested use directions on their own. **WSSA and our affiliated Societies strongly emphasize that the use of a pesticide product at less than its label-specified rates will cause population shifts to more difficult-to-control survivors and likely propagate resistance.**

Adoption of EPA's Permit by States to Protect "Waters of the State:" We understand the EPA general permit is intended to reduce and/or eliminate pesticide discharges to waters of the US to comply with the NPDES provisions of the CWA. It will cover several different pesticide application types made to, over or near waters of the US within NH, NM, MA, OK, ID, AK and certain other areas. It will likely also form a model for NPDES permit development by the other 44 other states. The Clean Water Act's NPDES program is designed to protect navigable waters of the US, and we are concerned that in the process of approving state NPDES permits EPA does not provide CWA protections (including citizen suit provisions) to waters that do not qualify as waters of the US and would not otherwise have such protections under state law. The EPA anticipates that 90% of the pest control activities will occur in areas covered under state-issued NPDES permits. To the extent EPA has influence on the scope of the 44 delegated states'

NPDES permits, we urge EPA to ensure the requirements of their NPDES permits are limited to activities related to pesticide applications to, over or near waters of the US.

Potential Coverage of Other Waters: The EPA states that this draft permit is available to operators who discharge to, over or near “waters of the 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 (in or above “standing or flowing water”);
- b. Aquatic weed and algae control (in “waters of the US” as well as “water’s edge,” including “irrigation ditches and/or irrigation canals”);
- c. Aquatic nuisance animal control (in “water and at water’s edge”); and
- d. Forest canopy pest control (where a portion of the pesticide will unavoidably be deposited to “water” below).

The EPA also asks 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.*” (75 Fed Reg 107:31783 (June 4, 2010).

**Increased jurisdictional clarity would help others determine if their pesticide use(s) warrant inclusion under this general NPDES permit.** For example, in addition to coverage of pesticide applications under these four permit use patterns to, over or near “waters of the US” (as defined at 40 CFR 122.2) as well as “water’s edge including irrigation ditches and canals,” it appears EPA may also intend to extend coverage and regulatory requirements to pesticide

applications made to many other water “conveyances with a hydrologic surface connection to waters of the US at the time of pesticide application.” The EPA instructs operators to include in their annual treated-area calculations those applications made to, over or near such conveyances when determining if they exceed EPA thresholds for Notice of Intent (NOI) submissions and various permit requirements triggered by NOI submission. **We wonder if EPA intends to apply the jurisdictional determinations of its 2008 guidance<sup>1</sup> with the Corps of Engineers regarding interpretation of *United States v. Rapanos*<sup>2</sup> to the potential regulation of such conveyances under this general NPDES permit.** Under that guidance, the agencies 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.

Outstanding National Resources Waters (ONRW): In section 1.1.2.2, EPA states that one is not eligible for coverage under the permit from a pesticide application to waters designated by a State, Territory, or Tribe as a Tier 3 or ONRW because of anti-degradation directives under 40 CFR 131.12(a)(3). As stated, **this would make control of destructive forest insects, mosquitoes, or invasive weeds in our national forests and parklands untimely and prohibitively expensive** by requiring an Individual Permit for pest control in the riparian areas of our most pristine lands and forcing managers to spend their limited resources and time in the procurement of individual permits. Such a policy would surely speed the degradation of forests

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<sup>1</sup> [http://www.usace.army.mil/CECW/Documents/cecwo/reg/cwa\\_guide/cwa\\_juris\\_2dec08.pdf](http://www.usace.army.mil/CECW/Documents/cecwo/reg/cwa_guide/cwa_juris_2dec08.pdf)

<sup>2</sup> 547 U.S. 715, 126 S. Ct. 2208 (2006)

and parklands, as can be seen in the millions of western forest acres pine trees killed by Pine Bark Beetle in the Rocky Mountain National Park and elsewhere.

The WSSA considers EPA's position on pesticide use in areas of ONRWs to be counter-intuitive, as it assumes that no environmental degradation will result if the pest control products are not used. That assumption is not valid when assessing those herbicides designed for invasive and noxious weed control. Invasive plant species represent a form of biological pollution that clearly and rapidly disrupts the function of ecosystems on a landscape scale and as such alterations multiply, what were once unique regional characteristics resulting from thousands of years of natural selection blur and decades of conservation achievements are lost. The risk assessment premise for exotic invasive plant species must consider the invasive plant as biological pollution and assess the use of the product against sure ecosystem degradation if no action is taken. WSSA and affiliated Societies urgently recommend that insect and aquatic and riparian invasive weed management actions taken by recognized pest management organizations in our national parks, forests and wildlife refuges be covered by the PGP.

NOI Thresholds: The EPA officials have frequently stated the agency's intent to set NOI thresholds at levels that would capture only the largest operators – approximately 10% of the total – responsible for discharges under these four pesticide use patterns<sup>3</sup>. However, some of the NOI thresholds at Part 1.2.2 of the permit are low enough that they could capture the annual total pesticide research and development (R&D) applications of major universities, experimental stations, pesticide manufacturers, government agencies or other R&D entities engaged in expert scientific research. The WSSA believes that applications solely for the purpose of “*pesticide*

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<sup>3</sup> For example, Linda Boornasian, EPA Office of Water, June 9, 2010

*research and development” (R&D), as defined in Appendix A, should be automatically covered by this permit and not be required to submit an NOI.*

Co-Permitting – Operators covered by the general permit are defined as any entity involved in the application of a pesticide. EPA defines those entities as the actual applicator or any entity with control over the financing or the decision to perform the application. The EPA suggests that the responsibility for complying with the requirements of the permit could be shared between these entities, with a decision-making body responsible for much of the assessment, recordkeeping and reporting, and the pesticide applicator responsible for properly maintaining, calibrating and using the application equipment. Under such a co-permit, the draft general permit would cover *“the operator who filed the NOI, including its employees, contractors, subcontractors, and other agents, for all activities identified on the NOI for the duration of the permit...”* (p.2). Coupling these entities under jointly shared co-permits, however, would also cause them to share significant legal responsibility (*“...[A]ny and all operators covered under this permit are still responsible, jointly and severally, for any violation that may occur.”* (p.12, FS). This creates legal pros and cons. On the one hand, performance contracts set by decision-making operators (government agencies or private/corporate organizations) provide legally-binding instructions to subcontractors about which pesticide(s) to apply, the application rate, where and when to apply the pesticide(s), and other pertinent information; thus there may be some logic to linking these entities under one permit. On the other hand, large operators may hire many different independent contractors during the year for various use categories to help complete their pest control activities, creating a pooled liability risk larger than any single subcontractor can tolerate.

A broader issue is the wording of the draft Fact Sheet (p. 12): “EPA encourages operators to explore possible cost savings by sharing responsibilities for implementing aspects of this permit. For example, a mosquito control district could assume the overall coordination of an integrated pest management program while a hired contractor may be responsible for minimizing the pesticide discharge and for site monitoring and maintaining and calibrating pesticide application equipment. EPA is requiring, however, that in instances where multiple operators are responsible for the discharge from larger pesticide application activities, some form of written explanation of the division of responsibilities be documented. However, any and all operators covered under this permit are still responsible, jointly and severally, for any violation that may occur, though EPA may consider this written division of responsibilities when determining the appropriate enforcement response to a violation.” We assume that this statement applies only to operators associated in some way with the specific application with respect to which a violation occurs. Stated as it is in the draft fact sheet, however, this language suggests that EPA intends to hold permittees in California jointly and severally liable for violations that result from the activities of different permittees making unrelated applications in Florida. Both are within the class of “any and all operators covered under this permit.” Even if the final Fact Sheet continues to embrace the notion of joint and several liability in all cases, this overstatement should be remedied. Clear allocation of responsibilities to individual permittees is simply a better, more efficient structure for a permit than co-permitting. **We believe co-permitting should not be mandated under this permit.**

Basic Technology-Based Effluent Limits – **The WSSA supports EPA’s determination that numeric technology-based effluent limitations in Part 2 are not feasible for pesticide NPDES permits** (p.29, FS) 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. Instead of numeric effluent limitations, EPA correctly concludes that the combination of pollution prevention approaches and structural management practices required in Parts 2.1 and 2.2 will provide the protections desired by the Agency.

Part 2.1 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. WSSA and affiliated Societies believe these control measures include the professional maintenance and operation of equipment and application of pesticides that professional applicators routinely use in applying pesticides. 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.

Integrated Pest Management (IPM): IPM methods protect workers, neighbors and the environment, while enhancing pest management strategies with a range of techniques that serve to minimize discharges to waters of the US. However, IPM is a process for decision making on pesticide use that occurs before permit issuance. EPA has no legal authority to impose the PGP where IPM considerations result in no pesticide discharge. The activity on which technology-based practices and procedures can be imposed under the PGP is the activity that results in a pesticide discharge. Thus, decision making prior to application is not such an NPDES permitted activity. While this may be difficult for EPA to sort out, the Agency should clarify that none of the PGP requirements for technology-based controls, recordkeeping, surveillance and reporting are applicable if operators choose not to apply pesticides.

In EPA's draft PGP, IPM requirements of Part 2.2 would apply *"to any entity that is required to submit an NOI, as required in Part 1.2.2, including any pesticide applicator hired by such entity or any other employee, contractor, subcontractor or other agent."* The WSSA believes that applications solely for the purpose of *"pesticide research and development"* (R&D), as defined in Appendix A, should not be required to implement Part 2.2. EPA states that such R&D pesticide applications must still implement Part 2.2 to the extent that its requirements do not compromise the research design. While this is likely sufficiently vague as to allow scientific research to proceed, **it still exposes scientists, extension workers, teachers, and product development engineers to potential legal jeopardy from citizen suits.** The WSSA urges EPA to fully exempt scientific R&D efforts from the IPM requirements of Part 2.2 unless the purpose of the studies is in some manner related to evaluation of IPM methods or their relative effectiveness.

Endangered Species Considerations -- EPA intends the PGP to provide protections for species listed as endangered, threatened, and species proposed to be listed as endangered or threatened; as well as both critical habitat and proposed critical habitat. We recognize that the same effluent limitations that would protect listed species and habitat would also provide protection for proposed species and habitat, but are concerned that EPA (or the Services) may incorporate additional limitations specifically for those species and habitat “proposed” to be listed. Species and critical habitat designations often change dramatically during the process of going from proposal to designation, and are often changed by court challenges. EPA’s current ESA placeholder provisions provide little information on how the final PGP requirements might vary from the proposal. It is also unclear when EPA will conclude these consultations and how or when EPA might include any additional effluent limitations or other permit terms referred to in this notice.

In its economic analysis, EPA expects “*the economic impact on covered entities, including small businesses, to be minimal*” (75 Fed Reg 107, 31784 June 4, 2010). Past experiences with Services’ pesticide consultations and biological opinions, however, lead us to disagree with EPA’s assumption. To the extent that the inclusion of those additional terms reflects any interpretation by the Agency of the Services recommendations or otherwise incorporates any element of independent decision making by EPA, the CWA and the NPDES permitting regulations require EPA to incorporate those changes only after separate public notice and comment. This requirement is not obviated by the by the record’s inclusion in the draft fact sheet (p. 104) of “potential provisions” for consideration by the commenting public, as those provisions do not constitute a proposal of the kind that gives the public adequate notice of EPA’s intentions or upon which it is appropriate to request public comment.

Expectations for Calibration Precision – As part of the proposed permit’s requirement to minimize pesticide discharges to waters of the US, EPA 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;**” (p.8, emphasis added). However, this same expectation is restated on page 34 of the Fact Sheet to read, “...to deliver the **appropriate quantity** of pesticide needed...” However, page 87 of the Fact Sheet states: “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.” These different requirements are conflicting and, furthermore, it is an unachievable expectation for “precise” calibration and delivery as an enforceable effluent limitation. The WSSA urges EPA to modify Part 2.1.3 and related statements wherever they occur in the Permit and Fact Sheet to read, “**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.**”

Water Quality-based Effluent Limitations (WQBELs) – The WSSA agrees with EPA that 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 that the Agency’s narrative statement in Part 3 of the permit addressing WQBELs is appropriate (p.71, FS). The EPA’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, EPA 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) EPA may require additional control measures as part of a specific permittees' requirements, or require operators to apply for an individual or alternative NPDES permit. Furthermore, 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.<sup>4</sup> It is *infeasible* 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

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<sup>4</sup> California SWRCB. 2004. Water Quality Order No. 2004-0009-DWQ. Pp 9-11.

pesticide releases to surface waters from many different locations; and (3) treatment in many cases may render the pesticide useless for aquatic pest control.

Monitoring Requirements – The EPA requested comment on the value, feasibility and safety of visual monitoring during application and of post-application surveillance under Part 4 of the permit. The WSSA agrees that it is critical 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. (p.14); this is the applicators’ responsibility. However, all permittees must monitor the amount of pesticide applied to ensure that the lowest amount needed to effectively control the pest is used, “...*depending on conditions...*” (p.87, FS), and balancing pest control application rates with the need for efficacy and the avoidance of pesticide resistance development. As we have stated earlier, the only documentation the Agency should require to determine the lowest effective application rate is the notation that applications of pesticide products are made per their label instructions for the applicators’ pest control objectives.

We also agree with EPA’s determination that requirements for visual monitoring during pesticide application would not apply to applications made at night or when the applicator is the driver of aircraft, watercraft or vehicular pesticide applications (p.87, FS). We agree with EPA’s requirement that -- 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 -- operators conduct spot checks in the area to and around where pesticides are applied for possible and observable adverse incidents.

The EPA states (75 Fed Reg 107:31784 (June 4, 2010)) that it is considering requiring the largest applicators provide ambient sampling data and asks for comments relative to this. The largest operators are generally state or federal forestry, water management, or health (e.g., mosquito control) agencies, and other parts of these agencies likely already conduct ambient monitoring for both water quality research and CWA compliance. **The EPA should explore efficiencies already present within such operators before requiring additional ambient sampling.**

Pesticide Discharge Management Plan – EPA 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 EPA at Part 5 of the Draft PGP 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 PGP and eligibility considerations under other federal, state and local laws. However, EPA's expectations for a PDMP as described at Part 5.1 (pp. 88-93) are so very detailed that it could take several months to assemble, verify, and keep up to date. **EPA's deadlines are impractical, especially in 2011. WSSA and affiliate Societies believe that EPA should allow operators to complete their PDMP over several months without fear of violation or enforcement actions.**

Adverse Incident Documentation: Part 6.4 of the permit requires permittees to identify, to the extent feasible, situations where adverse effects appear to have occurred in sites where

pesticide applications have been made, and to take specific actions in response to identified adverse incidents that may have resulted from the permittee's pesticide application. (p.96, FS). The WSSA agrees with EPA'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. EPA 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.*" (p.97, FS). The WSSA agrees with EPA 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.*" (p.97, FS). Permittees are required to provide oral notice to EPA within 24 hours and then follow-up with a written report within five (5) days of becoming aware of the adverse incident. Failure to report such incidents is a permit violation. **WSSA believes five days is not nearly enough time to collect the necessary information to make a valid report, and believe 30 days is the minimum reasonable time to expect a typical permittee to be capable of obtaining the necessary information and delivering it to the appropriate offices.**

It is unclear if EPA intends an adverse incident report to be equivalent to a water quality excursion. **WSSA urges EPA to clarify that self reporting of such an incident is not equivalent to admissions of a water quality excursion.**

Reporting of adverse incidents should not be required under this permit if: (a) permittees are aware of facts clearly 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) EPA notifies permittees that the reporting requirement has been waived for this incident or category of incidents. 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 EPA actions.

WSSA and affiliate Societies agrees with EPA'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. EPA 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.*"<sup>5</sup> WSSA and its affiliate Societies agree with EPA 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.*"<sup>6</sup> 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 EPA actions.

Recordkeeping and Annual Reporting – The recordkeeping and annual reporting required by EPA 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. Recordkeeping requirements identified in Part 7.2 (p.25) are to be kept by the NOI-filing organizations, although

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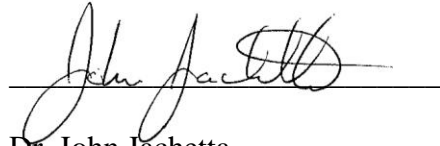
<sup>5</sup> Draft Fact Sheet at 97

<sup>6</sup> *Ibid*

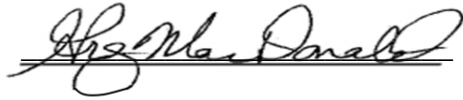
for-hire applicators must keep records at their business site of equipment maintenance and calibration. All records are to be documented as soon as possible but no later than 14 days after completion of an activity, and kept for at least 3 years. The EPA requires all entities to submit an annual report to EPA if they are required to submit an NOI. The WSSA believes these requirements will delay research and add significantly to the cost of scientific studies – many of which are conducted on strict budgets provided by granting organizations or under Good Laboratory Practices (GLP) methods for FIFRA registration or product labels. Any potential benefit realized by EPA is significantly outweighed by the extra burden such recordkeeping and reporting adds to normal research practices and schedules. **The WSSA urges EPA to eliminate CWA recordkeeping and reporting requirements for public and private R&D organizations conducting scientific pesticide research for publication or product development.**

The WSSA and its affiliate societies: the Aquatic Plant Management Society, North Central Weed Science Society, Northeastern Weed Science Society, Southern Weed Science Society, and Western Society of Weed Science appreciate the opportunity to submit these comments on EPA's proposed NPDES PGP. The WSSA has long supported and contributed to the science based risk assessments for herbicides under FIFRA. We hope that NPDES permits will help increase the environmental safety of these herbicides, but not hinder the timely treatment of weeds and invasive plants or exacerbate their impact on managed and natural ecosystems. We look forward to our continued interactions with EPA and know that our members can help provide the best science to manage weeds and invasive plants in a timely, economical, and environmentally safe manner.


Sincerely,



Dr. John Jachetta  
President  
Weed Science Society of America



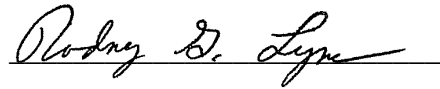
Dr. Greg MacDonald  
President  
Aquatic Plant Management Society



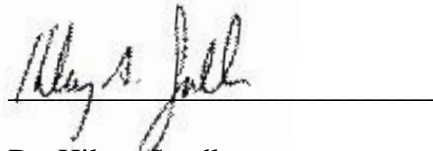
Dr. Michael Barrett  
President-Elect  
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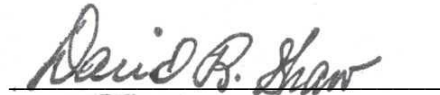
Dr. Chris Boerboom  
President  
North Central Weed Science Society



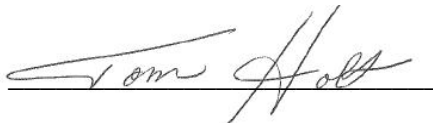
Dr. Rodney Lym  
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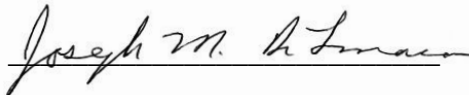
Dr. Hilary Sandler  
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Dr. David Shaw  
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Weed Science Society of America



Mr. Thomas Holt  
President  
Southern Weed Science Society



Dr. Joe DiTomaso  
President  
Western Society of Weed Science