



# Facts About...

Maryland's Proposed NPDES General Permit For Discharges From  
The Application of Pesticides (Draft Permit No. PE-11)

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## Reason for permit

The proposed permit is necessary because of a 2009 decision by the Sixth Circuit Court that biological pesticides and chemical pesticides with residuals were to be regulated by NPDES permit. Specifically, the background (with text borrowed from the EPA fact sheet) is as follows:

On November 27, 2006, EPA issued a final rule (hereinafter called the “2006 NPDES Pesticides Rule”) clarifying two specific circumstances in which an NPDES permit was not required to apply pesticides to or around water. They were: 1) the application of pesticides directly to water to control pests; and 2) the application of pesticides to control pests that are present over, including near, water where a portion of the pesticides will unavoidably be deposited to the water to target the pests, in both instances provided that the application is consistent with relevant Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) requirements. The rule became effective on January 26, 2007.

On January 19, 2007, EPA received petitions for review of the 2006 NPDES Pesticides Rule from environmental and industry groups. Petitions were filed in eleven circuit courts with the case, National Cotton Council, et al, v. EPA, assigned to the Sixth Circuit Court of Appeals.

On January 9, 2009, the Sixth Circuit vacated EPA’s 2006 NPDES Pesticides Rule under a plain language reading of the CWA. National Cotton Council of America v. EPA, 553 F.3d 927 (6<sup>th</sup> Cir., 2009). The Court held that the CWA unambiguously includes “biological pesticides” and “chemical pesticides” with residuals within its definition of “pollutant.” Specifically, an application of chemical pesticides that leaves no excess portion is not a discharge of a pollutant, and the applicator need not obtain an NPDES permit. However, chemical pesticide residuals are pollutants as applied if they are discharged from a point source for which NPDES permits are required. Biological pesticides on the other hand are always considered a pollutant under the CWA regardless of whether the application results in residuals or not and require a NPDES permit for all discharges from a point source.

In response to this decision, on April 9, 2009, EPA requested a two-year stay of the mandate to provide the Agency time to develop general permits, to assist NPDES-authorized states to develop their NPDES permits, and to provide outreach and education to the regulated community. On June 8, 2009, the Sixth Circuit granted EPA the two-year stay of the mandate.

As a result of the Court’s decision to vacate the 2006 NPDES Pesticides Rule, at the end of the two-year stay, NPDES permits will be required for discharges to waters of the U.S. of biological pesticides, and of chemical pesticides that leave a residue. In response to the Court’s decision, EPA decided to propose this general permit to cover certain discharges resulting from pesticide applications. EPA Regional offices may issue additional general permits or individual permits if needed.



Being an NPDES-delegated state, Maryland must now issue its own NPDES permits for this activity. In order to accommodate the potentially large universe of permittees, the Department is proposing a general permit also.

### Composition of Permit

Much of the Maryland permit is modeled off of the EPA's proposed general permit. The EPA proposal reflects considerable initial input from state environmental and agricultural regulatory agencies. The Maryland draft permit additionally reflects some likely changes that may result from comments received during the EPA's public comment period.

Because this is an NPDES permit, EPA has stated that it must be composed of certain elements, specifically effluent limits, monitoring, and reporting. And the effluent limits must be based on both technology and water quality considerations. Because of the unique nature of what is being regulated, effluent limits are not numerical, but narrative. Monitoring is not the retrieval of water samples followed by chemical or physical analysis, but rather a requirement that the permittee check to verify that proper procedures are being followed. Reporting is fulfilled by operating under a management plan that includes proper record keeping.

### Registration Requirements

MDE is proposing an adjustment to the EPA permit model in that there will be no requirement to submit a notice of intent for coverage under this permit. MDE is proposing to rely on licensing information by the approximately 226 commercial applicators that are currently regulated through Maryland Department of Agriculture's Integrated Pest Management (IPM) Program. EPA does not prohibit this type of approach, and EPA's own permit provides coverage for certain operators without submission of a notice of intent.

MDE's approach will ensure that professional applicators or persons employing professional applicators will be covered under the pesticide permit and assure that the applicators are knowledgeable of applicable permit conditions. The primary purpose of the registration process is to ensure that the regulated community is aware of the permit conditions and of their duty to comply. MDE believes that it can achieve broader, more comprehensive outreach to pesticide applicators by utilizing existing communications channels that have developed through the Maryland Department of Agriculture IPM Program.. MDE's draft pesticide permit also recognizes that pesticide applicators are also regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and other state regulations, including Toxic Material permit requirements.

### Shared responsibilities

Another departure from EPA's proposed permit is that the Department does not see a need to delineate responsibilities between "decision makers and non-decision makers. The Department believes Part I. Condition J "Duty to Comply" makes it clear all parties involved in a pesticide application event are responsible.



### Tier III Exclusion

The EPA model excludes application to Tier III waters from the general permit. Maryland does not currently have any waters designated as Tier III, but on the possibility that might change, we maintained a limited exclusion. The assumption behind that exclusion was that government resource management agencies are likely to be applying pesticides to protect the waterway (e.g. control of invasive aquatic life, protection of forest canopy). Therefore, blanket exclusion, with its inherent delay, would be counterproductive.

### Thresholds and Reporting

The thresholds used in this permit for plan development are taken from those that we anticipate to be used in the EPA model for registration. Only those operators (e.g. those that exceed the acreage thresholds) will have additional reporting requirements. However, all operators are required to consider integrated pest management practices and decisions in their operation and to report annually any adverse incidents. Only adverse incidents need to be reported annually. All other records are required to be maintained on site.

### Recordkeeping

The 3-yr period is that required by 40 CFR122.41(j)(2).

