

General Discharge Permit for Discharges from the Application of Pesticides

Maryland General Permit No. 17-PE Draft FAQs

Last Revised: 10/11/2019

Contents

Why do I need to apply for coverage?.....	3
Why are NPDES permits required for pesticide applications?	3
How does this relate to “TMPs”?.....	3
Why is Maryland issuing this now?.....	3
Which pesticide application activities require NPDES permits?.....	3
What are the requirements under MDE’s 17-PE?	4
Does obtaining an NPDES permit expose pesticide applicators to increased legal liabilities?.....	4
Who will need to apply for coverage?.....	4
What does it mean to be “covered” under MDE’s 17-PE?	4
Who must submit an NOI to obtain permit coverage under MDE’s 17-PE?.....	5
What is the difference between an Applicator and a Decision-maker?.....	5
I qualify for coverage under the 17-PE but still have an active TMP that has not expired, do I still need to submit an NOI?	5
What does submittal of an NOI mean?.....	5
Are for-hire pesticide applicators required to submit NOIs?.....	5
Who is responsible for seeking coverage under the 17-PE?	6
If an agency leases land to another entity, and applicators are hired to perform pest control activities on that land, who is the Decision-maker?	6
If an agency provides funds for pest control activities on private lands, is the agency a Decision-maker?	6
Does my discharge qualify for coverage?	7
What types of discharges are eligible for MDE’s 17-PE?	7
Is MDE’s 17-PE available for pesticide applications that result in discharges to impaired waters?.....	7
What if the label for a pesticide says it is approved for use in aquatic environments (i.e., use in water)? Do discharges to Waters of this State resulting from these pesticide applications still need an NPDES permit?	7

What if the label for a pesticide says it is not approved for use in water? Do discharges from these pesticides need an NPDES permit? 8

Is an NPDES permit required for discharges from pesticides applications that only occur for a short time? 8

Do any of the following affect whether an NPDES permit is required for my pesticide discharge:..... 8

How close to Waters of this State do my applications have to be to require an NPDES permit?..... 9

Is an NPDES permit required for pesticides applied to Waters of this State that are dry at the time of the discharge? 9

Is an NPDES permit required for chemical pesticide applications that do not leave a residue?..... 9

What are the requirements under MDE’s 17-PE for an Operator who is eligible for MDE’s 17-PE, but is not required to submit an NOI? 9

How do I apply for coverage? 10

What is the process for applying for coverage under an NPDES general permit? 10

Is there a fee for coverage under 17-PE? 10

Are separate NOIs required from Decision-makers for each pesticide application and/or for each separate treatment area?..... 10

When are Decision-makers who are required to develop a Pesticide Discharge Management Plan (PDMP) required to develop that plan?..... 11

Why do I need to apply for coverage?

Why are NPDES permits required for pesticide applications?

Section 301(a) of the Clean Water Act (CWA) prohibits any point source discharge of a pollutant to waters of the United States unless the discharge is in compliance with certain sections of the Act. One way a person may discharge pollutants without violating the Section 301 prohibition is by obtaining authorization under a Section 402 National Pollutant Discharge Elimination System (NPDES) permit.

The requirement to obtain NPDES permits for point source discharges from pesticide applications to waters of the United States stems from a 2009 decision by the Sixth Circuit Court of Appeals. In its ruling on *National Cotton Council, et al. v. MDE*, the Court vacated MDE's 2006 rule which said NPDES permits were not required for discharges of pesticides to waters of the United States for applications of pesticides to, or over, including near such waters when in compliance with the existing label (per the Federal Insecticide, Fungicide, and Rodenticide Act, or "FIFRA"). In its ruling, the Sixth Circuit determined that (1) biological pesticides and (2) chemical pesticides that leave a residue are pollutants as defined under the CWA and as such are subject to regulations applicable to pollutants. Courts have previously determined that applications of pesticides, such as from nozzles of planes and trucks, irrigation equipment, etc. are point sources. As a result of the Sixth Circuit's decision, point source discharges to waters of the United States from the application of pesticides require NPDES permits as of October 31, 2011.

In Maryland, the definition of Waters of the United States are further clarified and referred to as Waters of this State, to specify the waters that are regulated by MDE.

How does this relate to "TMPs"?

Maryland had regulations in place prior to the court decision requiring NPDES permits, which have resulted in Toxic Material Permits (TMPs) under COMAR 26.08.03.02. In February 2018, the Department proposed a change to our regulations that would allow incorporation of toxic material permit requirements into a discharge permit, specifically so that a single applicant would only need to obtain coverage under one permit, rather than having requirements to follow a general discharge permit (such as the 11-PE) and a TMP.

Why is Maryland issuing this now?

The 17-PE is a renewal of a permit that has been effective in the State since 2011, referred to as the 11-PE. All NPDES permits must be renewed every 5 years. This renewal has taken more than 5 years based on the desire to reduce the permits from two permits (TMPs and 11-PE) to one (17-PE). Most of the permit requirements remain unchanged from the existing permit.

Which pesticide application activities require NPDES permits?

National Pollutant Discharge Elimination System (NPDES) permits are required for any point source discharge to Waters of this State from the application of (1) biological pesticides and (2) chemical pesticides that leave a residue. MDE identified four pesticide

use patterns that generally include the full range of pesticide application activities that meet this condition, including mosquitoes and other flying insect pests, weeds and algae, animal pests, and forest canopy pests. This includes point source discharges from entities such as irrigation and mosquito control districts, federal, state, and local governments, and for-hire pesticide applicators.

NPDES permits are not required for non-point source discharges. The Clean Water Act (CWA) also exempts discharges of agricultural stormwater or irrigation return flow from the need for NPDES permits. Furthermore, in promulgating the 2006 NPDES Pesticides Rule, MDE expressly noted that the Rule did not cover applications of pesticides to terrestrial agricultural crops where runoff from the crop, either as irrigation return flow or agricultural stormwater, discharges into Waters of this State. It is important to note that if the pest to be targeted is a distance from Waters of this State, but that application is made such that a portion of the pesticide will be unavoidably deposited to Waters of this State and result in a discharge, an NPDES permit is required.

What are the requirements under MDE's 17-PE?

MDE's Pesticide General Permit (17-PE) delineates different responsibilities for different types of Operators as well as different types of pesticide application activities and locations of those activities. For example, the permit assigns different responsibilities to Decision-makers and Applicators; although any Operator covered under the permit is still responsible, jointly and severally, for any violation associated with its discharge. Similarly, the permit includes different requirements for discharges from the control of mosquitoes or from the control of pests in the forest canopy.

Does obtaining an NPDES permit expose pesticide applicators to increased legal liabilities?

No. In fact, the opposite is true. Any Operator who does not have a National Pollutant Discharge Elimination System (NPDES) permit, and whose application of pesticides results in a discharge to Waters of this State, is discharging illegally and may be in violation of the Clean Water Act. An NPDES permit authorizes the discharge of pollutants provided all of the permit conditions are met, and thus obtaining an NPDES permit and complying with the terms of an NPDES permit actually shields the Operator from liability, including certain forms of third party citizen suit liability.

Who will need to apply for coverage?

What does it mean to be "covered" under MDE's 17-PE?

MDE uses the term "covered" or "coverage" in the National Pollutant Discharge Elimination System (NPDES) program to identify Operators' discharges to Waters of this State that meet all the necessary eligibility and application provisions of an existing NPDES permit and as such are authorized to discharge under the terms and conditions of that permit. For example, a pesticide applicator that is "covered under the Pesticide General Permit (17-PE)"

has met all eligibility requirements of the permit and is authorized to discharge to Waters of this State consistent with the terms and conditions of the permit.

Who must submit an NOI to obtain permit coverage under MDE's 17-PE?

Certain Decision-makers, as defined in Appendix A of MDE's Pesticide General Permit (17-PE), must submit Notice of Intent (NOIs). There are basic triggers for when the NOI is required such as size of the application or if there are Desirable Species in the application area. See Table 1 of the 17-PE for identification of Decision-makers required to submit NOIs.

What is the difference between an Applicator and a Decision-maker?

For purposes of MDE's Pesticide General Permit (17-PE), an Applicator is an entity who performs the application of a pesticide, or who has day-to-day control of the application (i.e., they are authorized to direct workers to carry out those activities). A Decision-maker is an entity with control over the decision to perform pesticide applications, including the ability to modify those decisions. A Decision-maker, for example, is the entity that hires a pesticide application company to apply pesticides or instructs its own staff to apply pesticides. Decision-makers and Applicators are both Operators and thus in some instances, more than one Operator may be responsible for compliance with the permit for any given pesticide application activity.

I qualify for coverage under the 17-PE but still have an active TMP that has not expired, do I still need to submit an NOI?

Yes. Any operator with an existing TMP whose discharges require coverage under the 17-PE must submit an NOI at least 60 days prior to the expiration of the existing TMP.

What does submittal of an NOI mean?

A Notice of Intent (NOI) for a general permit is similar to a permit application, in that it is notification to the regulatory authority of a planned discharge for which coverage under a specific National Pollutant Discharge Elimination System (NPDES) general permit is needed and contains information about the discharge and the Operator of that discharge. The NOI serves as the Operator's notice to the permitting authority that the Operator intends for the discharge to be authorized under the terms and conditions of that general permit. By signing and submitting the NOI, the Operator is certifying that the discharge meets all of the eligibility conditions specified in the general permit (e.g., that a pesticide discharge management plan has been developed if necessary) and that the Operator intends to follow the terms and conditions of the permit. A fraudulent or erroneous NOI invalidates permit coverage. An incomplete NOI delays permit coverage until such time as the NOI has been completed.

Are for-hire pesticide applicators required to submit NOIs?

Where an applicator is hired or authorized by an entity to perform pest control activities, the applicator is not considered a "Decision-maker" and therefore is not required to submit a Notice of Intent (NOI).

Who is responsible for seeking coverage under the 17-PE?

The National Pollutant Discharge Elimination System (NPDES) regulations require that any “person” that discharges pollutants to Waters of this State can do so only under the terms and conditions provided in an NPDES permit. The NPDES regulations define “person” as an “individual, association, partnership, corporation, municipality, state or federal agency, or an agent or employee thereof.” This may include entities such as municipalities responsible for pest control, pest control districts, farmers, for-hire pesticide applicators, etc. Further, the regulations clarify that when an activity is owned by one person but operated by another person, it is the Operator’s duty to obtain a permit. Thus, MDE uses the term “Operator” when describing who is required to obtain NPDES permit coverage. MDE’s Pesticide General Permit (17-PE) defines “Operator” to mean any entity associated with the application of pesticides which results in a discharge to Waters of this State that meets either of the following two criteria:

- any entity who performs the application of a pesticide or who has day-to-day control of the application (i.e., they are authorized to direct workers to carry out those activities); or
- any entity with control over the decision to perform pesticide applications including the ability to modify those decisions.

For the 17-PE, MDE calls any Operator identified by (i) above an “Applicator” and any Operator identified by (ii) above a “Decision-maker.” Thus, in some instances, there may be more than one Operator responsible for a discharge and as such, more than one Operator required to have coverage under MDE’s 17-PE. As described elsewhere, even when more than one Operator is responsible for a given discharge, MDE’s 17-PE never requires more than one Operator to submit a Notice of Intent (NOI) to be covered under the permit. Any other Operators meeting the eligibility requirements of the permit are covered automatically without the need to submit an NOI (or, for that matter, any other application or similar paperwork).

If an agency leases land to another entity, and applicators are hired to perform pest control activities on that land, who is the Decision-maker?

An entity is unlikely to be a Decision-maker if it owns the land but the pesticide application activities are being performed without its input or control (e.g., a private party is spraying for weeds on public lands that the private party leases from the federal government). In this scenario, the lessee is the Decision-maker.

If an agency provides funds for pest control activities on private lands, is the agency a Decision-maker?

An agency is not considered a Decision-maker if it does not have control over the decision to perform pest control activities. Merely providing funds for such an activity is not considered to be a Decision-making activity. The entity who authorizes the pest control activities is the Decision-maker.

Does my discharge qualify for coverage?

What types of discharges are eligible for MDE's 17-PE?

MDE's Pesticide General Permit (17-PE) is available for Operators who apply (1) biological pesticides or (2) chemical pesticides that leave a residue, either of which result in point source discharges to Waters of this State, from the following pesticide use patterns:

- Mosquito and other flying insect pest control;
- Weed and algae control;
- Animal pest control; and
- Forest canopy pest control.

The 17-PE includes additional eligibility criteria, although those criteria are mostly for infrequent situations.

Is MDE's 17-PE available for pesticide applications that result in discharges to impaired waters?

In certain instances, coverage under MDE's Pesticide General Permit (17-PE) is not available for discharges to impaired waters. Specifically, the following discharges of pesticides are not authorized for coverage under the 17-PE:

- To waters which are impaired for the active ingredient of the pesticide
- To waters which are impaired for degradates of that active ingredient
- To waters which are impaired for the class of pesticides (e.g., pyrethroids) to which the pesticide to be applied belongs.

Discharges to waters impaired for temperature or some other indicator parameter, or for physical impairments such as "habitat alteration," are eligible for 17-PE coverage unless the Operator is otherwise notified by MDE.

If a discharge is not eligible for coverage under the 17-PE, Operators must choose between obtaining coverage under an individual permit for such a discharge or selecting some other means of pest management, e.g., using mechanical means or a different pesticide active ingredient.

What if the label for a pesticide says it is approved for use in aquatic environments (i.e., use in water)? Do discharges to Waters of this State resulting from these pesticide applications still need an NPDES permit?

Yes. National Pollutant Discharge Elimination System (NPDES) permits for pesticide discharges to Waters of this State are required under the Clean Water Act (CWA). In addition to NPDES permits, the user of the pesticide must follow the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) label. The CWA and FIFRA requirements operate independently of each other. This permit does not negate the requirements under FIFRA and its implementing regulations to use registered pesticides consistent with the product's

labeling. Applications in violation of certain FIFRA requirements could also be a violation of the permit and therefore a violation of the CWA (e.g., exceeding label application rates).

What if the label for a pesticide says it is not approved for use in water? Do discharges from these pesticides need an NPDES permit?

Possibly. Some pesticide labels refer to “water” and not “Waters of this State” or “waters of the United States.” It is possible that some pesticide products that are not approved for use in “water” may result in discharges to Waters of this State. For example, Waters of this State may be dry at the time of pesticide application, and there may be situations where pesticide applications to temporarily dry Waters of this State are performed using pesticides labeled for terrestrial or seasonally-dry use. The National Pollutant Discharge Elimination System (NPDES) permit requirements apply regardless of whether the Waters of this State are wet or dry at the time of the discharge.

Is an NPDES permit required for discharges from pesticides applications that only occur for a short time?

Yes. All applications of (1) biological pesticides and (2) chemical pesticides that leave a residue, in which applications are made directly to Waters of this State, or where a portion of the pesticide will unavoidably be deposited to Waters of this State, are required to be covered under a National Pollutant Discharge Elimination System (NPDES) permit. The Clean Water Act does not provide MDE with the authority to exclude certain types of discharges from the need to obtain permit coverage, such as small “de minimus” or short-term discharges, discharges from emergency situations (except in very limited circumstances as described in 40 CFR 122.3(d) where discharge is in compliance with the instructions of an On-Scene Coordinator), or discharges to “small” Waters of this State.

Do any of the following affect whether an NPDES permit is required for my pesticide discharge:

- a. Method of application (e.g., using hand sprayers, vehicle-mounted tanks with sprayer nozzles, or fixed- or rotary-wing aircrafts, etc.)
- b. Type of product (e.g., adulticides, larvacides, herbicides, insecticides, piscicides, algaecides, rodenticides, fungicides, etc.); or
- c. Industry (e.g., utility right-of-way, agricultural, golf course, railroad track maintenance, irrigation control, mosquito control, etc.)?

No. National Pollutant Discharge Elimination System (NPDES) permits are required for any pesticide applications that result in discharges to Waters of this State (unless exempted irrigated return flow or agricultural stormwater), regardless of the method of application, type of product, or industry.

How close to Waters of this State do my applications have to be to require an NPDES permit?

If a pesticide discharge occurs directly to Waters of this State, a National Pollutant Discharge Elimination System (NPDES) permit is required. If the pest to be targeted is at a distance from Waters of this State, but that application is made such that a portion of the pesticide will be unavoidably deposited to Waters of this State, an NPDES permit is required.

Is an NPDES permit required for pesticides applied to Waters of this State that are dry at the time of the discharge?

Yes. If a permitting authority determines that the pesticide application will indeed result in a discharge to Waters of this State, a National Pollutant Discharge Elimination System (NPDES) permit is required. A water of the United States does not lose its jurisdictional status if it becomes dry during extraordinary circumstances such as drought or if it flows continuously during parts of the year and has no flow during dry months. A discharger will need a permit regardless of whether the Waters of this State are wet, partially wet, or dry at the time of the discharge.

Is an NPDES permit required for chemical pesticide applications that do not leave a residue?

No. A National Pollutant Discharge Elimination System (NPDES) permit would not be necessary if it is determined that a residual did not enter Waters of this State. However, if a chemical pesticide is discharged to Waters of this State, any excess pesticides or pesticides that no longer provide any pesticidal benefit that remain in those waters are considered "residual." Thus, MDE expects that some portion of every pesticide applied to Waters of this State will leave a residual in those waters. As such MDE assumes that every application of chemical pesticides to Waters of this State will trigger the requirement for an NPDES permit.

MDE recommends that an entity applying chemical pesticides with a discharge to Waters of this State who disagrees with this assumption be able to provide scientific data supporting such a determination. Such data should show what level of the pesticide can be detected in water, and at what level in water the pesticide provides a pesticidal benefit. Such data should address the properties of the chemical pesticide under different water conditions (e.g., different pH, organic content, temperature, depth, etc.) that might affect the pesticide's properties. A permit would not be necessary if the data indicates that a residual does not enter Waters of this State.

What are the requirements under MDE's 17-PE for an Operator who is eligible for MDE's 17-PE, but is not required to submit an NOI?

Under the 17-PE, an Operator who is not required to submit an NOI is subject to fewer requirements than an Operator who is required to submit an NOI. Each part or subpart of the permit clarifies whether requirements in that part or subpart apply only to Operators required to submit an NOI or some other subset of Operators (for example, "all Operators,"

“all Applicators,” “all For-Hire Applicators,” etc.). Operators covered under MDE’s 17-PE that are not required to submit an NOI must still comply with the provisions of the permit applicable to them where those requirements are not identified as only applicable to Operators required to submit an NOI.

How do I apply for coverage?

What is the process for applying for coverage under an NPDES general permit?

National Pollutant Discharge Elimination System (NPDES) general permits do not require that Operators “apply” for coverage; rather, general permits typically rely on the submission of a document called a Notice of Intent (NOI). An NOI differs from an individual permit application in that it is submitted by Operators after the general permit is issued by the permitting authority. An NOI for a general permit is a notice to the NPDES permitting authority of an Operator’s intent to be covered under a general permit, and typically contains basic information about the Operator and the planned discharge for which coverage is being requested. Some general permits, such as MDE’s Pesticide General Permit, automatically cover some Operator discharges without submission of an NOI. In these instances, Operators must comply with applicable permit requirements for their pesticide applications without submission of any paperwork to the permitting authority (or in some instances, submission of some other type of notification document).

Is there a fee for coverage under 17-PE?

No. There is no fee associated with the submission of the documents (NOI, Reports, Forms, etc.) required for coverage under the 17-PE.

Are separate NOIs required from Decision-makers for each pesticide application and/or for each separate treatment area?

No. MDE’s Pesticide General Permit (17-PE) provides flexibility for Decision-makers on how information can be provided in the Notice of Intent (NOI). However, MDE expects that in most instances the Decision-maker will submit one NOI to cover all its pesticide applications in all treatment areas. The NOI is structured to allow for this flexibility. The only exception is that an NOI cannot include information for more than one state. Thus if a Decision-maker is required to submit an NOI for permit coverage and that Decision-maker’s activities are performed in more than one state, an NOI must be submitted for each state where those activities are to be performed. “Pest management areas” are those areas where the Decision-maker may be managing pests, and such management results in a discharge to Waters of this State. For example, an NOI may identify multiple pest management areas at the different state parks throughout an entire state, a mosquito district, or a single lake. Decision-makers have flexibility to decide which pest management areas are included on a single NOI. For example, a Decision-maker may, if it so chooses, submit separate NOIs for each of its treatment areas. However, MDE expects most Decision-makers will prefer having all their activities identified on one NOI.

When are Decision-makers who are required to develop a Pesticide Discharge Management Plan (PDMP) required to develop that plan?

Decision-makers required to develop a Pesticide Discharge Management Plan (PDMP) must do so by the time the Notice of Intent (NOI) is filed.