Effective stormwater management at major facilities is always a challenge. But with the recent bifurcation of the National Pollution Discharge Elimination System (NPDES) under the Clean Water Act (CWA) to include a separate pesticide general permit (PGP), the current administration is setting the stage for other pollutant-specific permits, which will result in layers of complex stormwater regulations. Many facility managers are not familiar with current pesticide permit requirements and how best to incorporate them into a facility’s existing environmental, regulatory, and litigation risk management programs, so it is important to understand where the pesticide permit program came from and how best to evaluate its application to your facility’s operations.

**HOW THE PGP EVOLVED**

The CWA was enacted by Congress in 1972. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) was enacted in 1947 and underwent major revisions in 1972, including when Congress passed pesticide oversight on to the US Environmental Protection Agency (USEPA). The CWA always had a clear history and purpose of zero point source discharge of pollutants to US waters unless those discharges were permitted. FIFRA’s purpose was always related to the proper marketing and labeling of a specific group of chemicals, with little or no regard for protection of US water quality. Therefore, at the time, it made sense that the CWA allowed for citizen lawsuits as an additional deterrent to violations affecting criti-
cal water resources. FIFRA does not provide for citizen suits.

From 1972 until around 2006, USEPA took the general position that if pesticides were applied in accordance with FIFRA labeling and other requirements, it would not seek to enforce CWA permit requirements. In November 2006, USEPA sought to eliminate concerns over whether the CWA applied to pesticide use by issuing a rule stating that NPDES permits were not necessary for applications of pesticides affecting waters if the use was carried out in accordance with FIFRA labeling.

In 2009, the Sixth Circuit Court of Appeals in National Cotton Council v EPA (553 F.3d 927 (6th Cir. 2009)) did away with USEPA’s rule-based CWA exemption for pesticide discharges. The court granted USEPA a stay of that decision until April 2011 to allow it and the states enough time to develop general permits, rules, and programs to cover pesticide discharges under the CWA. The court subsequently extended that April 2011 stay to Oct. 31, 2011.

USEPA released its final PGP Oct. 31, 2011 (www.epa.gov/npdes/pubs/final_pgp.pdf). However, USEPA’s general permitting authority extends only to certain federal facilities, tribal lands, US territories, the District of Columbia, and six states (Alaska, Idaho, Massachusetts, New Hampshire, New Mexico, and Oklahoma). The remaining 44 states are authorized to develop and issue NPDES pesticide permits on their own under intergovernmental agreements with USEPA. If your facility is not located in one of these areas, management will need to contact the appropriate state environmental agency for information on stormwater pesticide permit requirements.

KNOWING THE DEADLINE FOR COMPLIANCE

After the final PGP was issued Oct. 31, 2011, USEPA took an educational rather than an enforcement approach to parties that needed to submit a notice of intent (NOI) for coverage. USEPA extended the deadline for filing an NOI to Jan. 2, 2012.

Additionally, USEPA published on its website that it would not focus on enforcement until approximately Mar. 1, 2012. With the permit program now in its second full year, those facilities and operators without an NOI or those that are unfamiliar with the program’s scope and application have a significant amount of regulatory risk exposure.

UNDERSTANDING THE PGP’S SCOPE AND APPLICATION

To assist in the analysis of whether pesticide use requires permit coverage, USEPA has published two important guidance documents. First is an extensive Final PGP Fact Sheet available online (www.epa.gov/npdes/pubs/pgp_final_factsheet.pdf). The second is a Pesticide Discharge Evaluation Worksheet in a form-fillable template (www.epa.gov/npdes/pubs/pgp_appf.pdf). But before wading through those documents, there are a few important fundamentals to understand about the PGP.

- Facility management cannot simply contract away all of its permit responsibility to a licensed pesticide “applicator.” The permit defines “operators” as “applicants” and the “decision-makers” who make the decision to apply pesticides that result in discharges to jurisdictional waters of the United States.
- Generally, the PGP covers operators applying pesticides that result in discharges from the following activities: (1) mosquito and other flying insect pest control, (2) weed and algae control, (3) animal pest control, and (4) forest canopy pest control.
- The PGP appears to presume that pesticide applications leave a chemical residue.
- Pesticide application not covered by the PGP may require coverage under an individual permit or an alternative general permit if the application results in a point source discharge to jurisdictional waters of the United States.
- The PGP includes technology-based effluent limitations.
- The PGP includes recordkeeping, monitoring, corrective action, reporting, and other requirements typical of other stormwater management authorizations.
- Because pesticide use falls under the NPDES program, facilities are exposed to CWA citizen lawsuits.

All facilities have unique features that need to be factored into whether a permit is necessary and the development of specific pesticide best management practices (BMPs). Some of these features include jurisdictional wetlands, proximate surface waters, areas known to harbor endangered species, and canal and ditch infrastructure. But nothing can create more agony for facility management or state environmental officials than a regulation that is missing a definition critical to determining permit applicability.

ASKING HOW CLOSE IS “NEAR”

If the final general permit presumes that pesticide applications leave a chemical residue that can result in a discharge to waters of the United States, then how close can an applicator get to waters of the United States before the use is considered a discharge? Under the CWA, a facility’s management team would ordinarily expect to rely on the fact that there would be no potential violation of the CWA without an actual discharge of pesticides into US waters. Although USEPA has published a series of frequently asked questions for the NPDES program (http://cfpub.epa.gov/npdes/allfaqs.cfm) that admit the lack of a key definition for the term
“near,” its answers seem to provide an opportunity to broaden the scope and reach of the PGP and the CWA. Below are two frequently asked questions and the USEPA’s answers meant to deal with the “near” issue.

**Question 1.** How close to waters of the United States do my applications have to be to require an NPDES permit?

**USEPA answer.** If a pesticide discharge occurs directly to waters of the United States, an NPDES permit is required. If the pest to be targeted is at a distance from waters of the United States, but that application is made such that a portion of the pesticide will be unavoidably deposited to waters of the United States (for example, an application is made on a creek bank), an NPDES permit is required.

**Question 2.** How does the USEPA define “near” waters of the United States?

**USEPA answer.** Although the Sixth Circuit Court of Appeals did not define the term “near” in the context of the 2006 Pesticides Final Rule, the USEPA interprets this term to refer to the unavoidable discharge of pesticides to waters of the United States in order to target pests in proximity to but not necessarily in such waters. For example, this can occur while treating weeds along the bank of a ditch. The USEPA does not use or define the term “near” in its pesticide general permit or elsewhere in its regulations.

**CONSIDERING OTHER FACILITY MANAGEMENT ISSUES**

In developing a comprehensive stormwater management program at larger, multitenant facilities, the focus has to be on the design, implementation, and long-term monitoring of the stormwater plan, along with BMPs that balance the interests of a facility’s goals and budget, permit requirements, tenant relations, and neighbors. However, there are two inescapable factors that are common to most multitenant facilities.

The first is that the facility owns the real property the tenants occupy. Second, the facility owns and is responsible for maintenance of the infrastructure that collects and transports the stormwater. Both factors are notable because even though a facility may require tenants to permit, plan, and sample their own stormwater flows, it is nearly impossible for a facility to shift and escape all CWA responsibility for a tenant’s operations. So, at these types of facilities, management needs to understand its tenants’ use of pesticides and their knowledge and compliance with the PGP program.

Understanding that it may take some time to fully incorporate the PGP program into a facility’s comprehensive stormwater management program, what are some basic steps a facility can immediately take to show federal and state stormwater inspectors that the facility is in the process of developing and complying with the PGP?

- At a minimum, determine whether the facility needs to file an NOI based on pesticide use and whether there are any jurisdictional wetlands or other waters of the US “near” areas of pesticide application.
- Well in advance of the next application of pesticides at a facility, complete the Pesticide Discharge Evaluation Worksheet and file an NOI, if necessary. Remember, NOIs are not immediately effective on filing with the USEPA or state environmental agencies.
- Develop and issue pesticide use BMPs (even if the first version is relatively general in nature and scope).
- Amend the facility’s stormwater pollution prevention plan to explain the facility’s implemented pesticide management program and BMPs.
- If the facility has not developed and implemented a pesticide management program and BMPs, amend the stormwater pollution prevention plan anyway to acknowledge the PGP, fully explain the facility’s development process for such a program and BMPs, and provide a timeline for development and implementation.

Although a facility may be behind in developing and implementing a comprehensive program and the BMPs to deal with pesticide use, acknowledging the need and having a written development and implementation plan approved by management and appended to the stormwater pollution prevention plan can help when dealing with regulatory inquiries and inspections.

Every facility owner faces concerns over the mounting cost of compliance with stormwater management. Fragmenting the NPDES program to deal with specific pollutants such as pesticides arguably has done little but add new layers of complexity to already complex stormwater management issues, while exposing facilities to pesticide-based CWA citizen lawsuits. It will also set the stage for USEPA to identify additional pollutants that can be segregated for regulation under the NPDES program.

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