



## **Aerial Applicators' Obligations Under EPA's Final NPDES Pesticide General Permit (Updated January 2017)**

NAAA has worked to keep you abreast of the latest regulatory and legislative developments related to EPA's National Pollutant Discharge Elimination System (NPDES) pesticide general permit (PGP) and states' PGPs following the U.S. Court of Appeals for the 6th Circuit's decision in 2009. The PGP covers pesticide applications into, over or near "waters of the United States" as defined under the Clean Water Act (CWA). The dual regulation of pesticide applications under the CWA and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) is duplicative and does not result in additional environmental protections or benefits. The permits are estimated to more than double the total number of permittees under the CWA's NPDES program. Stakeholders have called NPDES permitting for pesticide applications impractical, unnecessary and prohibitively expensive, and have lobbied Congress to take action. Capitol Hill has responded, but to date has not passed legislative fix that would eliminate CWA permitting for pesticide applications. President-Elect Trump has pledged to eliminate two existing regulations for every one new regulation. This anticipated White House support for regulatory reform, and continued Republican leadership in the House and Senate, renew opportunities to pass an NPDES legislative fix during the 115th Congress. NAAA continues to work with its allies on a legislative strategy for 2017.

EPA's affects every NAAA member who applies pesticides into, over or near waters of the U.S. or helps make decisions about applying such pesticides in the four states where EPA is the lead agency (ID, NM, NH, MA, and nationwide federal lands (*e.g.*, national forests, military bases, national parks, etc.) and most U.S. territories). As we describe below, the forty-six other states have developed and implemented their own state versions of the PGP, following EPA's lead. These state PGPs vary widely in content, waters they cover, and other factors. For the states in which you operate, you will need to know how to meet permit requirements, to avoid PGP violations and enforcement actions, or worse, citizen suits. The following provides you information that has been updated for EPA's 2016 PGP reissuance, as well as a guide to what you as aerial applicators of pesticides should know about potential impacts. This is not legal advice, and NAAA urges you to review the EPA and state PGP documents for yourselves. This article will provide you with an overview, and includes web links to the PGP and related materials.

**Why NPDES Permit Coverage is Important:** Before the 6th Circuit decision in 2009 and the EPA's final issuance of the final PGP in 2011, pesticide applicators and the entities that hired applicators simply had to comply with FIFRA labels plus any other applicable state laws. However, with the 6th Circuit's decision, it is now a federal violation of the CWA to apply a pesticide into, over or near to a water of the U.S. without coverage by, and compliance with, an NPDES permit. Although the compliance requirements are quite burdensome, the upside is that once permit coverage is obtained the applicator, and/or decision-making entity that has hired the applicator, is protected from the substantial enforcement penalties (up to \$51,570 per day for each violation) as well as citizen suits. Thus, for aerial applicators, just going to work after October 31, 2011 entailed many new responsibilities. Not every type of pesticide application that would be subject to the CWA is covered by the EPA PGP; those applications must be

covered by a state PGP or another type of NPDES permit. This is discussed in more detail later in this article.

**Differentiating Between Applicators and Decision-makers:** The key question is who must apply for PGP coverage versus who is automatically covered. Automatic coverage for those operators to whom it is available is a benefit, as less paperwork and compliance requirements are involved. EPA has established different requirements for applicators and decision-making entities (e.g., your clients), and it is important to know the difference between these categories so you can meet the PGP requirements that apply to your business. Overall, the PGP regulates the activities of pesticide “operators” involved in discharges (pesticide applications) into, over or near waters of the U.S. These are either (1) “applicators” who perform the application of pesticides or have day-to-day control over the pesticide applications (i.e., they are authorized to direct workers to carry out those activities) that result in discharges to U.S. waters; or (2) “decision-makers” who have control over the decision to perform pesticide applications, including the ability to modify those decisions, that results in discharges to U.S. waters.

Under the PGP, applicators have less burdensome requirements than decision-makers. However, when an applicator is also a decision-maker, the applicator must comply with all applicable requirements imposed on *both* applicators and decision-makers. Furthermore, when the PGP references all “operators,” both applicators and decision-makers must comply. Adding to the confusion, the permit states that “subcontractors” who are hired and under the *supervision* of an owner or other entity are generally not considered by EPA to be “operators” (the owner or entity that hires them would be regulated by the PGP). On the other hand, landowners or other entities are not likely to be considered an “operator” subject to the PGP if, for example, pest control activities are being performed outside of their control (e.g., a public agency is spraying for mosquitoes over private property).

**Pesticide Uses Covered by the PGP:** The covered categories of pesticide applications are generally consistent with those addressed in the 6th Circuit decision, and do not represent every pesticide application activity that will require NPDES permit coverage. Four groups of pesticide uses are included: (1) mosquito and other flying insect pest control, to control public health/nuisance and other flying insect pests that develop or are present during a portion of their life cycle in or above standing or flowing water. Public health/nuisance and other flying insect pests in this category include mosquitoes and black flies; (2) weed, algae and pathogen pests in waters and at waters’ edge, including ditches and/or canals. These represent both aquatic weed and algae control in water bodies, as well as weed control on ditch banks or drinking water/irrigation reservoir or canal banks. This category also covers weed control applications where the treated waterbody may simply be a dry creek or other conveyance at the time of treatment, and can be located in utility or transportation rights of ways, ranches, farms, forest floors, or other upland area that have conveyances that are considered waters of the U.S. This aspect of the PGP--unknowing or accidental discharge to a dry conveyance in an upland terrestrial area that was not known to be a “water of the U.S.” -- has farm, transportation and utility groups most concerned; (3) animal pest control in water and at water’s edge. Animal pests in this use category include fish, lampreys, insects, mollusks, and pathogens; and (4) forest canopy pest control where application of a pesticide to a forest canopy from the air or ground to control the population of a pest species (e.g., insect or pathogen) includes a portion of the pesticide that will unavoidably be applied over and deposited into water below. This is not considered spray drift, which is not covered by the PGP. An estimated 365,000 pesticide applicators, including aerial applicators, farmers, forestland owners, public land managers, mosquito control districts, irrigation control districts, drinking water reservoir operators, government agencies and others must seek permit coverage under EPA’s permit, state PGPs, or individual permits. An explanation of the parties that are likely to fall into these use categories is available in the [Federal Register notice](#) for EPA’s final 2016 PGP, in EPA’s [fact sheet](#) accompanying the permit, or in the final PGP available on [EPA’s website](#).

**Pesticide Uses Not Covered:** Applicator and decision-making operators are not eligible for coverage under EPA's PGP for any discharge under the following circumstances (note: state-issued PGPs often have additional exclusions from coverage): (1) from a pesticide application to waters of the U.S. if the water is identified as impaired by a substance which is either an active ingredient in that pesticide product or is a degradant of such an active ingredient. Impaired waters are those that have been identified by a state, tribe, or EPA as not meeting applicable state or tribal water quality standards. These include waters with EPA- approved or EPA-established total maximum daily loads (TMDLs) and waters for which EPA has not yet approved or established a TMDL. A list of those impaired waters is available at [www.epa.gov/tmdl](http://www.epa.gov/tmdl) (2) Except for discharges from pesticide applications made to restore or maintain water quality or to protect public health or the environment that either do not degrade water quality or only degrade water quality on a short- term basis, operators are not eligible for coverage under the PGP for discharges to Tier 3 (Outstanding National Resource Waters). A list of Tier 3 waters in geographic areas covered under this PGP is available on EPA's website at <http://www.epa.gov/npdes/epas-tier-three-waters-pesticide-general-permit-pgp-outstanding-national-resource-waters> (3) Discharges currently covered by another NPDES permit (4) Discharges likely to adversely affect species that are federally-listed as endangered or threatened ("listed species") under the Endangered Species Act (ESA) or habitat that is federally designated as critical under ESA. The PGP has a six-step checklist that decision-makers must submit to gain coverage that certifies their planned pesticide applications will not adversely affect such listed species or critical habitat. That six-step process can be found in Appendix I of the permit. EPA posted updated information on ESA procedures on its 2016 PGP website at <https://www.epa.gov/npdes/pesticide-permitting-esa-procedures>, including an Interactive Mapping Tool to assist with identifying coverage areas that trigger additional ESA-related requirements. (5) Finally, the PGP does not cover irrigation return flow (which includes runoff from a crop field due to irrigation of that field) and agricultural stormwater runoff. The CWA exempts these discharges from NPDES permitting. Existing stormwater permits for construction, industry and municipalities already address pesticides in stormwater and are not covered by the PGP. EPA has determined that runoff into engineered conservation measures on a crop field such as grassy swales and other land management structures that direct flow from the crop field is considered either irrigation return flow or agricultural stormwater, and is not subject to the PGP. However, discharges from the application of pesticides into irrigation ditches and canals that are themselves waters of the U.S. are not exempt and do require NPDES permit coverage to be legal. Any discharges to waters of the U.S. that are not covered by the PGP must be covered by an individual permit or another general permit to be legal. This will be addressed further in the section below dedicated to a discussion of potential legal jeopardy.

**Requirements for Pesticide Applicators:** Pesticide applicator requirements are less burdensome than decision-maker PGP requirements, but they are still enforceable and noncompliance could expose an applicator to enforcement action or citizen suits. The below list of requirements is lengthy, however, many of the activities listed are those aerial applicators likely do already, such as maintain your equipment, calibrate your spraying apparatus, and keep spray logs. However, these activities now are enforceable requirements that also involve required documentation and recordkeeping. Both the activity itself (e.g., proper calibration) and maintaining records of those activities are separately enforceable under the PGP.

Perhaps the most important distinction between applicators and decision-makers, is that applicators are *automatically* covered by the PGP without having to complete time consuming forms. To meet the PGP requirements to minimize the discharge of pesticides to waters of the U.S., in addition to following the FIFRA label requirements, you must adhere to following practices and requirements:

(1) Applicators must use Pest Management Measures: To the extent not determined by the decision-maker, applicators must use only the amount of pesticide and frequency of pesticide application necessary to control the target pest, using equipment and application procedures appropriate for this task; maintain pesticide application equipment in proper operating condition, including requirement to calibrate, clean, and repair the application equipment and prevent leaks, spills, or other unintended discharges; and assess weather conditions (e.g., temperature, precipitation and wind speed) in the treatment area to ensure application is consistent with all applicable federal requirements.

(2) Applicators must also conduct the following *monitoring activities*: During any pesticide application with discharges authorized by the PGP, all applicators must, when considerations for safety and feasibility allow, visually assess the area to and around where pesticides are applied for possible and observable adverse incidents, as defined in Appendix A, caused by application of pesticides, including the unanticipated death or distress of non-target organisms and disruption of wildlife habitat, recreational or municipal water use.

(3) Applicators must also be aware of and take any needed corrective actions: Operators must review and, as necessary, revise the evaluation and selection of Pest Management Measures (described in (1) above) for the following situations: any spill, leak or unauthorized release or discharge of pesticides not authorized by the PGP or another NPDES permit; the EPA concludes, or applicator becomes aware, that the Pest Management Measures are not adequate/sufficient for the discharge to meet applicable water quality standards; any monitoring activities indicate a failure of such Pest Management Measures to meet PGP requirements; an inspection or evaluation of activities by officials reveals that modifications of Pest Management Measures are necessary to meet requirements of the PGP; or any operator observes or is made aware of an adverse incident as defined in Appendix A. Any corrective actions must be made before or, if not practicable, as soon as possible after the next pesticide application that results in a discharge. Failure to comply with the corrective action deadlines constitutes an additional violation. Correcting the situation does not absolve operators of liability for any original violation. EPA may impose additional requirements if corrective actions are needed.

(4) Applicators must document and report any adverse incidents seen: If an operator observes or is otherwise made aware of an adverse incident, as defined in Appendix A, which may have resulted from the discharge of a pesticide to a water of the U.S., the operator must immediately notify the appropriate EPA [Incident Reporting Contact](#). This notification must be made by telephone within 24 hours of the operator becoming aware of the adverse incident and must include the information identified in the permit at Section 6.4.1.1. Within 30 days of a reportable adverse incident, operators must provide a written report to the appropriate Regional EPA office and to the [state lead agency](#) for pesticide regulation. Also, if an operator becomes aware of an adverse incident to threatened or endangered species or critical habitat, an operator must immediately notify National Marine Fisheries Service (NMFS) in the case of anadromous or marine species, or the Fish & Wildlife Service (FWS) in the case of terrestrial or freshwater listed species or habitat. This notification must be made by telephone to the identified contacts on [EPA's PGP website](#). Where the applications of multiple applicators result in an adverse incident, notification and reporting by any one of these constitutes compliance for all.

(5) Applicators must report a spill, leak or other unpermitted discharge that exceed notification thresholds: If an applicator or other operator becomes aware of a spill, leak or other unpermitted discharge that is equal to or exceeds reportable quantities set forth in EPA regulations referenced in Section 6.5.1 and that results in an adverse incident, then the incident must be reported as discussed in (4) above. If the spill, leak, or unpermitted discharge does not result in an adverse incident, then the operator must document and retain the information discussed in Section 6.5.1 for 30 days.

(6) **Recordkeeping:** As set forth in Section 7.2 of the permit, all for-hire applicators must retain the following records: (a) documentation of equipment calibration; (b) information on *each* treatment area to which pesticides are discharged, including: (1) description or map of each treatment area, including location and size (acres or linear feet) of treatment area and identification of any waters, either by name or by location, to which pesticide(s) are discharged; (2) pesticide use pattern(s); (3) target pest(s); (4) name of each pesticide product used, including the EPA registration number; (5) quantity of each pesticide product applied to each treatment area; (6) pesticide application date(s); (7) and whether or not visual monitoring was conducted during pesticide application and/or post-application and if not, why not, and whether monitoring identified any possible or observable adverse incidents caused by application of pesticides.

(7) **Records retention:** All required records must be documented as soon as possible but no later than 14 days following completion of each pesticide application. Operators must retain any records required under this permit for at least 3 years after the operator's coverage under this permit expires or is terminated. Operators must make available to EPA, including an authorized representative of EPA, all records kept under this permit upon request and provide copies of such records, upon request.

**Requirements for Decision-makers:** In addition to almost all of the above requirements of applicators, decision-makers generally have many additional and burdensome requirements. These are briefly summarized here for those NAAA member aerial applicators who would also qualify as a decision-maker. A complete list of decision-maker requirements is available in the [Federal Register notice](#) of the final 2016 permit, in EPA's [fact sheet](#) accompanying the permit. Not all decision-makers must comply with the extensive requirements described here. EPA's PGP and state PGPs segregate decision-maker responsibilities on the basis of type of decision-making entity and, in some cases, whether they exceed annual treatment area thresholds. Table 1-1 of the 2016 PGP describes the annual treatment-area thresholds that separate which decision-makers must submit an NOI and therefore also complete the requirements below. **In general, NOIs are required of:**

- Any decision-maker with an eligible discharge to a Tier 3 water;
- Any decision-maker with an eligible discharge to waters of the U.S. containing NMFS-listed endangered or threatened species or critical habitat;
- Any decision-maker for which pest management for land resource stewardship is an integral part of their operations; mosquito control districts; irrigation or weed control districts; or similar pest control districts;
- Any local governments or other entities (including private entities) that exceed one or more of the following annual treatment thresholds for the four pesticide use categories; (a) insect adulticide treatment or forest canopy treatment of more than 6,400 acres during a calendar year; or (b) more than either 20 linear miles *or* 80 acres of water (surface area) during a calendar year. Decision-makers who are not described above need not submit an NOI.

Any decision-makers required by the factors listed above to submit an NOI must also comply with the following additional requirements:

(1) **Submission of an NOI:** Some decision-makers are not automatically covered, but are required to apply for coverage under the PGP, and wait for coverage approval. Decision-makers who do not meet one of the conditions identified in the previous paragraph are automatically covered. Application for PGP coverage involves submitting a Notice of Intent (NOI) to discharge. If required to submit an NOI, decision-makers (and applicators who are also considered decision-makers) must complete and file the NOI a minimum of 10 days before the intended application date (or 30 days before an intended application to waters of the U.S. where listed endangered or threatened species or critical habitat is

present). In cases of Declared Pest Emergency, NOIs are due no later than 30 days after discharge, except for areas where listed species and critical habitat are present where the deadline is no later than 15 days after beginning to discharge. Information required to complete the NOI is provided on the NOI form included in [Appendix D](#). A decision-maker must submit the NOI once, and submit an updated NOI if the details of the permit coverage change. Beginning with the 2016 PGP, the decision-maker must prepare and submit the NOI using EPA's electronic [eNOI system](#) unless the decision-maker has otherwise obtained a waiver from electronic filing from EPA. EPA will immediately post on the eNOI website all NOIs received. Late NOIs will be accepted, but authorization to discharge will not be retroactive. Coverage will be available for the duration of the five-year PGP cycle (ending October 31, 2021 for the 2016 PGP) for decision-makers who file an NOI, including all employees, contractors, subcontractors, and other agents, unless coverage is terminated by the decision-maker or EPA. Applicators who are not also decision-makers do not need to submit an NOI. Information on NOI filing procedures using EPA's eNOI system is available on EPA's website at <https://www.epa.gov/npdes/pesticide-permitting-ggp-enoi>.

(2) Use of Pest Management Measures: Decision-makers must minimize the discharge of pesticides to waters of the U.S. from the application of pesticides, through the use of Pest Management Measures, just as applicators must. To the extent the decision-maker determines the amount of pesticide or frequency of pesticide application, the decision-maker must only use the amount of pesticide and frequency of pesticide application necessary to control the pest. Other Pest Management Measures for decision makers are similar to Integrated Pest Management (IPM) in that they involve: (a) identification of the problem by establishing pest densities to serve as action thresholds for pest control; (b) considering behavior and life stages of each pest; (c) identification of breeding sites for source reduction and habitat management; (d) analysis of surveillance data; and (e) use of other data as appropriate. Pest management options to consider include: (a) no action; (b) prevention; (c) mechanical or physical methods; (d) cultural methods; (e) biological control agents; or (f) pesticides. If pesticide use is selected as the preferred method to manage the pest(s) and application of the pesticide will result in a discharge to waters of the U.S., decision-makers who must submit an NOI must reduce the impact on the environment and on non-target organisms by applying the pesticide only when the action threshold(s) has been met. There are specific IPM-like requirements for each of the four pesticide use categories for treatment of mosquitoes, weeds, animals and forest canopies.

(3) Pesticide Discharge Management Plans: Any decision-maker who is or will be required to submit an NOI – and is a *large entity* – as defined in [Appendix A](#) must prepare a Pesticide Discharge Management Plan (PDMP) by the time the NOI is filed. A PDMP is not required of a decision-maker who is a *small entity*, but instead a much shorter [Pesticide Discharge Evaluation Worksheet \(PDEW\) outlines the required information that small entities should include in their records. The PDEW is available at Appendix F. of the 2016 PGP.](#) The PDMP is very extensive and EPA estimates on average it will take 40 hours to draft it, and several hours annually to update it. The PDMP documents all preventative maintenance plans, and how decision-makers will implement the Pest Management Measure requirements. It also documents all IPM-like considerations and decisions; spill and adverse incident response procedures; any endangered species or critical habitat considerations; any FIFRA compliance considerations; and the names, contact information and responsibilities of all people on the PDMP team. When any corrective action is necessary or significant change to the methods the decision-maker uses, the PDMP must be updated to reflect those changes before the next pesticide application that results in a discharge, if practicable, or if not, no later than 90 days after any change in pesticide application activities. The PDMP must be signed, dated, and retained on site with all supporting maps and documents. The PDMP and all supporting documents must be readily available, upon request, and copies of any of these documents provided, upon request, to EPA; a state or local agency governing discharges or pesticide applications within their respective jurisdictions; and representatives of NMFS or FWS. EPA may provide copies of the PDMP or other information related to the PGP that is in its possession

(other than confidential business information) to members of the public.

(4) Other requirements of decision-makers: All decision-makers must also comply with other provisions that are identified in the [Federal Register notice](#) of the final 2016 permit, in EPA's [fact sheet](#) accompanying the permit, or in the PGP accessible from EPA's [website](#). These include taking and documenting corrective actions – similar to those required of applicators above, including adverse incident response, documentation and reporting, any adverse incidents to endangered or threatened species or critical habitat, and any reportable spills or leaks. In addition, these also include extensive recordkeeping and annual reporting that greatly exceeds that of applicators. The PDMP and recordkeeping requirements for decision-makers who are also *large entities* is greater than for decision-makers who are *small entities*, as defined in the PGP.

**Forty-six Other States Issuing their own PGPs:** EPA's PGP (and the ESA requirements in Appendix I) only apply in the four states EPA has direct CWA permitting authority (ID, NM, NH, and MA). Forty-six other states have developed their own PGPs from EPA's model, although their PGPs vary widely, from very restrictive to minimally restrictive. A chart comparing requirements of the states' PGPs is available on NAAA's [website](#). NAAA will post updated information to highlight any changes to state permit provisions as individual state PGPs are renewed in 2016-2017 time frame. Some states' permits (e.g., WA, CA) were in place prior to the 6th Circuit decision, and were updated to include all of EPA's considerations. State PGPs vary widely in the stringency of their requirements, whether applicators and/or decision-makers must submit an NOI, the annual treatment areas that trigger the need for local government and other decision-makers to submit NOIs, and their dates of implementation. About half of the state PGPs are tied to discharges to waters of the U.S. (like EPA's PGP), but the remainder are tied to waters of the state – which can be much more broadly defined than waters of the U.S. Most state PGPs cover the four use categories that EPA's PGP covers, but some state PGPs cover other use categories too (e.g., TX: "area wide pest control" category; NC and SC: "intrusive vegetation" pest control category; NJ: "aquaculture" "utility transmission," and "Pinelands" pest control category; MN: "other flying insect" pest control category; and MT: "other" pest control category). You will need to review the PGP requirements of each state you operate in, and file any documents and keep compliance records separately.

**Many of your customers are regulated by the PGP:** Many decision-making customers of NAAA members are regulated by the PGP, and they will seek your input for their recordkeeping and reports. For example, federal and state agencies with pest control responsibilities; operators of canals and reservoirs; national and state forest and natural resource managers; municipal and regional pest control agencies; mosquito control districts and health departments; utility and transportation rights-of-way managers; private forest and rangeland owners and managers; national and state park managers; commercial pest control businesses; owners and managers of farms and ranches with irrigation ditches and canals; homeowner associations and other entities that apply pesticides to waters or what could be defined as "waters" (e.g., rivers, lakes, wetlands and their tributaries, as well as canals, ditches, dry washes and ephemeral streams, or other upland areas that may be occasionally wet). EPA has indicated all operators (applicators and decision- makers) are jointly and severally responsible for any permit violations.

**Sources of Legal Jeopardy:** Just as you have compliance requirements, you will have legal jeopardy if you fail to perform these PGP requirements in the correct manner or by the deadlines for them indicated in the PGP. These are some of the potential sources of legal jeopardy:

- Failure to realize you may be a decision-maker: It will be wise to carefully evaluate each of your contracts going forward to determine if you are an applicator or in fact, also a decision maker. The added responsibilities and potential jeopardy of also being a decision-

maker could affect some applicators' willingness to accept some contracts. Also, if you defer from the contract with the client in any way, or if the contract with the client gives you authority to make decisions, such as choose a pesticide, determine buffer zones, etc., this may place you in the decision maker category and make you responsible for the additional extensive requirements that must be met;

Failure to be covered by the PGP: There are some exceptions to automatic PGP coverage for applicators (e.g., to water quality impaired waters, Tier 3 waters, or discharges that are likely to adversely affect species that are federally listed as endangered or threatened, or habitat that is federally listed as critical). It will be wise to carefully evaluate each of your contracts to determine if your intended treatment area(s) include the possibility of any such disqualifying treatments. If you are both an applicator and a decision-maker, there are other pitfalls that could jeopardize coverage (e.g., failure to submit an NOI, failure to have your NOI accepted). The added responsibilities and potential jeopardy of also being a decision-maker could affect some applicators' willingness to accept some contracts;

Failure to recognize a "water of the U.S. or "water of the state.": Permit coverage is not needed if no discharge occurs to jurisdictional waters. However, not all jurisdictional "waters" are easily recognized because they are not wet when pesticides are applied – and a discharge to such an unrecognized jurisdictional water without PGP coverage could trigger legal jeopardy. Such unrecognized jurisdictional waters also include unrecognized critical habitat for endangered or threatened species. If you are an applicator, you are automatically covered by the PGP for such unintended discharges if you comply with all other requirements of your PGP. But if you are also a decision-maker and have not submitted an NOI for the areas of those unintended discharges to unrecognized jurisdictional waters, you would be in violation of the CWA. Such potential violations and penalties could stack up from the date of such an unintended discharge for any failure to also complete the other PGP requirements that would be tied to the requirement to submit an NOI, such as development of a PDMP, IPM-like decisions, and recordkeeping, at a rate of up to \$51,570 per day per violation, extending from the date of application of the pesticide.

Failure to be fully aware of each states' PGP requirements: The permits of the 46 states that have developed PGPs can vary significantly from EPA's PGP, and from each other. If you are spraying pesticides for different customers in various states, you must be fully compliant with each state's PGP requirements. These PGPs vary widely, and some require NOIs from both applicators and decision-makers. The annual treatment area threshold also may vary extremely among states. NAAA encourages you to fully evaluate (or have your attorney evaluate) the various compliance requirements of each state you operate in, create compliance check-lists, train your other pilots and staff, and keep compliance records separately for each state.

Citizen suits: The CWA authorizes citizens and activist groups to sue pesticide applicators and decision-makers for apparent PGP violations. The sight of an aerial application of pesticides has been known to trigger second-guessing on the part of such individuals or groups, who may file lawsuits without full knowledge of the compliance situation. Even if you are in full compliance you may be sued, and defending against citizen suits is time consuming, disruptive to your business, emotionally upsetting, and costly. The more carefully you use best professional practices, document your PGP compliance, and maintain accurate and timely records, the better off you will be should you find yourself defending against a citizen suit. It is wise to evaluate your insurance policies in light of the many permit requirements and potential legal liability.

Joint and several liability: EPA's PGP states applicators and decision-makers will be jointly and severally liable for any permit violation that may occur, but will take into account in its enforcement actions any differentiation of responsibilities incorporated into executed

performance contracts. It is wise to carefully evaluate each of your contracts delineate who is the decision-maker and applicator, and their respective responsibilities.

□ Certification of “no adverse effects” on listed species or habitat: Decision-makers submitting NOIs for intended discharges to critical habitat or waters that contain listed endangered or threatened species must certify in the NOI form (available at [Appendix D](#)) that their proposed treatments will not have such adverse effects and document that through selection of one of six options. This certification is under penalty of the law, and adverse effects on such species or habitat can be a violation of not only the PGP and CWA, but also of the Endangered Species Act.

**Congressional Action:** To date all legal and legislative efforts to overturn the 6th Circuit decision, or exempt aquatic pesticide applications from CWA requirements have been unsuccessful, including *cert* petitions to the US Supreme Court to review the 6th Circuit’s decision. NAAA and its agriculture/pesticide user stakeholder coalition have led efforts to encourage Congress to address legislative fixes since the 6th Circuit decision in 2009. In successive congresses, the House passed similar versions of the Reducing Regulatory Burdens Act (H.R. 872 and 935, respectively), which would create a legislative exemption for NPDES permitting of pesticides, but the former Democratic majority in the Senate blocked all attempts to bring up a vote on the Senate versions of the bills until the GOP gained the majority. In addition, there have also been unsuccessful efforts to attach H.R. 872 or its language as an amendment in some of the many appropriations bills Congress must consider. On June 3, 2015 Senator Michael Crapo (R-ID) and Senator Tom Carper (D-DE) introduced the Sensible Environmental Protection Act (S. 1500) legislation that would address the dual-permitting burdens imposed by the 2009 decision. In a Jan. 20, 2016 markup, the EPW Committee voted (with 12 “yea” and eight “nay” votes) to include S.1500 in another bill, the Bipartisan Sportsmen’s Act of 2015. This was great news for NPDES pesticide permit opponents as S.1500 is much more likely to be enacted as part of a larger bill than if it stands alone. Unfortunately, the Bipartisan Sportsmen’s Act is stalled in the Senate due to controversy over other amendments (e.g., gun control).

On the House side, the Reducing Regulatory Burdens Act was renamed the Zika Vector Control Act (H.R. 897). The bill was brought up for a vote a few times May of 2016, but fell short of the support needed for a two-thirds supermajority. On May 24, 2016, H.R. 897 passed the House under regular order by a 258-156 vote, with 23 Democrats voting in favor. Unfortunately, the bill language included a two-year sunset provision for the NPDES exemption. A weakened version of H.R. 897 was attached to the Military Construction, Veterans Affairs, and Related Agencies Appropriations Act (H.R. 2577) when it failed to pass the Senate on June 28, in July 2016 just before the congressional recess, in September 2016. Other, more controversial amendments were largely to blame for the votes coming up short.

While none of these actions have succeeded to date, they do continue to bring to light the absolute necessity for a legislative solution to this burdensome and duplicative NPDES PGP. Following the 2016 election, there are renewed prospects for successfully passing a legislative fix with the GOP retaining control of the House and Senate, and with the Trump Administration likely support of regulatory reform. In the meantime, EPA’s PGP remains the law of the land.

**Going Forward:** NAAA will continue to work to keep you informed and continue work within a coalition of agricultural organizations for a legislative exemption from Clean Water Act NPDES permits. Absent a Congressional fix, aerial applicators should be aware that they must undertake efforts to comply with the EPA PGP or state PGPs in the states where they do business, and may be subject to enforcement and/or citizen action suits should they violate either the recordkeeping or performance aspects of the PGP. NAAA has been actively involved in this issue with the EPA for years and has provided numerous documents and held multiple meetings with the EPA expressing our concerns about

co-permitting of decision-making agencies and for-hire applicators, likely impacts of burdens and costs to the small businesses that make up NAAA membership, the need to enlarge EPA's annual treatment thresholds, etc. EPA's first draft of the permit required non-decision making applicators to file NOIs if treating over 640 acres, now but with NAAA's advocacy the final version of the permit did not require non-decision making applicators to file NOIs. Many of NAAA's recommendations were incorporated into the final version of EPA's PGP in 2011 and retained in the 2016 permit reissuance. NAAA will continue to stay abreast of the many complexities of the NPDES PGP and encourages members to check the NAAA website and read the eNewsletters for updates as they become available.