

Excerpts from EPA Responses to Comments With Regard to 3rd Party Lawsuits

Comment ID 299.1.001.004

Author Name: Kaufman Leslie

Organization: Kansas Cooperative Council (KCC)

The Kansas Cooperative Council is concerned that under EPA's draft, the possibility exists for overlapping violations and stacking of penalties. We believe it likely could arise when a violation on paper would be stacked with a violation from a water quality exceedance or observance of an adverse incident. This could result in a significant escalation of the penalty if these were considered separate violations under the Clean Water Act. We also believe the proposed draft creates the opportunity for activist citizen suits, particularly where the violations are basically paper issues. We urge EPA to eliminate the overlapping and stacking of violations.

Response

EPA acknowledges commenter's concern about overlapping and stacking violations; however, the approach used in the PGP is consistent with authorities provided under the Clean Water Act and consistent with all other EPA issued NPDES permits. The penalty provisions in the Clean Water Act state that Clean Water Act violations are subject to penalties "not to exceed" \$37,500 per day for each violation. This does not mean that each violation will be assessed the full penalty allowable under the Act; rather, EPA bases enforcement actions (and associated penalties) on four important environmental goals. First, penalties should be large enough to deter noncompliance. Second, penalties should help ensure a level playing field by ensuring that violators do not obtain an economic advantage over their competitors. These two goals generally require that penalties recover the economic benefit of noncompliance, plus an appropriate gravity amount. Third, CWA penalties should be generally consistent across the country. This is desirable as it not only prevents the creation of "pollution havens" in different parts of the nation, but also provides fair and equitable treatment to the regulated community wherever they may operate. Fourth, settlement penalties should be based on a logical calculation methodology to promote swift resolution of enforcement actions and the underlying violations. EPA expects to follow such an approach in establishing penalty amounts in response to permit violations.

With respect to citizen suits, CWA Section 505 provides that no citizen suit may be commenced prior to 60 days after a citizen gives notice to the alleged violator (among others). Thus, as a general matter, if the permit violation ceases during that 60 days, and is not reasonably expected to recur a citizen suit cannot be maintained because of the absence of on-going non-compliance with the permit. See *Gwaltney of Smithfield V. Chesapeake Bay Found.*, 484 U.S. 49. Thus, the Agency believes that citizen suits will not be as great of a burden to the permittees as the commenter suggests.

Comment ID 379.1.001.060

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The EPA now needs to do a better job of informing and educating aquatic pesticide users how their exposure to and jeopardy from such possibly undue or unwarranted citizen interference might now take place (or be ratcheted-up), stemming from applicators now having to work under the Clean Water Act and its associated NPDES protocols (i.e. EPA needs to better describe the how, when and where such possibly undue or unwarranted interference might now become more possible than before in our soon having to work under the Clean Water Act). The EPA also needs to identify what safeguards or amelioration measures are part of either the Clean Water Act or its associated NPDES protocols that will help aquatic pesticide users to avoid or at least reduce any such possibly undue or unwarranted citizen interference.

Response

EPA acknowledges commenter's assertion that the NPDES permit may bring undue or unwarranted citizen interference as a result of these activities being covered under the Clean Water Act; however, such interference is outside the scope of today's action. As written, the permit provides an opportunity for public input on the draft permit (for which the comment period lasted for 45 days between June 4, 2010 and July 19, 2010). EPA is issuing the final permit taking into account all comments received and believes that Operators complying with the terms of the permit should be adequately protected from citizen suits. Operators with a concern about citizen interference may want to consider retaining more detailed documentation of pesticide activities covered under the permit to be

able to better demonstrate compliance with the permit should the need arise. Please note, an eligible Operator that is complying with the terms of the PGP can use the PGP as a “shield” or defense to any CWA citizen suit that is filed against him/her for violation of the CWA associated with their discharge under the PGP. Also, refer to response to Comment ID 315.1.001.020.

The purpose of the PGP is to provide coverage for discharges of pesticides to waters of the United States and, provided all of the permit requirements are met, shield the permittee from liability from citizen lawsuits. Thus, this general permit is a legal mechanism, that authorizes the discharge of pesticides into waters of the United States. If Operators do not feel that permit coverage under the PGP is appropriate for their pesticide applications, they may apply for individual permit coverage.

EPA developed the PGP to provide an option for Operators to comply with the Sixth Circuit Court’s decision

The following excerpt is from the PGP Comment Response Approach.1 Essay:

EPA believes the final permit will not impose an unreasonable burden on Operators. The PGP acts as a shield from enforcement and citizen lawsuits provided all of the permit requirements are met. If Operators do not feel that permit coverage under the PGP is appropriate for their pesticide applications, they may apply for individual permit coverage.

EPA Pesticide Home Page:

http://cfpub.epa.gov/npdes/home.cfm?program_id=410

EPA Responses to Comments Document:

<http://www.colorado.gov/cs/Satellite/CDPHE-WQ/CBON/1251596793644>

(The link above connects to the CO WQCD permits page. Please see the Pesticides tab)