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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 122

[EPA-HQ-OW-2003-0063; FRL-9829-2]

RIN 2040-AF47

National Pollutant Discharge Elimination System Regulation Revision: Removal of the Pesticide Discharge Permitting Exemption in Response to Sixth Circuit Court of Appeals Decision.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is amending its regulations to remove language added by the EPA's 2006 NPDES Pesticides Rule which exempted the application of pesticides from National Pollutant Discharge Elimination System (NPDES) permit requirements in two circumstances: When the application of the pesticide is made directly to waters of the United States to control pests that are present in the water, and when the application of the pesticide is made to control pests that are over, including near, waters of the United States. This rulemaking is in response to the 2009 Sixth Circuit Court of Appeals ruling that vacated the EPA's 2006 NPDES Pesticides Rule.

DATES: This final rule is effective on [INSERT DATE OF PUBLICATION IN THE **Federal Register**].

ADDRESSES: The record for this rulemaking is available for inspection and copying at the Water Docket, located at the EPA Docket Center (EPA/ DC), EPA West 1301 Constitution Ave., NW, Washington, DC 20004. The record is also available via the EPA Dockets at <http://www.regulations.gov> under docket number EPA-HQ-OW-2003-0063. The rule and key supporting documents are also available electronically on the Internet at <http://www.epa.gov/npdes/pesticides>.

FOR FURTHER INFORMATION CONTACT: For further information contact Prasad Chumble, Water Permits Division, Office of Wastewater Management (4203M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460, telephone number: (202) 564-0021, e-mail address: chumble.prasad@epa.gov.

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I. General Information

A. Does This Action Apply to Me?

This action may be of interest to you if you apply pesticides to or over, including near, waters of the United States. Potentially affected entities, as categorized in the North American Industry Classification System (NAICS), may include, but are not limited to:

Table 1. - Entities Potentially Regulated by this Rule		
Category	NAICS	Examples of potentially affected entities
Agriculture parties—General agricultural interests,	111 Crop Production	Producers of crops mainly for food and fiber including farms, orchards, groves, greenhouses, and nurseries that have irrigation ditches requiring pest control.

farmers/producers, forestry, and irrigation.		
	113110 Timber Tract Operations	The operation of timber tracts for the purpose of selling standing timber.
	113210 Forest Nurseries Gathering of Forest Products	Growing trees for reforestation and/or gathering forest products, such as gums, barks, balsam needles, rhizomes, fibers, Spanish moss, ginseng, and truffles.
	221310 Water Supply for Irrigation	Operating irrigation systems.
Pesticide parties (includes pesticide manufacturers, other pesticide users/interests, and consultants).	325320 Pesticide and Other Agricultural Chemical Manufacturing.	Formulation and preparation of agricultural pest control chemicals.
Public health parties (includes mosquito or other vector control districts and	923120 Administration of Public Health Programs	Government establishments primarily engaged in the planning, administration, and coordination of public health programs and services, including environmental health activities.

<p>commercial applicators that service these).</p>		
<p>Resource management parties (includes State departments of fish and wildlife, State departments of pesticide regulation, State environmental agencies, and universities).</p>	<p>924110 Administration of Air and Water Resource and Solid Waste Management Programs</p>	<p>Government establishments primarily engaged in the administration, regulation, and enforcement of air and water resource programs; the administration and regulation of water and air pollution control and prevention programs; the administration and regulation of flood control programs; the administration and regulation of drainage development and water resource consumption programs; and coordination of these activities at intergovernmental levels.</p>
	<p>924120 Administration of Conservation Programs</p>	<p>Government establishments primarily engaged in the administration, regulation, supervision and control of land use, including recreational areas; conservation and preservation of natural resources; erosion control; geological survey program administration; weather forecasting program administration; and the administration and protection of publicly and privately owned</p>

		forest lands. Government establishments responsible for planning, management, regulation and conservation of game, fish, and wildlife populations, including wildlife management areas and field stations; and other administrative matters relating to the protection of fish, game, and wildlife are included in this industry.
Utility parties (includes utilities)	221 Utilities	Provide electric power, natural gas, steam supply, water supply, and sewage removal through a permanent infrastructure of lines, mains, and pipes.

II. Background and Rationale for Action

On November 27, 2006, the EPA issued a final rule, Application of Pesticides to Waters of the United States in Compliance with FIFRA (71 FR 68483) (“2006 NPDES Pesticides Rule”), which promulgated 40 CFR § 122.3(h). Section 122.3(h) specified two circumstances in which an NPDES permit would not be required for the application of pesticides to waters of the United States. They were: 1) the application of pesticides directly to waters of the United States to control pests; and 2) the application of pesticides to control pests that are present over waters of the United States, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters of the United States to target the pests effectively; provided

that the application is consistent with relevant Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) requirements.

On January 19, 2007, petitions for review of the 2006 NPDES Pesticides Rule were filed in eleven federal circuit courts of appeals by industry and environmental groups. Petitions were consolidated and assigned to the Sixth Circuit Court of Appeals. On January 7, 2009, the Sixth Circuit Court concluded the EPA's 2006 NPDES Pesticides Rule was inconsistent with the Clean Water Act. *Nat' Cotton Council of Am. v. EPA*, 553 F.3d 927 (6th Cir. 2009). On January 17, 2012 the court issued a mandate vacating the Rule.

Today's action removes 40 CFR §122.3(h) from the Code of Federal Regulations (CFR), in accordance with the vacatur of that section by the Court. The EPA is not providing an opportunity for comment on this final rule. Under the Administrative Procedure Act of 1946 (APA) an agency may issue a final rulemaking without providing notice and an opportunity for public comment in certain specific instances. This may occur, in particular, when an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that public notice and comment procedures are impracticable, unnecessary, or contrary to the public interest. See 5 U.S.C. 553(b)(3)(B).

The EPA finds that notice and an opportunity for public comment are unnecessary for today's action. This action is ministerial because the Sixth Circuit Court vacated the 2006 NPDES Pesticides Rule effective January 17, 2012. The EPA has no discretion in taking this action. Based on the Court's decision, the 2006 NPDES Pesticides Rule is no longer effective. Therefore, the EPA is removing the Rule from the CFR to conform to the Court's decision. Providing an opportunity for notice and comment is therefore unnecessary. The EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(3)(B).

III. Implementation

The EPA has determined that good cause exists to waive the requirement under 5 U.S.C. 553(d) that a substantive rule's effective date be not less than 30 days after the publication of the rule. The APA authorizes exceptions to 5 U.S.C. 553(d) for substantive rules that grant or recognize an exemption or relieve a restriction; interpretative rules and statements of policy; and as otherwise provided by the agency for good cause found and published with the rule. The 2006 NPDES Pesticides Rule was vacated by the Sixth Circuit Court effective January 17, 2012. This rule only amends the CFR to reflect the Court's order. It does not impose any requirements or alter the status quo in any way, and regulated parties will not need to adjust their behavior in response to this rule. The EPA finds that this constitutes good cause to waive the requirement that a rule be published not less than 30 days before its effective date pursuant to 5 U.S.C. 553(d)(3). Therefore, this final rule is effective on [INSERT DATE OF PUBLICATION IN THE **Federal Register**].

IV. Statutory and Executive Order Reviews

A. Executive Order 12866 (Regulatory Planning and Executive Order 13563: Improving Regulation and Regulatory Review)

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and Executive Order 13563 (76 FR 3821, January 21, 2011) and is therefore not subject to review under the Executive Orders.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). The Agency believes this action does not impose a burden because it only removes the 2006 NPDES Pesticides Rule from the CFR.

C. Regulatory Flexibility Act

Today's action is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA) or any other statute. This rule is not subject to notice and comment requirements under the APA or any other statute because although the rule is subject to the APA, it does not impose any requirements or alter the status quo in any way, and regulated parties will not need to adjust their behavior in response to this rule. Therefore, the Agency has invoked the “good cause” exemption to the notice and comment requirement under 5 USC 553(b).

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538 for State, local, or tribal governments or the private sector. The action imposes no enforceable duty on any State, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA. This action is also not subject to the

requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132 (Federalism)

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because the action removes the 2006 NPDES Pesticides Rule from the CFR, which has already been vacated by the Sixth Circuit Court. This rule imposes no regulatory requirements on any State, tribal, or local government. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 2000), requires the EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It imposes no regulatory requirements or costs on any tribal government. It does not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045 (Protection of Children from Environmental Health and Safety Risks)

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in Executive Order 12866, and because the Agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

H. Executive Order 13211 (Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use)

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs the EPA to provide Congress, through the Office of Management and Budget, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, the EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations)

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This action merely removes the 2006 NPDES Pesticides Rule from the CFR which was vacated by the U.S. Court of Appeals.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided

by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, the EPA has made such a good cause finding, including the reasons therefore, and established an effective date of [INSERT DATE OF PUBLICATION IN THE **FEDERAL REGISTER**]. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

V. Statutory Authority

This rule is issued under the authority of sections 101, 301, 304, 306, 308, 402, and 501 of the CWA. 33 U.S.C. 1251, 1311, 1314, 1316, 1317, 1318, 1342, and 1361.

List of Subjects in 40 CFR Part 122

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

Dated: June 21, 2013

Bob Perciasepe,

Acting Administrator

For the reasons set out in the preamble, 40 CFR part 122 is amended as follows:

**PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL
POLLUTANT DISCHARGE ELIMINATION SYSTEM**

1. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 et seq.

§ 122.3 [Amended]

2. Section 122.3 is amended by removing and reserving paragraph (h).

[FR Doc. 2013-15445 Filed 06/26/2013 at 8:45 am; Publication Date: 06/27/2013]