



**Wastewater Section**

1200 'N' Street, Suite 400, The Atrium

PO Box 98922

Lincoln, NE 68509-8922

Tel. 402/471-4220

Fax 402/471-2909

**February 15, 2011**

**Fact Sheet**

**General NPDES Permit for Pesticides**

**Applications To, Over, or Near Waters of the State of Nebraska**

**NPDES NEP100000**

**TABLE OF CONTENTS**

<b>A.</b>	<b>PROPOSED ACTION - TENTATIVE DETERMINATION .....</b>	<b>2</b>
<b>B.</b>	<b>HISTORY .....</b>	<b>2</b>
<b>C.</b>	<b>COVERAGE UNDER THE GENERAL PERMIT .....</b>	<b>3</b>
<b>D.</b>	<b>SUPPORTING DOCUMENTATION .....</b>	<b>5</b>
<b>E.</b>	<b>INFORMATION REQUESTS .....</b>	<b>6</b>
<b>F.</b>	<b>SUBMISSION OF FORMAL COMMENTS OR REQUESTS FOR HEARING .....</b>	<b>6</b>

## A. Proposed Action - Tentative Determination

The Nebraska Department of Environmental Quality staff has developed a general permit authorizing **pesticides applications to, over, or near Waters of the State of Nebraska**. This general permit was developed according to the regulations as set forth in NDEQ Title 119, *Rules and Regulations Pertaining to the Issuance of Permits under the National Pollutant Discharge Elimination System*, Chapters 25 and 28. This permit provides coverage for the discharge of pesticides and their residuals to waters of the State of Nebraska. The goal of this permit is to reduce or eliminate pollution from the discharges of **pesticides** to, over, or **near waters of the state** by requiring implementation of best management practices to protect water quality.

## B. History

Applications of pesticides have been and continue to be regulated by a branch of the EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The FIFRA label solely regulated the application of pesticides until this coming April 2011 when EPA will require an NPDES permit in addition to regulation by FIFRA.

This was based on a 2001 federal court decision that NPDES permits were required for certain application of aquatic herbicides, *e.g.*, *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F3d 526 (9th Cir 2001), and for aerial application of pesticides where residue drifts or washes into surface water, *League of Wilderness Defenders v. Forsgren*, 309 F3d 1181 (9th Cir 2002).

To address the 2001 court decision, EPA promulgated a new rule in November 2006 concluding that pesticides applied in accordance with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) are exempt from Clean Water Act permitting requirements. *See* 71 Fed Reg 68,483 (Nov. 27, 2006). This rule was litigated and in an action by the U.S. Court of Appeals, Sixth Circuit, and the EPA's 2006 rule was stricken. The court's web site summary is at, <http://environmentalappealscourt.blogspot.com/2009/01/national-cotton-council-v-epa.html> follows:

*Jan 7: In the U.S. Court of Appeals, Sixth Circuit, Case No. 06-4630. As explained by the Appeals Court, the case involves the final regulation issued by the U.S. EPA under the Clean Water Act, 33 U.S.C. § 1251 et seq. The Clean Water Act regulates the discharge of "pollutants" into the nation's waters by, among other things, requiring entities that emit "pollutants" to obtain a National Pollutant Discharge Elimination System (NPDES) permit. On November 27, 2006, the EPA issued a Final Rule concluding that pesticides applied in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) are exempt from the Clean Water Act's permitting requirements. [71 FR 68,483 (11/27/06)]. [See WIMS 11/22/06]*

*Two different groups of Petitioners -- one representing environmental interest groups and the other representing industry interest groups -- oppose EPA's Final Rule as exceeding the EPA's interpretive authority. EPA defends the Final Rule by arguing that the terms of the Clean Water Act are ambiguous and that the Final Rule is a reasonable construction of the Clean Water Act entitled to deference from the Court.*

*The Appeals Court said, "We cannot agree. The Clean Water Act is not ambiguous. Further, it is a fundamental precept of this Court that we interpret unambiguous expressions of Congressional will as written. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). Therefore, we hold that the EPA's Final Rule is not a reasonable interpretation of the Act and vacate the Final Rule." The Appeals Court explains its decision further saying, ". . . we conclude that the statutory text of the Clean Water Act forecloses the EPA's Final Rule. The EPA properly argues that excess chemical pesticides and chemical pesticide residues, rather than all chemical pesticides, are pollutants. However, the Final Rule does not account for the differences between chemical and biological pesticides under the language of the Clean Water Act. Further, because the Act provides that residual and excess chemical pesticides are added to the water by a 'point source' there is no room for the EPA's argument that residual and excess pesticides do not require an NPDES permit. The 'point source' from which the residue originates is easily discernable and necessarily must 'be controlled at the source.' See 73 Fed. Reg. at 33,702. Given all of the above in combination with the EPA's interpretation that '[p]oint sources need only convey pollutants into navigable*

*waters to be subject to the Act,' id. at 33,703, dischargers of pesticide pollutants are subject to the NPDES permitting program in the Clean Water Act. As such, the EPA's Final Rule cannot stand. Because the Clean Water Act's text bars the Final Rule we make no determination regarding the validity of the issuance of the Final Rule under the APA, nor do we analyze the relationship between the Clean Water Act and the FIFRA."*

The U.S. Court of Appeals, Sixth Circuit granted a stay in April, 2009, of their January 7, 2009 decision which vacated the U.S. Environmental Protection Agency's (EPA) pesticide rule until April 11, 2011. This general NPDES permit will allow discharges to waters of the State of Nebraska in accordance with the court ruling.

## C. Coverage Under the General Permit

The general permit establishes the coverage area, eligibility, limitations, and the effective term as required by NDEQ Title 119, Chapter 25.

### 1. Area of Application

This permit area of coverage is defined as the State of Nebraska as required in NDEQ Title 119, Chapter 25, section 001. Statewide application is appropriate because the potential sources are commonly found throughout the state. Applicability is limited to areas of the state where NDEQ is the permitting authority, which excludes certain Indian lands throughout the state as explained by Part B, *Permit Area*, of the general permit. For the purposes of this general permit, surface waters of the State of Nebraska are divided into three groups based on physical characteristics, impairment status, threatened and endangered species, and public drinking water intakes and the conditions promulgated in NDEQ Title 117, Chapter 2, Sections 011 and 012. Section 011 states water quality criteria related to aquatic herbicides or algicides and their effects shall not apply to waters within canals, except those canals designated as segments, during periods when these chemicals are applied by an irrigation district for the control of aquatic plants. All standards shall apply at all times to waters within canals designated as segments. Discharges from canals to other surface waters of the State shall not, at any time, contain herbicides or algicides in amounts which are toxic to aquatic life. Section 012 states water quality criteria related to aquatic biocides (e.g., ichthyocides, herbicides or algicides) and their effects shall not apply to surface waters during periods when aquatic biocides are applied by an entity responsible for the management of a surface water body under the following conditions:

- Aquatic biocides are applied only for the purposes of attaining, maintaining, or enhancing beneficial uses identified in Title 117, Chapters 4, 5, 6, and 7.
- The application of aquatic biocides shall not cause adverse impacts to any assigned beneficial uses of surface waters beyond the targeted surface water body.
- The application of aquatic biocides must be in accordance with the label restrictions and all applicable federal, state, and local laws or regulations.
- Entities responsible for the management of surface water bodies may include the Nebraska Game and Parks Commission, Natural Resources Districts, U.S. Fish and Wildlife Service, U.S. Forest Service, National Parks Service, U.S. Army Corps of Engineers, Natural Resource Districts, weed management districts, Irrigation districts and canal operators, city governments, lake associations, individuals, or any other entity responsible for managing the surface water body's assigned beneficial uses.

This permit provides coverage for applications of *pesticides* to, over, or *near waters of the state* throughout the State of Nebraska excluding tribal land within the State of Nebraska. This permit does not cover terrestrial applications of pesticides that are not *near water* nor does it cover associated runoff from applications to agriculture land or irrigation return flow from cropland which are exempt in the Clean Water Act. Nebraska's National Pollutant Discharge Elimination System (NPDES) permits are for the protection of waters of the state. The Nebraska Department of Agriculture and EPA's FIFRA program deal directly with pesticides. Nebraska evaluated the different conditions of Nebraska's waters and determined that there were three different conditions that must be considered to provide protection. Therefore, waters of the state have been divided into three groups for this permit. The three groups are

representing different conditions that would require different Best Management Practices (BMPs) or have different restrictions.

Group I waters are defined as having no flow (dry) for at least 24 hours after application, have no discharge, or have a discharge that can be controlled for a period of 24 hours after application. Group I waters must have none of the conditions of Group III waters. Aquatic pesticides characteristically have exposure requirements under 24 hours due to dispersion, dilution, hydrolysis, photolysis, degradation, and binding. Implementing BMPs and limiting the target area from discharge limits the effects on downstream waters and the amount needed for an application. Group I waters do not require a notice of intent (NOI). The Director has made a determination and public noticed that decision with the permit public notice. See the notice of intent section.

Group II waters are defined as flowing or discharging water bodies. Group II waters must have none of the conditions of Group III waters. Since Group II waters are flowing or transporting the pesticide it is important that consideration be given to downstream impacts. The dosage and application method must be considered to limit compounding impacts of the application. Group II waters do not require a notice of intent (NOI). The Director has made a determination and public noticed that decision with the permit public notice. See the notice of intent section.

Group III waters are waters designated as state resource waters in NDEQ Title 117, are listed as impaired under the Clean Water Act 303(d) for any of the ingredients in the pesticide or residuals, contain threatened or endangered species or critical habitat and not specifically addressed by the Nebraska Game and Parks Commission through established standard procedure, when a flowing water pesticide application area is within 250 feet of the confluence with a Group III water, or when the target area is adjacent (250 feet) to or includes a surface water intake for public drinking water and the stream or lake would contribute to the intake. A NOI is required for Group III waters and permit issuance is subject to Department review prior to issuance. The review is being required to evaluate compliance with NDEQ Title 117 anti-degradation, state resource water requirements (Chapter 3), drinking water intake requirements (Chapter 2), Clean Water Act Section 303(d) requirements, NDEQ Title 119 NPDES requirements, and the Nebraska Non-game and Endangered Species Conservation Act. The 250 foot distance from a Group III water is included based on the NDEQ Title 117 Warmwater A acute mixing zone and the likelihood of dilution and/or dispersion negating the acute effects of the pesticide within that zone.

## **2. Eligibility and Limitations**

Eligibility specifies the activity is authorized under the general permit and the conditions under which the permit may be issued as required in NDEQ Title 119, Chapters 25. The limitations of the general permit indicate where the authority of the Clean Water Act and NDEQ Titles 117 and 119 no longer regulate the application of pesticides or where the general permit cannot be issued due to an individual NPDES permit being issued, pending, or required.

## **3. Notice of Intent**

The submittal of a notice of intent (NOI) is required under 40 CFR 122.28(b)(2) to receive authorization to discharge under this general permit. The NOI for the general pesticide permit meets the requirements of 40 CFR 122.28(b)(2)(ii). Group I, and Group II waters and the application of pesticides to control flying insects including mosquitoes and/or their larva have been excluded from this requirement as allowed in NDEQ Title 119, Chapter 25 and 40 CFR 122.28 (b)(2)(v). A statement from the Director is included in the public notice which follows:

Groups I and Group II do not require submittal of a notice of intent. Pursuant to 40 Code of Federal Regulations (CFR) §122.28(b)(2)(v), the director of NDEQ is authorized to permit certain discharges under a general permit without requiring submission of a notice of intent where the director finds the notice of intent requirement would be inappropriate. For this general permit for pesticides, the director finds that the notice of intent would be inappropriate because the purpose of the discharge in accordance with the proposed general permit for pesticides is to allow extremely time-sensitive applications of

pesticides to control aquatic borne pests and weeds. The director further finds that such aquatic pesticides have undergone the rigorous registration procedure under FIFRA during which the U.S. Environmental Protection Agency (EPA) assesses a variety of potential risks to human health and the environment effects associated with the use of the product and determined the pesticide will perform its intended function without unreasonable adverse effects on the environment when used in accordance with directions for use prior to approving registration for such use. During this registration process, EPA examines the ingredients of a pesticide, the intended type of application site and directions for use and supporting scientific studies for human health and environmental effects and exposures. In addition, the general permit for pesticides has requirements to keep the pesticide within the target area and has additional best management practices and requires a notice of intent in sensitive group III areas.

#### **4. Best Management Practices**

The development of BMPs is allowed under 40 CFR 122.44 when the development of numeric water quality based limitations is infeasible for the general permit. Water quality criteria for pesticides cannot be applied as a water quality based permit limit (WQBEL) through modeling procedure and also under the conditions promulgated in NDEQ Title 117, Chapter 2, Sections 011 and 012. The BMPs are developed based on the Best Professional Judgment (BPJ) of the permit writer. The use of BPJ is allowed under 40 CFR 401.14 when no technology based Effluent Limitation Guidelines (ELGs) are promulgated. The BPJ is developed based on the guidance provided in the University of Nebraska, Lincoln, Cooperative Extension, Institute of Agriculture and Natural Resources (IANR), *Aquatic Pest Control for the Commercial/Noncommercial Pesticide Applicator* and the Aquatic Ecosystem Restoration Foundation, *Biology and Control of Aquatic Plants: a best management practices handbook*.

#### **5. Pesticide Use Management Plan**

The requirement to create a pesticide use management plan and the associated minimum requirements are derived through the use of BPJ based on the general permit BMPs, the water quality requirements and restrictions in NDEQ Title 117, the NPDES regulations in NDEQ Title 119, and Nebraska Non-game and Endangered Species Conservation Act.

#### **6. Permit Term**

This permit is to be issued for a five-year term. This is the maximum time period allowed pursuant to NDEQ Title 119, Chapter 16.

### **D. Reporting Requirements**

This permit requires the reporting of noncompliance in accordance with 40 CFR 122.41 and NDEQ Title 119, Chapter 14. Annual reporting is not required because all noncompliance must be reported and 40 CFR 122.44 does not require the submittal of an annual report under these conditions.

### **E. Special Conditions, Management Practices, and Other Limitations**

These conditions are included as promulgated in NDEQ Title 119, Chapters 5, 14, and 25, and as provisions in compliance with NDEQ Title 117, the Nebraska Non-Game and Endangered Species Conservation Act, and the National Historic Preservation Act.

### **F. Standard Conditions and Requirements**

These conditions are included as promulgated in NDEQ Title 119, Chapter 14 and apply to all NPDES permits. These conditions have been included expressly or adopted by reference in accordance with 40 CFR 122.41 which require all conditions applicable to NPDES permits be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations (or the corresponding approved State regulations) must be given in the permit.

### **G. Supporting Documentation**

1. Gettys LA, WT Haller and M Bellaud, eds. *Biology and Control of Aquatic Plants: a best management practices handbook*, Aquatic Ecosystem Restoration Foundation, Marietta GA, 2009.
2. NDEQ Title 117 - *Nebraska Surface Water Quality Standards* (Revised March 22, 2009);
3. NDEQ Title 118 - *Ground Water Quality Standards and Use Classifications* (Revised March 27, 2006);
4. NDEQ Title 119 - *Rules and Regulations Pertaining to the Issuance of Permits under the National Pollutant Discharge Elimination System* (Revised May 16, 2005);

5. USEPA *Technical Support Document for Water Quality-based Toxic Control* (EPA 505/2-90-001 PB91-127415, March, 1991);
6. 40 CFR, Part 122, 124, and 125, NPDES Regulations;
7. Nebraska Non-game and Endangered Species Conservation Act (Neb. Rev. Stat. §§ 37-430 through 317 – 438);
8. University of Nebraska, Lincoln, Cooperative Extension, IANR, *Aquatic Pest Control for the Commercial/Noncommercial Pesticide Applicator*.
9. USEPA NPDES *Pesticide General Permit (PGP) for Point Source Discharges to Waters of the United States from the Application of Pesticides (Draft)* and Fact Sheet, 2010.

## H. Information Requests

Inquiries concerning the draft permit, its basis or the public comment process may be directed to:

NPDES Permits Unit      Tel. 402/471-8830 or 402/471-4220      Fax: 402/471-2909

A TDD operator is available at 711.

Copies of the application and other supporting material used in the development of the permit are available for review and copying at the Department's office between 8:00 a.m. and 5:00 p.m. on weekdays.

### Location Address:

NDEQ – NPDES Program  
The Atrium, Suite 400  
1200 N Street  
Lincoln, Nebraska

### Mailing Address:

NDEQ – NPDES Program  
P.O. Box 98922  
Lincoln, Nebraska 68509-8922

## I. Submission of Formal Comments or Requests for Hearing

The date on which the public notice period ends is specified in the public notice. During the public notice period, the public may submit formal comments or objections, and/or petition the Department to hold a public hearing concerning the issuance of the draft permit. All such requests need to: be submitted in written form, state the nature of the issues to be raised, and present arguments and factual grounds to support them. The Department shall consider all written comments, objections, and/or hearing petitions received during public comment period in making a final decision regarding permit issuance.

Formal comments, objections and/or hearing requests need to be submitted to:

NPDES Permits Unit

### Location Address:

NDEQ – NPDES Program  
The Atrium, Suite 400  
1200 N Street  
Lincoln, Nebraska

### Mailing Address:

NDEQ – NPDES Program  
P.O. Box 98922  
Lincoln, Nebraska 68509-8922