

**401 CHURCH STREET
L & C ANNEX 6TH FLOOR
NASHVILLE TN 37243-1534**

Addendum to Rationale
Including
Record of Comments and Responses
(Notice of Determination)

**General National Pollutant Discharge Elimination System (NPDES)
Permit for Discharges from the Application of Pesticides**

Permit No. TNP100000

March 30, 2012

Administrative Record

The permit rationale (or fact sheet) dated November 21, 2011, sets forth the Division of Water Pollution Control's (division's) basis for permit conditions to be applied statewide for the issuance of the new Tennessee National Pollutant Discharge Elimination System (NPDES) General Permit for Application of Pesticides (PGP). The PGP is intended to authorize discharges of pesticides and pesticide by-products from point sources to waters of the State of Tennessee.

On November 21, 2011, the division issued Public Notice #MMXI-022, which announced its intent to issue the PGP. Copy of the draft PGP permit was made available in an electronic format on the division's web site at <http://www.tn.gov/environment/permits/herbicide.shtml>. The proposed NPDES permit was drafted in accordance with the provisions of the Federal Water Pollution Control Act, the Tennessee Water Quality Control Act, and other lawful standards and regulations. The division received comments through December 26, 2011. This Notice of Determination (NOD) serves as the division's response to questions, comments and issues that were submitted during the subsequent comment period.

Comments and Responses

Part/Section	Comment
General	The definition of the waters of the state includes the language “beneath the surface of the ground.” This language should be removed in order to fully adopt EPA’s language for defining waters of the nation.

Response:

The definition of the waters of the state is included in the Rules of Tennessee Department of Environment and Conservation, [Chapter 1200-4-3, General Water Quality Criteria](#). Those rules are applicable for the purpose of implementing NPDES program in the State of Tennessee. Therefore, unless the rules are changed, the definition of the waters of the state for the purpose of the PGP cannot be changed.

Part/Section	Comment
General	In conversations between the U.S. Fish and Wildlife Service and Mr. Jack Faulk with EPA, Mr. Faulk indicated that managed refuge wetlands (dikes, water control structures, etc) would not be considered waters of the U.S. under the recent 6th circuit court decision (and the subsequent PGP). The Service respectfully requests that TDEC follow EPA guidelines on defined waters of the state and exclude managed impoundments (seasonally flooded agricultural fields or moist soil management areas) from the definition of waters of the state of Tennessee.

Response:

Again, the definition of the waters of the state is included in the Rules of Tennessee Department of Environment and Conservation, [Chapter 1200-4-3, General Water Quality Criteria](#). It is outside of the purpose or scope of this NPDES permit to establish methodology for determining boundaries of what constitutes waters of the state.

Part/Section	Comment
General	EPA's Pesticide General Permit (November 2011) has specific language which states " <i>The PGP does not cover, nor is permit coverage required for, pesticide applications that do not result in point discharge to waters of the U.S., such as terrestrial applications for the purpose of controlling pests on agricultural crops, forest floors, or range lands. Also, agricultural run-off and irrigation return flows continue to be exempt from permitting, as provided under the CWA.</i> " The proposed draft does not mention excluding pesticide applications to agriculture lands that may be adjacent to water.

Response:

We were unable to locate the quoted language in the EPA’s final permit. Language that is similar in its content can be found in the fact sheet (rationale):

Page 5: A “point source” is any “discernible, confined and discrete conveyance” but does not include “agricultural stormwater discharges and return flows from irrigated agriculture.” 33 U.S.C. 1362(14).

Page 8: Irrigation return flow (which includes runoff from a crop field due to irrigation of that field) and agricultural stormwater runoff do not require NPDES permits, as exempted by the CWA. [...] This permit does not cover, nor is permit coverage required, for pesticides applications that do not result in a point source discharge to Waters of the United States such as for the purpose of controlling pests on agricultural crops, forest floors, or range lands.

Page 101: It should be noted that pesticide concentrations in agricultural streams most often originate from terrestrial agricultural activities exempted under the CWA from NPDES permit requirements or activities not covered under this permit.

Furthermore, the definition of “point source” on page A-6 of the permit states:

Point source – means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include introduction of pollutants from non point-source agricultural and silvicultural activities, including stormwater runoff from orchards, cultivated crops, pastures, range lands, and forest lands or return flows from irrigated agriculture or agricultural stormwater runoff.

The examples provided above clearly show that agricultural run-off and irrigation return flows continue to be exempt from this permit and NPDES permitting in general, as provided under the CWA.

Part/Section	Comment
1.2.4	The proposed PGP adopts the EPA PGP annual treatments area thresholds recommendations. In searching other states PGP permit requirements some southeastern states have thresholds that are the same for all agencies or organizations.

Response:

It is unclear from the comment above if the commenter endorses EPA’s approach, or that of “some southeastern states.” For the purpose of consistency with the federal permit, as well as a convenience for decision-makers and applicators that operate in more than one state, we decided to adopt EPA’s thresholds verbatim.

Part/Section	Comment
1.2.4	For maintenance of USFWS levees, the refuge would not treat more than 20 liner miles in a year. In most instances, Service personnel apply pesticides to our levees to control woody growth when the impoundments are dry. In some areas, water may be in a drainage ditch along a levee, however, in a calendar year, treatment of these areas with water would not exceed 20 linear miles. During our annual operations we will not exceed the annual treatment area thresholds for local governments. TDEC should allow the Service to be treated as "a local government" with the same "threshold" and "acreage" allowances.

Response:

If USFWS is an “Agency for which pest management for land resource stewardship is an integral part of the organization’s operations”, an extent of pesticide application in any calendar year cannot be used as a criterion for decision-makers’ reclassification. The division is not in a position to define USFWS’ mission, operations and/or organizational setup.

Part/Section	Comment
Definitions	The current definition of treatment areas is – “the entire area, whether over land or water, where a pesticide application is intended to provide pesticidal benefits within the pest management area.” USFWS concern is with “over land.” We apply pesticides to agricultural fields that are seasonally flooded and moist soil units to provide habitat for wintering waterfowl. These areas are dried in the spring and summer and invasive species are treated to promote higher yields of agricultural crops or moist soil plants. The areas are flooded from November through March. Again these are managed impoundments that connect to waters of the state through a series of levees, water control structures and ditches. Pesticide treatment in these areas is done when the fields are dry. Residue from pesticides should not be an issue when these fields are flooded. Again we respectfully request that TDEC adopt the EPA language and exclude terrestrial areas.

Response:

The definition of treatment area, for the purpose of this comment, does not need to be changed. The concern appears to be related to the definition of “waters of the state”, which has previously been addressed. Generally speaking, absence of water cannot be used as criteria for determining waters of the state. In addition, aquatic organisms (eggs, larvae, etc.) can be present during dry periods and may be particularly vulnerable to indiscriminant application of pesticides.

Part/Section	Comment
8.0	This section states that decision-makers must submit NOI, NOT and annual reports consistent with those forms contained in Appendices D, E and G. The final permit should clarify that use of equivalent forms designed by permittees, comparable to those found in Appendices D, E and G can be used for compliance purposes.

Response:

The intent of the draft permit language was to allow such flexibility through use of the word “consistent.” No changes in the final permit are required as a result of this comment.

Determination

In conclusion, the comments included in this notice of determination document were compiled based on their relevance to the permit content, intent and interpretation of this general permit, rather than implementation of the permit conditions (e.g. penalty evaluations, appropriateness of various enforcement measures, development of TMDLs, etc.). Those questions or comments that became a moot point as a result of the changes made in the final permit were not included in this document.

The division's decision on this matter is to issue a General NPDES Permit for Discharges from Application of Pesticides, Permit No. TNP100000.

DATE: March 30, 2012



Vojin Janjić
Manager, Permit Section