COLORADO DISCHARGE PERMIT SYSTEM (CDPS)

FACT SHEET FOR PERMIT NUMBER COG860000

GENERAL PERMIT FOR DISCHARGES FROM APPLICATIONS OF PESTICIDES

WATER QUALITY CONTROL DIVISION

Introduction and Summary of Permit Development Process

EPA and many states that are delegated Clean Water Act permitting authority have prepared general permits to provide coverage for discharges from applications of pesticides for the first time. This has being done to comply with a Court Decision that requires discharges from applications of pesticides to have permit coverage beginning October 31, 2011. The Division developed and issued a CDPS general permit that models EPA's general permit, with the few notable exceptions described in this fact sheet.

The Division published a draft General Permit for public notice on January 28, 2011 and received public comment through February 28, 2011. The Division's draft permit modeled EPA's draft permit that was published for public notice on June 2, 2010 with some notable exceptions that were discussed in a fact sheet for the draft CDPS permit. EPA had an extensive public comment process on their draft permit. EPA received public comments on the draft permit for 45 days. During that time the agency held four public meetings and a webcast. EPA received 771 sets of comments on their draft permit and has made those and responses available on the internet in the official docket for the permit (Docket ID No. EPA-HQ-OW-2010-0257 available at: www.regulations.gov). The Division received 10 sets of comments on the CDPS draft general permit for discharges from applications of pesticides. Because the Division modeled EPA's draft permit and EPA's final permit, the Division has adopted EPA's responses to comments as Division responses to comments for comments that were within the scope of those received and considered by EPA. The Division has provided separate responses to comments that were received on the CDPS permit that are outside the scope of comments received on the EPA permit. Additional information on comments and responses follows at the end of this fact sheet.

Summary of Notable Changes from EPA's draft Permit

The Division has modeled this final permit after EPA's final permit with the following exceptions.

No Application. The Division is not requiring entities seeking coverage under this permit to submit an application, or notice or intent, for any discharges associated with applications of pesticides authorized under this permit. In its final permit, EPA had no requirement to submit an application for a subset of discharges authorized under the permit. The authority to provide coverage under a general permit without a requirement to submit an application is found at 5 CCR 1002-61.9(2)(b)(ii)(E), which conforms to the federal requirements found at 40 CFR 122.28 (b)(2)(v). In making this determination, EPA analyzed the factors that must be considered prior to making a no application determination and then exercised its discretion and did not require a subset of operators to submit NOIs. The Division has relied upon EPA's analysis of the factors, and expands that analysis with additional information. The Division is exercising its discretion to not require an application because the Division does not have the resources to receive and process applications. The development and implementation of a new general permit to authorize thousands of pesticide applications in Colorado is a substantial undertaking. As a practical matter the Division does not have staff available to receive applications, does not have a database available to enter the information, and does not have staff available to review the adequacy of applications and process those as appropriate to authorize permit coverage. The Division included a requirement in this permit to submit a Compliance Certification to the Division which will provide a means of identifying the subset of discharges covered under this permit that would have been required to submit an application or Notice of Intent if EPA were the permitting authority rather than the Division.

No Termination. Requirements to Submit a Notice of Termination were removed from the permit as they were determined to be unnecessary since there is no requirement to submit an application for any discharges associated with applications of pesticides authorized under this permit.

Requirement for Submission of a Compliance Certification. The Division included a requirement in this permit to submit a Compliance Certification to the Division. This was included to provide a means other than a permit application of identifying the subset of operators covered under this permit that would be required to submit an application under EPA's permit. The Division also determined in accordance with the provisions of Regulation 61.8(3)(f) that this condition is necessary to ensure compliance with the technology based requirements of the state and federal act. The Compliance Certification is required to be submitted for the subset of operators required to implement Integrated Pest Management Practices (IPMs) and document those practices in a Pesticide Discharge Management Plan in order to ensure that those operators are aware of and are complying with those conditions in the General Permit.

No Annual Report. Requirements to submit an annual report were removed from the permit as the Division does not have the resources available including staff and a database to receive, log in, review, and store copies of those documents. The Division determined that the requirement for a Compliance Certification provided another means for the same subset of operators to certify that they are in compliance with the terms and conditions of the permit.

Permit Term. The Division issued a short term 2-year permit. The duration of the term is based on the time frame the Division anticipates will be required to obtain the resources necessary to implement state level implementation of the NPDES program requirements for this category of discharges, including permitting, data management, and compliance assurance. The Division determined that a short term permit is appropriate because it will be necessary to revisit the terms and conditions of the pesticide permit at that time, including the requirement to submit an application, commensurate with resources available to implement the program elements. The Division does not intent to administratively continue this permit. During this 2-year permit term the Division does not intend to notify operators that Compliance Certifications have been received, routinely respond to complaints, or routinely respond to reports of adverse incidents.

Editorial Changes. The Division made the following editorial changes in the permit: substitution of the Division as the responsible agency, replacement of waters of the U.S. with surface waters of the state, and removal of text singularly related to EPA and pertaining to marine waters and endangered species requirements (since the Division permit action does not trigger an ESA Section 7 Consultation). The permit includes federal regulatory citations; the Division is relying on the corresponding applicable provisions in state statutes and regulations. No changes are made to EPA's Fact Sheet, which is provided as the remainder of the Division Fact Sheet to document the basis of the terms and conditions of the CDPS permit. As applicable, the basis for the conditions of the CDPS permit which are different than the conditions in the EPA permit that is described in this preface supersedes the basis described in EPA's fact sheet (attached as Appendix A).

Janet Kieler

November 4, 2011

Response to Public Comments

The public notice period was from January 28, 2011 through February 28, 2011. Comments were received from a number of members of the Colorado Wed Management Association. Additional comments were received from Rio Blanco County, Gunnison County, the Colorado Department of Agriculture, the City of Aurora, Northern Water Conservancy District, the City and County of Denver, the Colorado Division of Wildlife, Green Industries of Colorado, and the Sierra Club.

Comments within the Scope of Comments Received and Addressed by EPA

The City and County of Denver and Green Industries of Colorado submitted to the Division copies of comments that were submitted directly to EPA. The Division has adopted EPA's responses to those comments and they are not repeated in this document since they are available on the internet at www.regulations.gov (Docket ID No. EPA-HQ-OW-2010-0257) and the specific comments and responses can be easily found through a document search. For other comments that were within the scope of comments and received and responded to by EPA where

entities did not indicate that they submitted the same comments to EPA, the Division provides the following cross walk of the comments to the EPA response to comment document to assist entities in easily finding the response, as the Division is adopting the EPA response. A copy of EPA's responses to public comment document is also available in the administrative record for this permit action.

EPA's response to public comment document contains individual comments and EPA's responses. The document also contains ten comment essays that provide a combined detailed response to a large number of comments. Comments that were received on the CDPS permit where the Division adopted EPA's response are grouped in accordance with how EPA parsed and responded to comments for ease of reference to the EPA response to public comments document.

Comments where WQCD adopts EPA's Comment Essays in addition to the individual comments and responses for the corresponding subject area.

Approach and Approach 1. Comments regarding the relationship and considerations between CWA and FIFRA.

Approach, Approach 1, and Scope. Comments regarding what activities are covered or not covered, and whether certain activities require coverage under an NPDES permit even if not eligible for coverage under the PGP, and comments regarding costs to comply. This includes comments regarding adjuvant use and inert or other ingredients, the scope of Mosquito and Other Flying Insect Pest Control, the scope of Aquatic Weed and Algae Control, the scope of the term "at the waters edge", the scope of Forest Canopy Pest Control, the scope of Aquatic Nuisance Animal Control, Coverage for Applications to Tier 3 Waters (Outstanding Waters), consideration of non-aquatic pests that reside above the high water mark, and a request to see IPM requirements for "non aquatic pests".

Corrective Action. Comments regarding how determinations will be made that water quality standards are being exceeded.

NOI Threshold. Comments regarding the Compliance Certification deadlines, thresholds for Compliance Certifications, IPMPs, and PDMPS including the use of linear distance threshold versus annual treatment thresholds, and guidance for determining if action thresholds have been met.

Recordkeeping and Reporting. Comments seeking clarity in documentation requirements, comments regarding data documentation requirements, and comments regarding the Pesticide Discharge Management Plan (PDMP) including the requirement that the permittee identify areas that are impaired and/or listed on the 303(d) list, language regarding PDMP deadlines, and requirements regarding the PDMP team.

Structure. Comments seeking clarity regarding operators (decision-makers and applicators), multiple operators, and responsibilities for preparation of required plans and certifications.

Comments where WQCD adopts EPA's individual comments and responses for the corresponding subject area.

General Statement of Support. Comment that the proposed permit is a start for starting to gain control over the release of these harmful chemicals into our environment and comment in support requirements for an IPM.

Technology Based Effluent Limits. Comments regarding the requirement to use the "lowest rate" and the requirement to establish past or present aquatic nuisance animal densities to serve as action thresholds for implementing pest management strategies, and requirement for species identification for mosquito habitat.

Water Quality Based Effluent Limits. Comment that the narrative water quality based effluent limit is vague and unclear.

Administrative. Comments regarding the clarity of the permit, terminology used, citations, and editorial suggestions.

Site Monitoring. Comments regarding the burden of general permit monitoring requirements and permit language regarding monitoring requirements.

Enforcement. A comment stating that those with permits will be targets when water quality problems are detected.

State Only Comments

Surface waters of the state. Comments were submitted stating that debate regarding the definition of the terminology "state waters" continues to exist and in order to comply with permit actions it is necessary for water bodies to be defined in operational terms. Parties suggested the Division consider limiting application of the permit to waters of the U.S. because surface waters of the state are broader than waters of the U. S. Comments were also submitting requesting that the Division develop a fact sheet or brochure that clearly explains when the CDPS would apply to ditch applications, indicating that in recent Colorado Pesticide Applicator meetings there have been many questions as to when a ditch application would be subject to the CDPS.

Response. Both the federal and the state acts require a permit for the discharge of a pollutant into waters within the jurisdiction of the agency. "Pollutant" is defined the same in the federal and state statutes. The Sixth Circuit court decision determined that pesticides are pollutants in the specified circumstances. Therefore, in Colorado, all persons are required to have a permit in order to discharge pesticides into waters of the state. If the Division were to limit application of this General Permit to discharges into waters of the U.S., discharges of pesticides into waters of the state (that would not qualify as waters of the U.S.) would require an individual permit. The

Division finds that it is appropriate for discharges of pollutants into surface waters of the state to be covered by this General Permit. However, the Division notes that the statutory exemption from permitting for flow or return flow of irrigation water into state waters (C.R.S. § 25-8-504) was not modified by the court's decision. Therefore, to the extent this statutory exemption applies a CDPS is not required.

General Regarding CO Approach. Comments stated general support of WQCD approach with limited resources and that the lack of an application requirement is appropriate in light of its inability to collect fees to review apps. Comments were received encouraging the Division to act to establish an NPDES general permit and include a certification requirement. Other comments stated it was problematic to issue a draft CDPS permit modeled after EPAs draft because parties have no idea how EPA will respond to those comments. Comments were received indicating the permit process falls short and is a violation of due process. Comments urged the Division to take a substantially different permitting approach in Colorado due to delegation, Colorado laws, and the semi-arid climate. Comments stated that they were pleased that we will be reviewing the permit in a 2 year time frame. A comment was received stating that if Congress acts the Division should rescind the state permitting process. A comment was received requesting that Colorado take a less costly approach.

Response. The Division has been monitoring the pesticide permit development process including actions taken by the Courts and Congress during the past 3 years. In January 2009 after the U.S. Sixth Circuit Court of Appeals Vacated EPA's November 2006 Pesticides rule, the Division determined that it would be unable to issue a CDPS pesticide permit without statutory change and direction to collect fees and obtain the resources necessary to implement a pesticide permitting program in Colorado. In April 2010, in response to requests from pesticide operators, the Division revised its position and decided to issue a short term pesticide permit to provide coverage for discharges from the application of pesticides for a period of time until fee authority and resources could be obtained. A significant objective was to minimize the impacts to the existing permitting program by expending as little resource as possible for the development of the short term permit, and to develop a short term permit that would minimize the impact to the existing permitting program during the intervening period until resources could be obtained. The Division has continued to monitor the permit development process to date including EPA's October 31, 2011 issuance of a final pesticide permit. For issuance of the CDPS final pesticide permit, the Division determined that the fundamental approach taken in the January 2011 draft permit remained appropriate, including the permitting process used, the reliance on EPA's permit as a model, and the notable changes to the EPA permit such as no application requirement and no annual report requirement. The comment regarding Congressional action is not relevant at this time as Congress has not taken action regarding pesticide permitting in the context of implementing the U.S. Sixth Circuit Court Decision.

Compliance Assistance. Comments were received requesting the Division develop outreach material including PDMP guidance, and provide training to applicators.

Response. Please see the response to the general comments regarding the Colorado approach above. During this 2-year permit term, the Division will adopt guidance and outreach materials developed by EPA and make those available to Operators via the Division's web site. This includes EPA's Pesticide Discharge Management Plan Template and Pesticide Discharge Evaluation Worksheet which were made available with the issuance of EPA's final permit.

Public Notice Availability. The City and County of Denver commented that the permit documents were not available at the Clerk and Recorders Office at the time the draft permit was issued for public notice and comment.

Response. Over the last 10 years the Division has worked with each County Clerk and Recorders office to make electronic copies of public notice documents available to the public to reduce the need to send paper copies where possible. The City and County of Denver's Clerk and Recorder's office responded to an inquiry by the Division regarding this issue and provided an email address that could be used to provide that office access to electronic copies of public notice documents and agreed to receive the documents in that manner. Electronic copies of the pesticide permit public notice documents were sent to the Denver Clerk and Recorder's Office, and many other Clerk and Recorder's Office. The Division is not aware that any member of the public who was unable to obtain a copy for review. Regarding the public notice itself, some of the Division's standard language was not applicable to this permit since it is a statewide master general permit without an application requirement.

Executive Order D 2011-005. The City and County of Denver commented that the Division was not in compliance with Executive Order D 2011-005 with the issuance of this permit.

Response. The Governor's Executive Order directs state agencies to avoid imposing mandates on local governments through promulgation of regulation. The issuance of a permit is not promulgation of a regulation therefore the Executive Order does not apply.