Ohio Environmental Protection Agency

Division of Surface Water

Response to Comments

Project: Pesticide Discharges General NPDES Permit

Ohio EPA ID #: OHG870001 (drafted as OHI000001)

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Ohio EPA held a public hearing Jan. 27, 2011, regarding Pesticide Discharges National Pollutant Discharge Elimination System (NPDES) General Permit. This document summarizes the comments and questions received at the public hearing and/or during the associated comment period, which ended Feb. 3, 2011.

Ohio EPA reviewed and considered all comments received during the public comment period. By law, Ohio EPA has authority to consider specific issues related to protection of the environment and public health. Often, public concerns fall outside the scope of that authority. For example, concerns about zoning issues are addressed at the local level. Ohio EPA may respond to those concerns in this document by identifying another government agency with more direct authority over the issue.

In an effort to help you review this document, the questions are grouped by topic and organized in a consistent format. Comments were received from 27 people and organizations.

Note: The permit number was changed between public notice and final issuance at the request of U.S. EPA.

Comments on Why the Permit is Needed

Comment 1: This NPDES permit is not necessary. The proposal is redundant: First, there are very few U.S. EPA-approved aquatic pesticides on the market. These are tested for safety and persistence before they receive approval. Second, all pesticides are already regulated by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), administered by the Ohio Department of Agriculture (ODA). Third,

the Ohio EPA has had oversight of pesticide use in Ohio since the early 1980s. There is no protection added by the proposed permit.

Response 1: Ohio is issuing this general permit to satisfy the mandate of the U.S. Sixth Circuit Court of Appeals. This court found that FIFRA regulation of pesticides does not meet Clean Water Act permitting requirements for certain types of pesticide applications. Based on this decision, Ohio EPA must have a permit in place by April 9 so these applications remain legal.

Comment 2: **U. S. EPA's decision not to appeal the court ruling is very concerning. Ohio EPA should challenge this ruling on the grounds that EPA already had opportunity to detail its concerns through label approval and registration.**

Response 2: The Sixth Circuit decision was appealed to the U.S. Supreme Court by the National Cotton Council and other industry petitioners. The Supreme Court declined to hear the appeal.

Comments on Permit Coverage and Administration

Comment 3: **Ohio EPA should exempt public and private resource management agencies from permit coverage. Ohio EPA should exempt small businesses, if U.S. EPA allows. Ohio EPA should exempt mitigation projects done under Section 401 of the Clean Water Act.**

Response 3: Ohio EPA cannot exempt these activities from NPDES coverage. State law and the Clean Water Act do not contain exemptions for small-scale or beneficial activities. We have changed some of the Part V requirements to reduce burdens on these types of pesticide applications.

Comment 4: **Ohio EPA should extend the comment period on this permit. While we understand the Agency's desire to meet the April 9 court-ordered deadline, we believe that this endeavor is too substantive for such a short comment period. We are concerned that this permit is not being sufficiently communicated to all interested parties.**

Response 4: Based on our reading of the comments on this permit, we are more concerned about the consequences of not having a permit in effect by April 9. We can have a workable permit in place by that time.

Comment 5: **The administrative burdens of this permit are substantial. The permit includes a large increase in paperwork – Notices-of-Intent**

(NOIs), site monitoring, IPM and PDMP preparation and annual reports. These add significantly to application costs, and will need to be passed on to clients and taxpayers. We are concerned that the increased cost will lead to less application of pesticide, and less control of important pests, notably invasive species. Tracking annual treatment areas is a poor investment, particularly for conservation managers.

Response 5: In the draft permit, Ohio EPA included fewer people under the NOI requirements than the federal permit. In response to comments, we have reduced the NOI requirements further by exempting resource conservation management applications, wetland mitigation applications and certain other types of wetland applications.

We have also exempted small business and certain types of wetland applications from the Integrated Pest Management and Pesticide Discharge Management requirements in Part V of the permit. These changes minimize paperwork requirements for smaller applications.

Comment 6: Ohio EPA should delay issuance of the state permit until U.S. EPA issues its permit, and include any regulatory reductions from the federal permit.

Response 6: We would prefer to delay issuance of the Ohio permit, so that we can make sure the permit language is as similar to U.S. EPA's as possible; however, if U.S. EPA's permit issuance is delayed, we plan to issue the state permit so pesticide applications remain legal. We plan to include a number of the known regulatory reductions in the final Ohio permit.

Comment 7: What are the fees for the permit and NOI?

Response 7: The only fees associated with this permit are a $200 NOI fee for those required to submit an NOI. This fee applies once every five years, or at permit renewal. There are no permit issuance fees or annual discharge fees for this permit.

Comment 8: With both Ohio EPA and ODA involved in regulating pesticide use, we have concerns about duplicative governance. ODA has the expertise on the pesticides and licenses the applicators. In the interest of maximizing efficiencies and expertise, shouldn't NPDES permitting for pesticides come under the purview of ODA? We are concerned that a new, two-tiered reporting system and duplicative governance will not comport with the goals and objectives of the new administration.

At a minimum, the following items should be streamlined between the two agencies:

- **Inspections and enforcement**
- **Annual reporting**
- **Integrated Pest Management Requirements**

Response 8: ODA does not currently have authorization to implement the NPDES program. They are seeking delegation for NPDES authority for animal feeding operations; if successful, this could lead to delegation for pesticides at some future date.

We agree that the bullet items above should be streamlined between Ohio EPA and ODA. Ohio EPA will be working to dovetail the NPDES requirements to ODA requirements as closely as possible.

Comment 9: **Ohio EPA should adopt several useful concepts from the draft South Carolina permit – (1) automatic approval of NOIs if the applicant has not heard from the Agency within 10 days; (2) eliminate the annual report requirement. As an alternative, could Ohio EPA use Department of Agriculture records to satisfy the annual reporting requirement?**

Response 9: Ohio EPA is not sure that these particular conditions are appropriate for our program. First, Ohio is anticipating significantly fewer NOIs than South Carolina would have; South Carolina's NOI requirements are very close to the federal permit requirements, and Ohio's NOI requirements are meant to have fewer NOIs than the federal system. Ohio EPA expects to process NOIs promptly for those projects requiring NOIs.

The differences in NOI requirements relate to the annual report requirement. U.S. EPA has been allowing state flexibility to vary from the federal permit in one of these two areas. U.S. EPA wants to collect information about large-scale uses with either the NOI or the annual report. The object is to have information on users that will allow state or federal staff to identify pesticide users for compliance inspections. Ohio EPA believes the annual report will provide more useful information than the NOI because the annual report reflects actual pesticide use. Also, minimizing the numbers of NOIs reduces the administrative burden on both permittees and the state, and reduces the time between the recognized need for pesticide application and the actual application.

Information from ODA records could provide much of the information for annual reports. However, other important information for the purposes

of this permit are not included in the ODA rules – the waters or watersheds that receive pesticide applications and contact information.

Comments on Coverage and the Waters-of-the-State Definition

Comment 10: Are applications to ponds with no outflow covered under this permit? What about upground water supply reservoirs?

Response 10: Ponds with no outflow may or may not be covered by the permit. If the pond has any connection to surface or ground water, it is a water-of-the-state, and pesticide applications to those ponds are covered. If there is no connection, then pesticide applications would not be covered.

Applications to upground water supply reservoirs are covered by this permit because upground reservoirs are waters of the state.

Comment 11: It should be clarified that the discharge of a pesticide to a ditch is not regulated by the Clean Water Act.

Response 11: This NPDES permit does cover the discharge of a pesticide to a ditch because ditches are waters of the state under Section 6111 of the Ohio Revised Code.

Comment 12: Many farmers produce crops on fields with areas classified as prior converted wetlands. These areas are and should continue to remain exempt from the general permit.

Response 12: Prior converted wetlands are not covered by this general permit.

Comment 13: It should be clarified that spray drift does not require a permit.

Response 13: Spray drift should not need a permit because it is an avoidable source to surface water, in the sense that spraying can be done at times other than very windy days. The permit regulates discharges over or near surface waters, when the pesticide cannot be prevented from entering a water of the state, even with standard professional application procedures.

Comment 14: Are discharges of lime to lakes covered by the permit? Lime changes pH and promotes planktonic algae growth and inhibits macrophyte growth. Is this something we want in Ohio? Is lime labeled for use in or on Ohio waters?

Response 14: Applications of lime to lakes are not covered by this permit because they do not meet the definition of pesticide. Adding lime to a lake is a

discharge of pollutants and requires an NPDES permit. It is possible that the Temporary Discharges general permit could provide coverage for emergency lime treatments of a water body.

Comment 15: The permit's definition of pesticides includes rodenticides. We bait storm sewers for rodent control, placing a block of rodenticide on a string or wire and lower it into a sanitary or storm sewer manhole. This practice is not specifically mentioned, but would it be included under area-wide pest control?

Response 15: These baits in sanitary or storm sewers are not subject to NPDES requirements. Only the permission of the sewer authority is needed for these programs. These applications do not fit the court's definition of "in, over or near waters".

Comments on Part I of the Permit - Applicability

Comment 16: The term "near" is ambiguous, and needs to be better defined. Also, defining "water" and "water's edge" would increase understanding of the permit requirements. Is 500 yards from the water a good definition of "near"? What does "unavoidably deposited" mean?

Response 16: The term "near" is defined by whether the discharge of pollutants to surface waters can be avoided. If deposition to surface waters cannot be avoided, the discharge is covered by the permit. If it can be prevented by using good application methods and timing, then the pesticide should not be reaching a surface water. We believe that "near" will generally be much closer than 500 yards for most applications, such as herbicides.

"Unavoidably deposited" means that pesticides will be applied to the surface water, even though it is not the target, even using professional application methods. Spraying of vegetation on stream or ditch banks is a good example. Spraying of banks is so close to streams that some pesticide will inevitably be deposited in the stream.

We have replaced the term "water" with "surface water" to make the term more precise. "At the water's edge" is defined by application areas where pesticide is unavoidably deposited in surface water, despite surface water not being the target of application.

Comment 17: The Ohio Department of Transportation's (ODOT) interpretation of "near" is that herbicide spraying conducted in upland areas at the top of the ditch slope (such as guard rail areas) and roadway

slopes that are outside of the regularly wetted perimeter of the ditch would not unavoidably deposit herbicide to the water. As such, ODOT believes that any herbicide spraying that it conducts as part of its maintenance program that is not directly to the regularly wetted perimeter of a roadside ditch, or other waters of the state above the ordinary high water mark or wetland boundary, would not require authorization under an NPDES permit. ODOT requests Ohio EPA's opinion on this interpretation.

Response 17: If using this practice and definition results in no pesticide being deposited in the stream, it is a good reading of "near". Another interpretation would be that applications within the top of the ditch banks are covered, and those above the top are not (because spraying outside of the ditch banks should not result in deposition to waters of the state).

Comment 18: Permit language should be less confusing as to who is required to get a permit, and the additional NOI requirements. Does this require anyone making an application of aquatic weed control or algae control to have a permit if they met the threshold but would only file a Notice of Intent if the additional requirements are met in Part II?

Response 18: Anyone applying a pesticide for aquatic weeds or algae is covered by the permit. This permit applies to all covered applications, but the NOI needs to be filed only for those applications identified in Part II. We have changed the NOI requirements to make them clearer.

Comment 19: Are emergent wetland plants included in aquatic weed control?

Response 19: Yes, unless covered by one of the two new use patterns added to the final permit. The permit language has been changed to specifically include wetlands.

Comment 20: The permit states that operators are not eligible for coverage for discharges to surface waters of the state for the pesticide and its degradates. How do we read this in light of TMDL studies that address impairments, and ditch maintenance activities on impaired waters?

Also, it is difficult to ascertain from the Integrated Water Quality Report which waters are impaired as a result of the pesticide or its degradates. Ohio EPA should provide a specific list of impaired waters that list a pesticide or any potential degradates as a source of impairment.

It is also important to define what a degradate is. Microbial degradation products include phosphate, ammonia, formaldehyde, amino acids, carbohydrates, carbon dioxide and natural acids. Are these chemicals considered degradates under the permit?

Response 20: The degradates of a pesticide are those break-down products that are specifically related to the pesticide. The more fundamental degradates such as phosphorus, ammonia and other compounds or elements present naturally or due to multiple sources are not degradates under this permit. The definition of "pesticide residue" has been changed to reflect this.

Comment 21: Smaller water supplies rely on copper sulfate addition to their upground reservoirs for algae control. If the draft permit is finalized, these facilities may not be allowed to treat their reservoirs at all if the receiving water is impaired under the WQS definitions.

Response 21: These treatments may not be affected much by permit coverage. First, the impaired waters provision is pollutant specific; it would apply in this situation only if the stream were impaired by copper or sulfate. Second, the water from these reservoirs is routed through public water systems and does not reach a receiving water until it passes through a wastewater treatment plant (WWTP). The WWTP, rather than the reservoir, would be evaluated to see if copper limits were needed. It is possible that limits at the WWTP may limit the applications of copper sulfate, but those requirements already exist and are not specifically part of the Pesticide General Permit.

Reservoirs that have overflows to a surface water may have issues with this provision if the surface water is impaired for copper. We believe that these issues will be very rare, and may be dealt with through Total Maximum Daily Load calculations that will allow the reservoir to be treated periodically.

Comment 22: In the Sixth Circuit Court decision that required NPDES coverage, the Court stated that if "a chemical pesticide is known to have lasting effects beyond the pesticide's intended object, then its use must be regulated under the Clean Water Act". The fact sheet recognizes that only those chemical pesticides that leave a residue need NPDES coverage; however, this language has not been included in Part I.C.1 of the draft permit. This language should be included in the permit.

Response 22: This language has been included in the final permit.

Comment 23: In Part I.C.1.c the definition of Area-wide Pest Control mentions infestations greater than 15 acres. Does this mean that applications of less than 15 acres are exempt from needing an NPDES permit?

Response 23: No. This language was removed from later drafts of the federal permit, and has been removed from the final Ohio EPA permit.

Comment 24: The Area-wide pest control cut off of 15 acres is too low. It should be 45 acres.

Response 24: See previous response.

Comment 25: The Area-wide Pest Control definition is too vague. The definition should clearly exclude terrestrial pests. Does this replace the Forest Management Category in the federal permit? The definition of rangeland is also unclear; does this include golf course turf?

Response 25: We have changed this category to Forest Management to conform to the federal permit. Pesticide applications to golf course turf only do not need NPDES permit coverage if they are not in, over or near waters.

Comment 26: In paragraph D, who determines and what are the conditions as to why a permit would not be re-issued?

Response 26: Ohio EPA may decide not to reissue a general permit for any reason; typically it is because there are too few operators covered by a permit to justify the additional costs of doing a general permit. While we cannot imagine a situation where Ohio EPA would want to issue individual permits for pesticide application, individual permits would still be available if the Agency decided not to renew the general permit.

Comment 27: The Ohio Utility Group (OUG) requests that Ohio EPA revise the general permit to create an additional pesticide use pattern that clearly provides coverage for utility right-of-way maintenance. This revision is necessary and warranted because the "area-wide pest control" use pattern does not appear to authorize these discharges. Further, the utility industry's vegetation management practices result in only incidental and *de minimus* discharges of pesticides to waters of the state because licensed applicators are employed, efforts are made to identify and avoid water bodies and herbicide applications are limited to targeted plants whenever possible.

Response 27: We have added this use category to the general permit.

Comments on Part II of the Permit – Notices-of-Intent

Comment 28: Please clarify as to when an NOI is necessary. The Ohio Professional Applicators for Responsible Regulation (OPARR) does not believe that any of its members will be required to submit an NOI. However, we request additional time to confirm this and notify anyone that may need to submit an NOI.

Response 28: The permit has been clarified to require only decision makers (those authorizing pesticide application) to submit an NOI. For-hire applicators are automatically covered by the permit.

Comment 29: Can a company submit one NOI to cover the entire State? Can a reservoir system operator submit one NOI for all reservoirs in the system? Can a county or metropark system submit one NOI for their entire area of responsibility? NOI submittals and fees would be a burden if large numbers of them were required to be submitted.

Response 29: Many operators can submit one NOI for an entire area. One NOI could be submitted for one use category for an entire city, county or metropark system. One NOI could be submitted for an entire forest. One company doing applications in the same pesticide use category could apply statewide. See Response 32 regarding for-hire applicators.

Comment 30: Is a treatment area an individual site or can it be a whole county? Please clarify that a pest management area can include multiple treatment areas.

Response 30: It can be an entire county for a county government or pest control district. A pest management area may include multiple treatment areas. See previous response.

Comment 31: NOI submittal is a burden for resource management agencies. First the regulatory fit is wrong. There is a substantial difference between pest control in simplified agricultural or built environments, compared to the complex biological systems of natural environments. Neither this permit nor the ODA pesticide regulatory system were written with ecological management of invasive species in mind.

Second, tracking cumulative annual treatment areas is a poor use of conservation resources. Control of invasive plant species is most effective by early detection and treatment of small areas. The mapping and calculation of these areas on the chance that an

annual threshold will be exceeded is a cost that could discourage early detection of invasive species.

Finally, there is insufficient scientific support or economic justification for setting invasive plant thresholds for IPM standards. There is no supporting data for identifying an action threshold for invasive plant species.

With this in mind, resource management agencies should be exempt from NOI requirements, and associated Part V requirements.

Response 31: We agree that NOIs are not needed for these particular projects. We have exempted resource management areas and mitigation projects under Section 401 of the Clean Water Act from NOI requirements.

Comment 32: How will contractors who are hired for pesticide application be addressed in this program? Most for-hire applicators operate under contracts with their client decision-making government agencies or private companies; these applicators should not be required to submit individual NOIs. These applicators should be automatically covered by Ohio EPA's general permit, regardless of the number of clients they have or acres they apply pesticides to during any certain period of time.

Response 32: For-hire applicators are covered automatically by the permit. Only decision makers need to submit NOIs.

Comment 33: Will the various categories of wetlands be defined by the Ohio EPA or other government official, or is this an interpretation done by the operator? Will Ohio EPA define all of the Category 3 wetlands on a given property, such as a golf course? Do all aquatic weed/algae applications in Lake Erie need an NOI, or only if it exceeds a threshold, or only if it is being done by aerial spraying?

Response 33: Ohio EPA has removed the categorization-related requirements for wetlands and treats them all the same. It is not reasonable to require all wetland applications to have a delineation and categorization done before a pesticide is applied. NOIs are needed for Lake Erie applications only if done by aerial spraying.

Comment 34: What is "discharge wastewater associated with applications"?

Response 34: In the final permit, we have changed this to "apply pesticides under this permit".

Comment 35: Please add a definition of piscicide.

Response 35: We have reworded this section in plain English to clarify that these are applications done to control non-native fish species.

Comment 36: Please change the NOI requirements for drinking water supplies to "drinking water supply for human consumption".

Response 36: We have changed the phrase to "public drinking water supply".

Comments on Part III of the Permit – Effluent Limits and Monitoring Requirements

Comment 37: Please clarify what the "lowest effective amount of pesticide" means and why this language is necessary. Does Ohio EPA only want the lowest rates found on the label? We suggest changing this to application within the label application rates found on the label, which is the current law. Or it could be changed to read, "you must maintain, calibrate and operate application equipment so that the appropriate quantity of pesticide is delivered to provide best control of the target pest consistent with the independent obligation and authority of the FIFRA label, manufacturer's specifications for equipment precision, weather conditions, and best professional judgment to minimize pesticide discharges to waters of Ohio".

What is meant by "adhering to any manufacturer's conditions and industry practices"? Will there be a standard form issued that describes these?

Who determines the "optimum frequency of pesticide applications"? Would a company with years of experience in the aquatics field be able to determine the optimum frequency of applications? If not, who would determine this?

Response 37: We have included some of the suggested language in the final permit. It now reads, "lowest effective amount of pesticide to provide best control of the target pest consistent with the independent obligation and authority of the FIFRA label, manufacturer's specifications for equipment precision, weather conditions and best professional judgment".

We believe this language responds to the other questions by acknowledging the best professional judgment of the applicator. We believe that further definition of "manufacturer's conditions" and "optimum frequency" is unnecessary with the language above.

Comment 38: Narrative technology-based effluent limitations are the only feasible solution for this permitting scheme, as many questions surround how numeric effluent limitations could be practically achieved. Especially when Ohio water quality criteria do not exist for many pesticides.

Response 38: We acknowledge this comment.

Comment 39: Please clarify how the water quality-based effluent limitations in paragraph B would apply to golf courses.

Response 39: The general requirements to meet Ohio Water Quality Standards apply to everyone, regardless of whether there is a permit. These requirements must be in NPDES permits. The specific condition related to maximum contaminant levels is being corrected to apply to ponds only if they are greater than 5 acres in surface area (the current Ohio EPA requirement). Because most golf course ponds are smaller than this, the MCL requirement would not apply to many golf course ponds.

Comment 40: Could you define how "public access" would apply to golf courses? Does this require golf courses to put up temporary signs?

Response 40: This requirement would apply to golf courses only if ponds were greater than 5 acres, of if the waterbody is a former quarry or borrow pit. This is now clear in the final permit. These waters are often connected to ground water, and require additional protections. If the pond is larger than 5 acres, then signs would also be required.

Comment 41: Do we need to determine, document and monitor the maximum contaminant level of aquatic herbicides in these water bodies? There are cross-over calculations between FIFRA label requirements and drinking water standards for the whole waterbody (regardless of whether it is a drinking water supply).

Response 41: The permit does not require monitoring for this provision. We intended for this to be determined by calculating an as-mixed concentration using an estimate of the waterbody volume and FIFRA label information.

Comment 42: Some of the larvicides in use are growth regulators which can take several days to weeks to be effective. Numerous larviciding treatments are conducted on a daily basis in several different communities in our jurisdiction. We request clarification of the

requirement to conduct pre- and post- application pest surveillance.

Post-monitoring activities could be in the form of a dated visual check that describes the application results and effects on target and non-target species. This could be in the form of a checklist consistent with other NOIs administered by Ohio EPA.

Response 42: The permit is flexible in terms of the timing of post-monitoring. A dated visual check and checklist is a reasonable response to the permit requirement.

Comment 43: Will ODA records suffice for record keeping? The record-keeping provisions should be moved out of the Corrective Actions paragraph because they appear to apply to more than just corrective actions. They should either be a separate paragraph in Part III, or be moved to Part IV.

Response 43: The permit requirements and ODA requirements strongly overlap. As a result, you can use the same information to satisfy both requirements in those areas. The additional requirements under this permit (not cited in ODA rules) are related to affected waters or watersheds and any adverse incidents noted. This information is fundamental to a surface water permit, and must be required.

For small entities and those treating areas below thresholds, the requirements would be essentially the same – only adverse incident records would be added to the ODA requirements.

For facilities required to do IPM, there are requirements of this permit not directly considered in ODA record-keeping rules: (1) surveillance methods; (2) pest management strategies and action thresholds; (3) water or watershed identification; and (4) visual monitoring requirements, including any observed impacts to non-target organisms.

We agree that the record-keeping provisions are not in the correct location. They have been moved to Part IV, paragraph D.

<u>Comments on Part IV of the Permit – Special Conditions</u>

Comment 44: Mosquito larviciding applications take place in road side ditches, catch basins, standing water in fields, woodland environments or in manmade structures. To meet current ODA requirements, a street address/street intersection/known treatment area located on district treatment maps have been used in the past for identifying

areas where treatment has occurred. Consideration for this type of documentation as locations for the pest management log is requested.

Response 44: This information can be used as location information. Note that the name of the receiving waters or local watershed name is also required.

Comment 45: Does "unauthorized release or discharge" include run-off from a pesticide application to adjacent turf?

Response 45: Not in most cases. Applications to turf that meet FIFRA requirements and run off are not covered by this or any other permit condition. This condition would apply to runoff if the discharge of pesticide were caused by a spill or other similar condition not allowed by FIFRA.

Comment 46: Again, the "lowest amount of pesticide per application" language should be changed to refer to FIFRA label rates.

Response 46: We have included the revised language cited in Response 37 above.

Comment 47: Again, could you explain what is meant by "adhering to any manufacturer's conditions and industry practices"?

Response 47: We believe that further explanation in the permit is unnecessary. See Response 37 above.

Comment 48: Who will perform the inspections/evaluations described in Paragraph C. 1. d?

Response 48: This inspection could be done by Ohio EPA, ODA staff, or local authorities.

Comment 49: What conditions from an adverse incident report would trigger control measures? What are numbers of species? Occasionally, situations occur that have little or no relation to pesticide application; for example, oxygen depletion due to algae decomposition, etc.

Response 49: Under the adverse incident reporting requirements, Ohio EPA expects permittees to assess why a specific problem has occurred and what steps can be taken to eliminate the problem if it is related to pesticide application procedures. Revisions to control measures are triggered when an adverse incident is related to a pesticide discharge; this can be determined by the permittee, Ohio EPA or other state or local authority.

We understand that mortality can occur as a result of natural processes or non-pesticide pollutants. While these occurrences are reportable adverse incidents, they do not imply liability by the pesticide applicator. The purpose of the permit condition is to identify adverse incidents and sort out causes and any liabilities afterward.

The adverse incident report requires a list of species, which can be fish, animals or plants, that have been affected during the adverse incident.

Comment 50: For record-keeping requirements, will current ODA reporting requirements for pesticide applications satisfy the recording requirements for the NPDES permit? We believe that they should be used for both purposes. Do ODA laws and rules apply to applicators in the sense that applications must be under the direct supervision of a licensed applicator?

Response 50: See Response 43 on the record-keeping requirements. ODA laws and regulations apply independently of this permit. The permit does not incorporate any of these requirements by reference, except where both incorporate a FIFRA requirement.

<u>Comments on Part V of the Permit – Conditions for Applications Greater than Treatment Area Thresholds</u>

Comment 51: Table 1 in Part V is very confusing and needs to be expanded upon and explained better as to when the triggers apply. Area-wide treatments are mentioned in Part V but are not listed in Table 1. The language needs to be standardized between Table 1 and Part I. C.

Response 51: We have standardized the language between Table 1 and Part I. C. In the final permit, the category for Area-wide Pest Control has been changed to Forest Canopy Pest Control.

Comment 52: The thresholds listed in Table 1 are too low, and will encompass too many small applications. At a minimum, we suggest changing the lake acre threshold from 20 acres to 50-500 acres, and the area thresholds from 640 acres to 6,400 acres.

Response 52: We have increased thresholds in the final permit to the numbers that we believe will be in the final federal permit. The final thresholds are 80 acres for lakes and wetlands, and 6400 acres for mosquito control and forest pest control.

Comment 53: How are treatment areas to be aggregated? How is the aggregation of treatment acres among separate reservations or nature preserves (or among divisions of an agency) handled for NOIs and Part V requirements? For the spot treatments typical of conservation management areas, it would require extensive mapping to determine whether a threshold had been exceeded. Can the property owner avoid these requirements by doing part of the work himself, and contracting other parts to a subcontractor?

Do treatment areas need to be aggregated at all? If all applications are made according to the pesticide label, why would we want to look at this cumulatively if we are continually treating the same site with the same pesticide? Other states such as Indiana and Illinois are not taking a cumulative approach unless a different pesticide is used with each application.

Response 53: We have clarified the treatment area aggregation process in the footnotes for Table 1. These aggregation methods are the same as those used in the federal permit. Treatment areas are aggregated (each treatment of the same area counts against the threshold) for all pesticide use categories except weed and algae control and nuisance animal control.

We are uncertain as to what understanding the commenter has regarding Indiana and Illinois. Illinois' draft permit requires NOIs for everyone covered by the permit; thresholds do not figure in to the NOI process. It is our understanding that Indiana has not yet sent a draft general permit out for public notice.

Comment 54: While we support the use of IPM, we are aware that these practices require time and expertise, and add direct and indirect costs to pesticide use. Many aspects of IPM are mandatory and already integrated into FIFRA label requirements. We are concerned that extensive documentation requirements regarding IPM decision-making could lead to potential CWA penalties and lawsuits.

If these conditions cannot be removed from the permit, we urge Ohio EPA to consult with ODA on these requirements. ODA has established IPM definitions by rule; using ODA requirements would prevent duplication and promote understanding.

Response 54: We agree that using existing ODA rules for IPM would promote consistency and avoid duplication. We have changed the IPM requirements so they refer to the ODA rules.

We have retained some documentation requirements in the permit related to IPM. These are needed for permittees to show they have met the IPM requirements in the permit.

Comment 55: Cuyahoga County Board of Health is in support of a general permit that incorporates the concept of IPM and helps ensure that the application of pesticides is conducted properly and documented as necessary.

Response 55: We acknowledge this comment.

Comment 56: Ohio EPA should re-evaluate the IPM requirements to make them more flexible and adaptable to a variety of industries. The current requirements are too prescriptive and do not relate well to utility practices. For example, the draft permit requires permittees to identify the problem, including specific species to be controlled, but utility line maintenance projects are often not targeted at specific species and most often attempt to control all tall vegetation that could come into contact with transmission lines or cause interruptions in electric service.

Response 56: We have changed the IPM requirements to cite current ODA rules. We believe using these rules will add flexibility to the process.

Comment 57: Who determines the pest action threshold for the use of a pesticide, Ohio EPA or the property manager?

Response 57: Generally, the operator determines the pest action threshold.

Comment 58: Under IPM, it mentions biological control agents. While these are not chemical controls, would they be considered a pesticide under the NPDES and require the same or different reporting criteria? How would products that are repellents for geese and are sprayed around the edges of ponds be categorized?

Ohio EPA should define "biological control agents" and "cultural methods" and provide interested parties with an opportunity to comment on these definitions.

Response 58: Biological control agents are not necessary pesticides, but can be. Certain biological control agents, such as microbes, biochemical pesticides or plant-incorporated protectants are also "biological pesticides" subject to this permit. Certain other biological control agents, such as grazing animals or predators, are not pesticides. Geese

repellents are classified as biological pesticides under the definitions in this permit.

We have included definitions for “biological control agents” and “cultural methods” in the final permit.

Comment 59: We are not aware of any golf courses that apply mosquito control products, but golf is an outdoor activity and our business could be greatly affected if Ohio EPA limits product choices. Mosquitoes are a real public health threat and these products should be available for use at label rates by licensed applicators.

Response 59: Spraying for mosquitoes at a golf course may be an activity covered by the NPDES permit, if there are waters of the state within the boundaries of the golf course. The permit does not specify products to be used.

Comment 60: Is a permittee required to obtain approval from Ohio EPA of the PDMP prior to implementation of the same?

Response 60: No.

Comment 61: PDMPs are exceedingly burdensome and costly to compile and maintain. We believe Ohio EPA should reduce the amount of information required under this section of the permit and allow for some compliance flexibility.

Response 61: Ohio EPA has exempted small businesses and public organizations, and certain wetland management applications from PDMP requirements. We have defined small business as those businesses that have 100 or fewer employees and are independently owned. This definition is used in the Air Title V permitting program and is simpler than definitions based on Small Business Administration classifications.

Comment 62: Implementation of a PDMP is financially and technically infeasible for a statewide application area. ODOT maintains its own vegetation management guidelines for applications of pesticides. These guidelines ensure that ODOT is in compliance with the general intent of this NPDES permit. However, mapping and reporting as specified by the PDMP reporting requirements is not currently practical.

Response 62: The PDMP requirements allow the incorporation of existing management practices. The ODOT vegetation management guidelines could serve as the basis of the PDMP.

Comment 63: In South Carolina's draft NPDES permit, permittees are not required to submit annual reports unless the regulator expressly requests a report from the permittee. Ohio should similarly limit or eliminate the annual reporting requirement in its permit.

Response 63: While Ohio has streamlined annual reporting requirements, we believe some information needs to be submitted to allow the Agency to follow-up and do compliance inspections. U.S. EPA has indicated this information is required, but can be done in one of several places in the permit process. South Carolina has apparently decided that it will collect information on larger sources by requiring NOIs, allowing them to not have annual reports submitted. Ohio is choosing to use annual reports to collect data and require fewer NOIs.

The reasons for our choice have to do with both administrative streamlining and data accuracy. By requiring fewer NOIs, we are restricting our review and application processing to only those projects that have significant potential for environmental impact. Considering that much of the data for the annual report is already required to be collected by ODA, we believe our approach has less paperwork burden as well.

By collecting data in the annual report, we will be getting information about the actual application rates and locations. Using NOI data means using projected rates, which will be less accurate and probably slightly inflated to cover worst-case conditions.

Comment 64: If a lake is treated for an area larger than the treatment threshold in the first year of the permit, but is not treated in subsequent years, the subsequent years should be exempt from the reporting requirement because there is nothing to report.

Response 64: We have included the federal permit requirement that requires reporting for subsequent years even if no pesticide is applied. We will have a checkbox that says "no pesticide applied over threshold" on the form to make it easier to fill out.

<u>Comments on Part VI of the Permit – Standard Permit Conditions</u>

Comment 65: How would the transfer requirements affect a golf course that is sold or taken over by a management company? This permit should not be a hurdle for a golf course owner to sell property.

Response 65: The transfer requirements would apply to any regulated facility (including a golf course) that is sold. If an NOI was required, the parties buying and selling would need to fill out the general permit transfer form on the

Ohio EPA website. These transfers are common and have not affected property sales. If an NOI was not required, and would not be required for the new owner, the permit coverage applies automatically.

Comment 66: How will the water quality-based permit conditions in Parts III and VI be interpreted? Certain dyes used to shade ponds for algae control color the water; certain other pesticides cause a small amount of foaming to occur. Would these conditions be violations of the permit?

Response 66: The "free-from" conditions are used to regulate nuisance conditions of color, foam, toxicity, etc. Pesticides are approved for defined uses in defined areas; if the effects of the pesticide go beyond the approved area, the Agency would consider that a nuisance. For example, shade dyes in ponds are an intended use of a chemical in a defined and approved location. This is not a nuisance condition; however, if the dye migrates to a stream or other body of surface water, Ohio EPA would view that a nuisance, and would consider it a violation of the permit.

The same conditions apply to foaming and other nuisance conditions regulated by the water quality-based conditions of the permit. Foaming beyond natural levels is permitted in the area of pesticide use. If the foaming migrates outside of that area, it would be considered a violation of the nuisance provisions of the permit.

Comment 67: Part VI, Item F does not seem to be worded for anything outside of wastewater treatment facilities. It would be hard to interpret this section in relationship to pesticide applications to water.

Response 67: We have revised this paragraph to be titled "Equipment Operation and Quality Control", and have removed sub-item 3 to make it more applicable to pesticide applications.

Comment 68: While the prospect of individual NPDES permits is unpalatable, we wonder whether agencies such as Cleveland Metroparks can manage the geographically diverse, ecologically-based herbicide discharge more efficiently under an alternative permit.

Response 68: This decision would be up to the Metroparks. We have made changes in the general permit to help fit the pesticide applications used for resource management.

Comment 69: Section O. describes Sampling and Analytical Methods, although the triggers for monitoring are not clear within the permit.

Response 69: We have removed this paragraph from the final permit. U. S. EPA has not included this in the drafts of their general permit.

Comments on Part VII of the Permit – Definitions and Acronyms

Comment 70: Could you define "pesticide" as it is used in this document for the control or eradication of pest associated with the described areas eligibility?

Response 70: The term "pesticide" is defined in Part VII of the permit.

Comment 71: We would recommend an improved definition for "adverse incident". The word "may" leaves this statement open to false claims – "evidence of likely exposure to pesticide" might be better terminology. The items in the bullet list should include a quantified description of non-target plant, fish or wildlife.

Response 71: We have not changed the definition of adverse effect as requested. The definition used in the Ohio and federal permits is meant to capture a variety of events, some of which will be related to pesticide applications. Ohio EPA prefers to collect information on the "adverse incident" and determine causes as part of follow-up.

Comments on Draft Drinking Water Conditions

Comment 72: The Division of Drinking and Ground Water (DDAGW) public notice refers to additional permit conditions for applications to drinking water reservoirs that are not set forth in the draft permit. These specific restrictions have not been included in the draft permit for review and comment. Prospective permittees have not been afforded an adequate opportunity to review such terms and conditions and comment on the same.

These provisions seek to regulate toxins in the water and appear to go beyond the purpose of the NPDES permit requirement as articulated by the court in National Cotton Council.

Response 72: A public notice was sent to interested parties for the drinking water program on Dec. 23, 2010. The public notice contained the draft conditions related to drinking water reservoirs and provided notice of intent to include them in the final permit. Ohio EPA believes interested parties were afforded an adequate opportunity to review and comment on these conditions.

Comment 73: **These conditions compromise the ability to produce high-quality water by discouraging early management of algae. Many water systems treat reservoirs as often as weekly to prevent the growth of a significant amount of algae. These schedules prevent the formation of harmful algal blooms, and should not be impeded. In addition, Ohio EPA needs to recognize the difficulty in getting timely test results for toxins; it can take as long as 7 days to get results back from a laboratory. By this time the results may no longer be applicable.**

As alternatives we suggest that either:

- **These management issues be incorporated into ODA's certification and training process, rather than include them in the NPDES permit.**
- **Make these conditions DDAGW requirements, separate from the NPDES permit.**
- **Limit these conditions to periods when algae cover more than 20 percent of the reservoir surface area, or other level that would define when toxins are not a concern.**

Response 73: It was not the intent of the conditions to discourage the use of algaecide as a preventive measure. This condition has been revised to prohibit application of an algaecide only during a severe bloom, unless if it can be demonstrated that the treatment does not pose an unacceptable risk to public health. Several different alternatives to make this demonstration are included to provide for maximum flexibility. Ohio EPA also intends to develop a fact sheet containing recommendations for application during other circumstances.

Comment 74: **If Ohio EPA includes these conditions in the final NPDES permit, the Agency should clearly define "active algae bloom" and set analytical test procedures to determine algae and/or toxin levels. Also, the Agency should change the species identification requirement to the genus level; typically operators test algal species only to the genus level. Ohio EPA needs to identify test methods for algae and/or toxins in the permit.**

Response 74: As noted above, the condition was revised to prohibit application only during severe blooms and to provide additional flexibility. Ohio EPA has defined "severe bloom" but to allow for flexibility, has not been specific as to monitoring requirements or analytical procedures. Identification to genus level is acceptable, and Ohio EPA has removed reference to the term "species".

Comment 75: The third bullet point of these requirements provides that an operator may be required to sample finished water, based on the results of raw water samples. Akron does not believe that Ohio EPA can regulate the finished water through the use of an NPDES permit. Such matters are between the operator and DDAGW.

Response 75: Requirements to sample finished water have been removed from the conditions. Projected or measured toxin concentrations in drinking water are one alternative used to show that toxin concentrations will be met despite algaecide treatment. (See Response 73).

Other Comments

Comment 76: Under the draft permit, the locations and names of the waters where pesticides were applied become public information. This amounts to a customer list that businesses have spent a large amount of time building, and could lose if this information were made public. We request that this information be considered confidential business information and not be made public.

Response 76: The permit as drafted does not require this information to be made public. Annual report information may be submitted as a summary for a HUC-8 watershed. For example, the annual report could list out the total pesticide application information for ponds treated within a given watershed, without identifying the individual ponds. As a reference, we have appended a list of HUC-8 watersheds to the permit. Data on individual locations is required to be kept by the record-keeping provisions of this permit and ODA regulations. The individual location data would be available for inspection, but not in reports made to Ohio EPA. As a result, we do not believe that changes to the permit language are necessary.

Comment 77: The Ohio Farm Bureau Federation (OFBF) understands that this permit is subject to consultation with the U.S. Fish and Wildlife Service (U.S. FWS) and other agencies under the Endangered Species Act. We understand that U.S. EPA has commenced this consultation but has inserted placeholder language in its draft permit pending its completion. We appreciate U.S. EPA's statement that stakeholders seeking coverage under this permit do not have a separate obligation to consult with the U.S. FWS prior to submitting an NOI. However, we are concerned that some requirements under this permit may significantly change as a result of the consultation between federal agencies and that this permit is not finalized until this consultation is complete.

Response 77: As a delegated NPDES state, Ohio consults with U.S. FWS independently of U.S. EPA. U.S. FWS was notified of this draft permit and did not submit any comments on the draft. These conditions have been removed from the final permit.

Comment 78: Ohio should include in the permit all monitoring and conditions related to endangered species protection. This should not be left open-ended for future interpretation.

Response 78: See the previous response.

Comment 79: What is the educational process prior to implementation?

Response 79: We plan to build the education process into the existing educational programs of ODA and Ohio State University Extension. These programs occur periodically throughout the year.

Comment 80: Do you anticipate activist lawsuits? How do you protect yourself from these if you are not filing an NOI and have to do the pesticide discharge management plan?

Response 80: We have not heard of any intended lawsuits. In addition to meeting the conditions of the permit, a permittee should keep documentation on how they have met the limitations in Part III of the permit.

Comment 81: How can citizens challenge you on the permit?

Response 81: You may appeal the permit issuance to the Environmental Review Appeals Commission (ERAC). This appeal must be sent to the ERAC at the address below within 30 days of the permit issuance date.

Environmental Review Appeals Commission
77 South High Street, 17th Floor
Columbus, OH 43215

Comment 82: Akron's water treatment plant is already regulated pursuant to an individual NPDES permit. This permit requires monitoring for upstream and downstream locations for copper with the intent of monitoring previous algaecide applications on Lake Rockwell Reservoir. If the City is subject to the Pesticide General Permit requirements for the application of algaecide to its drinking water reservoirs, the City requests that the requirement to sample copper be removed from its individual permit.

Response 82: The copper monitoring requirement in the Akron WTP permit is separate from this permit. The Pesticide General Permit covers the application of pesticide to Lake Rockwell. This general permit has visual monitoring requirements, but no chemical monitoring requirements. There is no duplication in monitoring requirements between the two permits.

The copper monitoring requirement in the Akron WTP exists to monitor the effect of periodic copper treatments, if any, on the Cuyahoga River downstream from the reservoir. We see no reason to remove the monitoring requirement from the individual permit at this time.

End of Comments

Comments Submitted by:

Aqua Doc Lake and Pond Management
Aquatic Control Incorporated
Blues Creek Industries
City of Akron
City of Norwalk
Clermont County Water Resources Department
Cleveland Metroparks
Columbus and Franklin County Metroparks
Cuyahoga County Board of Health
Five Rivers Metroparks
Golf Course Superintendents of America, Ohio Chapters
GraysAquatic
Greene Soil and Water Conservation District
Jeff Finn
Jones Fish Hatcheries Inc.
Ohio Department of Natural Resources
Ohio Department of Transportation
Ohio Farm Bureau Federation
Ohio Professional Applicators for Responsible Regulation
Ohio Utility Group
Richland Soil and Water Conservation District
Summit County Health District
The H2O Company
Toledo Area Metroparks
Toledo Area Sanitary District
Union Soil and Water Conservation District
Wyandot Soil and Water Conservation District