STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL
OFFICE OF THE SECRETARY
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DOVER, DELAWARE 19901
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Secretary's Order No.: 2012-W-0033

RE: Approving Final Delaware Regulatory Amendments to 7 DE Admin. Code 7201: *Delaware Regulations Governing the Control of Water Pollution*, to add new Subsection 9.8: *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State*

Date of Issuance: August 15, 2012

Effective Date of the Amendment: September 11, 2012

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") the following findings, reasons and conclusions are entered as an Order of the Secretary in the above-referenced rulemaking proceeding.

Background and Procedural History

This Order considers proposed regulatory amendments to 7 DE Admin. Code 7201, *Delaware Regulations Governing the Control of Water Pollution*, specifically, to add a new subsection to existing Section 9.0 *General Permit Program*, to wit: Subsection 9.8, *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State* (hereinafter referred to as the "proposed Aquatic Pesticides Regulations", or "APR"). The Department's Division of Water commenced the regulatory development process with Start Action Notices 2010-25. This proposed revision to Delaware's

existing Water Pollution regulations is being promulgated as a result of the 2009 decision by the U.S. Sixth Circuit Court, whereby the Court determined that the application of biological pesticides and chemical pesticides with residuals to waters regulated under the provisions of the federal Clean Water Act must be regulated by a National Pollutant Discharge Elimination Program (NPDES) permit. Being an NPDES-delegated state (with the exception of federal facilities), the State of Delaware, through DNREC, is required to issue its own NPDES permits and develop regulations that align with the federal Pesticide General Permit (PGP) issued on October 31, 2011.

In order to allow aquatic pesticide application through the summer months of 2012, the Department's Division of Water issued emergency regulations, to wit: Emergency *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State*, which are effective from March 1, 2012, through August 31, 2012. DNREC is authorized, pursuant to 29 Del.C. §10119, to adopt emergency regulations if an agency determines that an imminent peril to human health, safety, or welfare requires adoption, amendment, or repeal of a regulations with less than the notice required by 29 Del. C. §10115. Much of the aquatic pesticide spraying during the above-referenced timeframe was concentrated on eliminating mosquito populations, which are a significant risk to human health and welfare, due to their ability to transmit diseases and other blood-borne vectors. Delaware's proposed APR will allow pesticide applicators to obtain the required permits coverage for applying aquatic pesticides, as required, from this point forward.

The Department's proposed amendments to 7 DE Admin. Code 7201, *Delaware Regulations Governing the Control of Water Pollution*, were initially published as Emergency Regulations in the March 1, 2012 edition of the Delaware *Register of Regulations.* It should be noted that the Department engaged many stakeholders during this promulgation process to revise these regulations. A Writing Committee made up of industry representatives and divisional staff met numerous times, beginning with the initial Regulatory Advisory Comment (RAC) meeting held in December of 2010, to discuss the proposed revisions to the regulations. In addition, several subcommittees made up of Writing Committee members, interested parties and staff met several times over the course of the past year and a half to provide feedback with regard to these proposed regulatory revisions. The input from the subcommittees and Writing Committee has been given consideration by the Department in the development of the regulatory language. Prior to the public hearing held in this matter on July 30, 2012, the Department's Surface Water Discharges Section also hosted three public workshops in March of 2012 (one in each county) to discuss the aforementioned proposed revisions. It should also be noted that no members of the public were present at the time of the public hearing on July 30, 2012, nor were any public comments received by the Department regarding this proposed promulgation prior to the close of the record on August 14, 2012.

Subsequent to the record closing in this matter, the Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated August 15, 2012 (Report). The Report recommends certain findings and the adoption of the proposed Amendments as attached to the Report as Appendix A.

Findings and Discussion

I find that the proposed Amendments are well-supported by the record developed by the Department, and I adopt the Report to the extent it is consistent with this Order. The Department's experts developed the record and drafted the proposed Amendments. Moreover, I find that the Department's experts in the Division of Water fully developed the record to support adoption of these Amendments.

With the adoption of this Order, Delaware will be enabled to amend its Water Pollution Regulations, specifically, with the addition of new subsection Subsection 9.8, *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State*, thereby enabling the Department to comply with the 2009 decision by the U.S. Sixth Circuit Court, to wit: that the application of biological pesticides and chemical pesticides with residuals to waters regulated under the provisions of the federal Clean Water Act must be regulated by a National Pollutant Discharge Elimination Program (NPDES) permit. Additionally, this promulgation will allow the Department to incorporate the above proposed new regulations into its existing 7 DE Admin. Code 7201, under new Subsection 9.8, as the current Emergency Regulations concerning this matter, (which, as noted above, were enacted by DNREC effective March 1, 2012) are set to expire August 31, 2012.

In conclusion, the following findings and conclusions are entered:

1.) The Department has jurisdiction under its statutory authority to issue an Order adopting these proposed Amendments as final;

2.) The Department provided adequate public notice of the proposed Amendments, and provided the public with an adequate opportunity to comment on the proposed Amendments, including at the public hearing held on July 30, 2012;

3.) The Department held a public hearing on July 30, 2012 in order to consider public comments before making any final decision;

4.) The Department's Hearing Officer's Report, including its recommended record and the recommended Amendments as set forth in Appendix A, are adopted to provide additional reasons and findings for this Order;

5.) The recommended Amendments do not reflect any changes from the proposed Amendments as published in the July 1, 2012, *Delaware Register of Regulations*;

6.) The recommended Amendments should be adopted as final regulation Amendments because Delaware will be enabled to (1) comply with the 2009 decision by the U.S. Sixth Circuit Court, to wit: that the application of biological pesticides and chemical pesticides with residuals to waters regulated under the provisions of the federal Clean Water Act must be regulated by a National Pollutant Discharge Elimination Program (NPDES) permit; (2) incorporate the above proposed new regulations into its existing 7 DE Admin. Code 7201, under new Subsection 9.8, as the Emergency Regulations concerning this matter, which were enacted by DNREC effective March 1, 2012, are set to expire August 31, 2012; (3) promote a greater understanding of said regulations for the regulated community; and (4) the amendments are well supported by documents in the record; and that

7.) The Department shall submit this Order approving the final regulation to the *Delaware Register of Regulations* for publication in its next available issue, and provide such other notice as the law and regulation require and the Department determines is appropriate.

Collin P. O'Mara
Secretary

Ahear\ Aquatic Pesticides Regs.2012.ORD

HEARING OFFICER'S REPORT

TO: The Honorable Collin P. O'Mara
Cabinet Secretary, Department of Natural Resources and Environmental Control

FROM: Lisa A. Vest
Public Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: **Approving Final Delaware Regulatory Amendments to 7 DE Admin. Code 7201: *Delaware Regulations Governing the Control of Water Pollution*, to add new Subsection 9.8: *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State***

DATE: Aug. 15, 2012

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Monday, July 30, 2012, at 6:00 p.m. at the Department of Natural Resources and Environmental Control ("DNREC", "Department"), 89 Kings Highway, Dover, Delaware to receive comment on proposed regulatory amendments ("amendments") to 7 DE Admin. Code 7201, *Delaware Regulations Governing the Control of Water Pollution*, specifically, to add a new subsection to existing Section 9.0 *General Permit Program*, to wit: Subsection 9.8, *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State* (hereinafter referred to as the "proposed Aquatic Pesticides Regulations", or "APR"). This proposed revision to Delaware's existing Water Pollution regulations is being promulgated as a result of the 2009 decision by the U.S. Sixth Circuit Court, whereby the Court determined that the application of biological pesticides and chemical pesticides with residuals to waters regulated under the provisions of the federal Clean Water Act must be regulated by a National Pollutant Discharge Elimination Program (NPDES) permit. Being an NPDES-delegated state (with the exception of federal facilities), the State of Delaware, through DNREC,

is required to issue its own NPDES permits and develop regulations that align with the federal Pesticide General Permit (PGP) issued on October 31, 2011.

In order to allow aquatic pesticide application through the summer months of 2012, the Department's Division of Water issued emergency regulations, to wit: Emergency *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State*, which are effective from March 1, 2012, through August 31, 2012. DNREC is authorized, pursuant to 29 Del.C. §10119, to adopt emergency regulations if an agency determines that an imminent peril to human health, safety, or welfare requires adoption, amendment, or repeal of a regulations with less than the notice required by 29 Del. C. §10115. Much of the aquatic pesticide spraying during the above-referenced timeframe was concentrated on eliminating mosquito populations, which are a significant risk to human health and welfare, due to their ability to transmit diseases and other blood-borne vectors. Delaware's proposed APR will allow pesticide applicators to obtain the required permits coverage for applying aquatic pesticides, as required, from this point forward.

The Department has the statutory basis and legal authority to act with regard to the proposed amendments to 7 DE Admin. Code 7201, *Delaware Regulations Governing the Control of Water Pollution*, specifically, to add a new subsection to existing Section 9.0 *General Permit Program*, to wit: Subsection 9.8, *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State*, pursuant to 7 Del. C., Chapter 60. Additionally, as referenced above, being an NPDES-delegated state (except for federal facilities), DNREC must issue its own NPDES permits for such activity pursuant to 40 CFR 123 as well. In order to accommodate the potentially large universe of operators, DNREC is issuing a general permit

regulations based on the U.S. EPA's Pesticides General Permit (PGP), issued on October 31, 2011.

The Department's proposed amendments to 7 DE Admin. Code 7201, *Delaware Regulations Governing the Control of Water Pollution*, were published as Emergency Regulations in the March 1, 2012 edition of the Delaware *Register of Regulations*, and the record remained open for public comment through close of business on August 14, 2012.[1] It should be noted that no members of the public attended the public hearing held on July 30, 2012, nor was any public comment received by the Department during the post-hearing phase of this promulgation.

The Department engaged many stakeholders in the process to revise these regulations. A Writing Committee made up of industry representatives and divisional staff met numerous times, beginning with the initial Regulatory Advisory Comment (RAC) meeting held in December of 2010, to discuss the proposed revisions to the regulations. In addition, several subcommittees made up of Writing Committee members, interested parties and staff met several times over the course of the past year and a half to provide feedback with regard to these proposed regulatory revisions. The input from the subcommittees and Writing Committee has been given consideration by the Department in the development of the regulatory language. Prior to the public hearing held in this matter on July 30, 2012, the Department's Surface Water Discharges Section also hosted three public workshops in March of 2012 (one in each county) to discuss the aforementioned proposed revisions. Again, no members of the public were present at the time of the public hearing on July 30, 2012, nor were any public comments received by the Department

[1] Pursuant to SB #178, which was signed by Delaware Governor Jack Markell in July 2012, all State agencies (including DNREC) are now required to keep the record open for an additional 15 days for inclusion of written comment which may be received by said agency on any proposed regulation following the conclusion of any public hearing on said regulation matter.

regarding this proposed promulgation prior to the close of the record on August 14, 2012. Proper notice of the hearing was provided as required by law.

II. SUMMARY OF THE PUBLIC HEARING RECORD:

The public hearing record consists of the following documents: (1) a verbatim transcript and fourteen (14) documents introduced at the public hearing held on July 30, 2012, and marked by this Hearing Officer accordingly as Department Exhibits 1-14. The Department's person primarily responsible for the drafting and overall promulgation of these proposed regulatory amendments, Beth Krumrine (Environmental Scientist IV), developed the record with the relevant documents in the Department's files.

Following the submission of the Department's exhibits into the record at the hearing held on July 30, 2012, Ms. Krumine proceeded to offer a brief summary as to the history and the purposes behind the present proposed promulgation. As noted above, the purpose of this action is to revise and update 7 DE Admin. Code 7201, *Delaware Regulations Governing the Control of Water Pollution*, specifically, to add a new subsection to existing Section 9.0 *General Permit Program*, to wit: Subsection 9.8, *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State*. The need for this revision arises as a result of a 2009 decision by the U.S. Court of Appeals holding that the application of biological and/or chemical pesticides with residuals to regulated waters must be covered by a National Pollutant Discharge Elimination Program (NPDES) permit. As noted previously, with Delaware being an NPDES-delegated state (except for federal facilities), DNREC must issue its own NPDES permits for such activity pursuant to 40 CFR 123 as well. In order to accommodate the potentially large universe of operators, DNREC is issuing a general permit regulations based on the U.S. EPA's Pesticides General Permit (PGP), issued on October 31, 2011.

In order to allow aquatic pesticide application through the summer months of 2012, the Department's Division of Water issued emergency regulations, to wit: Emergency *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State*, which are effective from March 1, 2012, through August 31, 2012. Much of the aquatic pesticide spraying during the above-referenced timeframe was concentrated on eliminating mosquito populations, which are a significant risk to human health and welfare, due to their ability to transmit diseases and other blood-borne vectors. Delaware's proposed APR will allow pesticide applicators to obtain the required permits coverage for applying aquatic pesticides, as required, from this point forward.

Much of the proposed regulation is modeled after the EPA's PGP (effective 10/31/11). The PGP reflects considerable initial input from state environmental and agricultural regulatory agencies. Groups that participated in the Department's Regulatory Advisory Committee with respect to this proposed promulgation are as follows: DNREC's Drainage Program (Tax Ditches), DNREC Mosquito Control, DNREC Office of the Secretary, DNREC Watershed Stewardship, New Castle County, Private Industry (represented by Envirotech and Solitude Lake Management), the Delaware Department of Agriculture, and the Sussex Conservation District.

The proposed APR applies to all Operators who apply pesticides directly to Waters of the State, to systems that discharge to Waters of the State, or to areas immediately adjacent to Waters of the State that leave a residue for the following Pesticide Use Patterns: (1) mosquito and other flying insect pest control; (2) weed and algae pest control; (3) animal pest control; and (4) forest canopy pest control. The following requirements are set within the regulations based on Operator's size and total annual pesticide application to such waters:

- All Operators as described above will be required to follow certain Best Available Technology and Best Management Practices, consider Integrated Pest Management (IPM) practices, and report all Adverse Incidents and quantifiable Spills and Leaks;
- Operators who exceed specific Annual Treatment Thresholds will be required to submit a standard Notice of Intent (NOI) form supplied by the Department. Only those operators that exceed the thresholds will have additional requirements, such as monitoring and recordkeeping;
- State of Delaware Operators and Operators that are considered to be a Large Entity (as defined within the proposed regulations) that exceed Annual Treatment Thresholds must additionally create a Pesticide Discharge Management Plan (PDMP) according to specific requirements within the regulations. Monitoring and annual reporting is additional required for these Operators.

The thresholds used in the proposed regulations were established to provide for a clear numeric indicator of when a NOI will be required to be submitted, while PDMP requirements are based on the size of the Operator and the total number of people that the Operator serves. Thresholds within the proposed permit were derived utilizing the EPA draft regulation. Because this is a NPDES permitting regulation, both the Clean Water Act and EPA's regulations require that it is composed of certain elements, specifically, effluent limits, monitoring, and reporting. Effluent limits must be based on both technology and water quality considerations. Because of the unique nature of the regulated constituent, effluent limits are not numeric in nature, but narrative. Monitoring is not the retrieval of water samples followed by chemical or physical analysis, but rather a requirement that the operator verifies that proper procedures are being

followed. Reporting is fulfilled by proper recordkeeping and operating under the PDMP, when required.

The Department's approach with regard to this proposed promulgation is intended to ensure that professional applicators or persons employing professional applicators would be covered under the pesticide regulation, and to assure that the applicators are knowledgeable of applicable permit conditions. The primary purpose of the registration process is to ensure that the regulated community is aware of the permit conditions, and of its duty to comply. DNREC's draft pesticide regulation also recognizes that pesticide applicators are separately regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), and other state regulations.

Other highlights of the proposed APR are as follows:

- **Shared Responsibilities:** One major departure from EPA's proposed permit is that DNREC does not see a need to delineate responsibilities between "decision makers" and non-decision makers. DNREC believes this regulation makes it clear that all parties involved in a pesticide application event (i.e., the Applicator and/or the Operator) are responsible.
- **Federal Facilities:** Federal facilities and lands in Delaware are being covered by the EPA permit (NPDES number DEG87000F) which became effective 10/31/11.
- **Tier III Exclusion:** The EPA model excludes pesticide applications to Tier III waters from coverage under the general permit. DNREC does not currently have any waters designated as Tier III, but on the possibility that it might change, a limited exclusion was maintained within the draft regulation. Justification for this limited exclusion is the fact that government resource management agencies are likely to apply pesticides to protect a waterway (e.g., control of invasive aquatic

life, protection of forest canopy). Thus, a blanket exclusion would be counterproductive to the overall goal of environmental protection.

- **Recordkeeping:** The federal regulations require records to be maintained for a three-year period[2]. However, Delaware requires all records and documents to be maintained for a five-year period, which is reflected in the allowable timeframe of permit coverage.
- **Endangered Species:** Pursuant to 40 CFR Part 123.25, state pesticide regulations or permits are not mandated to address federally-listed endangered species at this time. However, the state pesticide regulations may need to be re-promulgated at a later date, upon such a time that the State of Delaware develops stricter standards for both state and federally threatened and/or endangered species. State endangered species regulatory revisions are currently under consideration.
- **Stormwater Management Areas:** Although stormwater management areas are not directly considered to be Waters of the State, this Subsection regulates discharges that flow into Waters of the State, which can include stormwater wet ponds. If an Operator is uncertain as to whether a stormwater management area will discharge, it is the best approach to obtain coverage if a rain event will result in a discharge.

[2] 40 CFR 122.41(j)(2).

Lastly, Ms. Krumrine explained at the time of the public hearing that the proposed regulation has been reviewed by the EPA, and the EPA had no objections as to the content of the same.

Again, no member of the public attended the hearing held on July 30, 2012, nor was any comment received at any time by the Department during the post-hearing phase of this promulgation. It should also be noted that all proper notification and noticing requirements concerning this proposed promulgation were met by the Department.

III. RECOMMENDED FINDINGS AND CONCLUSIONS:

Based on the record developed, I find and conclude that the Department has provided appropriate reasoning regarding the need for the proposed regulatory amendments to 7 DE Admin. Code 7201, *Delaware Regulations Governing the Control of Water Pollution*, specifically, to add a new subsection to existing Section 9.0 *General Permit Program*, to wit: Subsection 9.8, *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State*. Accordingly, I recommend promulgation of these proposed amendments in the customary manner provided by law.

Further, I recommend the Secretary adopt the following findings and conclusions:

1. Proper notice of the hearing was provided as required by law.
2. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;
3. The Department provided adequate public notice of all proceedings, including a public hearing, in a manner required by the law and regulations;
4. The Department held its public hearings in a manner required by the law and regulations;

5. Promulgation of the proposed regulatory amendments to 7 DE Admin. Code 7201, *Delaware Regulations Governing the Control of Water Pollution*, specifically, the addition of new subsection Subsection 9.8, *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State*, will enable the Department to comply with the 2009 decision by the U.S. Sixth Circuit Court, to wit: that the application of biological pesticides and chemical pesticides with residuals to waters regulated under the provisions of the federal Clean Water Act must be regulated by a National Pollutant Discharge Elimination Program (NPDES) permit;

6. Additionally, this proposed promulgation will allow the Department to incorporate the above proposed new regulations into its existing 7 DE Admin. Code 7201, under new Subsection 9.8, as the Emergency Regulations concerning this matter, which were enacted by DNREC effective March 1, 2012, are set to expire August 31, 2012;

7. The Department has reviewed these proposed regulatory amendments in the light of the Regulatory Flexibility Act, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;

8. The Department's aforementioned proposed *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State*, as originally published in the March 1, 2012 *Delaware Register of Regulations* (at that time, as *Emergency Regulations*), and then subsequently published in the July 1, 2012 *Delaware Register of Regulations,* and as set forth in Appendix "A" hereto, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they should be approved as final regulatory amendments,

which shall go into effect ten days after their publication in the next available issue of the *Delaware Register of Regulations*; and

9. The Department shall submit the proposed regulation as a final regulation to the *Delaware Register of Regulations* for publication in its next available issue, and shall provide such other notice as the law and regulations require, and as the Department determines is appropriate.

LISA A. VEST
Public Hearing Officer

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APPENDIX "A"

Exception: Expedited hearing decisions for medical assistance must be made within 3 working days from receipt of the appeal which meets the criteria for an expedited appeal process. See Section 5304.3

2. **Decisions Are Binding on the Department of Health and Social Services**
3. **Decisions Comply with Laws and Regulations**
   The Hearing Officer's decision will comply with State and federal laws and regulations and are based on the hearing record.
4. **Decisions Must Contain Specific Information**
   The written decision will contain, at a minimum, the following information.
   A. Information to enable a reader to understand how the decision was reached.
   B. Supporting evidence
   C. Food Supplement Program cases will state whether benefits will be issued or terminated.
   The decision contains:
   ~~A.~~ 1. A statement of the appellant's right to judicial review
   ~~B.~~ 2. The identity of the individual
   ~~C.~~ 3. A summary of evidence
   ~~D.~~ 4. Findings of fact
   ~~E.~~ 5. A discussion or analysis of facts and arguments presented at the hearing
   ~~F.~~ 6. A discussion of how the applicable rules apply to the facts in the case
   ~~G.~~ 7. The resulting conclusions
   ~~H.~~ 8. The hearing officer's decision and/or order
   ~~I.~~ 9. Applicable rules involved in reaching the decision

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF WATER RESOURCES

Surface Water Discharges Section

Statutory Authority: 7 Delaware Code, Chapter 60; (7 **Del.C.**, Ch. 60)

SECRETARY'S ORDER
***Pursuant to 29 Del. C.* §10119**
Order No. 2012-W-0021

Regulations Governing the Discharges from the Application of Pesticides to Waters of the State

Re: Sixty- (60) day renewal to Order No. 2012-W-0006 enacting emergency regulations, *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State*

AUTHORITY AND FINDINGS

Secretary's Order No. 2012-W-0006 was adopted in February 2012 to temporarily enact a new regulatory requirement, *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State under* revision of 7 **Del.C.**, Chapter 60, Section 9.0. This notification acts to renew Order No. 2012-W-0006 for an additional 60 days after the initial 120-day effective period pursuant to 29 **Del.C.** §10119 (3).

In 2009, the Court (National Cotton Council, et al. v. Environmental Protection Agency ([EPA]) vacated EPA's 2006 Final Rule on Aquatic Pesticides, which determined that National Pollutant Discharge Elimination System

(NPDES) permits were not required for applications of pesticides to United States' (U.S.) waters. As a result of the court's decision, discharges to waters of the U.S. from the application of pesticides will require NPDES permits when the court's mandate takes effect. On March 28, 2011, the Court granted EPA's request for an extension to allow more time for pesticide operators to obtain permits for pesticide discharges into U.S. waters from April 9, 2011, to October 31, 2011.

The State of Delaware has delegated authority from EPA for administration of the NPDES and issuance of the State's own NPDES permits. Delaware must, therefore, promulgate regulations to address the new NPDES permitting requirement for the application of pesticides on or near water bodies of the state.

The Department of Natural Resources and Environmental Control's (DNREC) Division of Water (DW) has been working to draft regulations to address the new NPDES permitting requirements. However, the required court date of October 31, 2011, was not met by Delaware due to the time-intensive nature of the undertaking combined with staff shortages/turnover in addition to EPA's final rule not having been completed prior to the October 31 deadline. Development of the final regulation is currently underway; however, it is unlikely the final regulations will be promulgated prior to the expiration of the emergency regulations. Without the 60-day extension of the emergency regulations, DNREC will be in violation of the federal requirements to have an NPDES program in place for the application of aquatic pesticides in or near Delaware Waters. The emergency regulations, *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State,* has allowed pesticide applicators to obtain the required NPDES permits to apply aquatic pesticides from March-June where extension of such regulations will allow for such coverage until September 2012.

Much of the aquatic pesticide spraying during this timeframe is concentrated on eliminating mosquito populations, which pose a significant risk to human health and welfare due to their ability to transmit diseases and other blood-borne vectors. The best known mosquito-borne diseases are West Nile Virus, Malaria, and Yellow Fever. Others, such as Dengue Fever and Encephalitis, are common within America but not as well-known throughout the general populous. Historically, such diseases have been at very low levels as the result of our Nation's progressive and intensive mosquito-control effort; however, for the first time in nearly 50 years, such diseases have been documented in the U.S. mostly as a direct result of the declining vector control programs combined with an increase in immigrants who transport such blood-borne diseases into the U.S.

For this reason, it is vital to renew emergency regulations under Order No. 2012-W-0006 within Delaware to not allow the lapse in Delaware's Mosquito Control Program offered through the DNREC's Division of Fish and Wildlife. The DNREC's DW will continue to work with stakeholders toward completion of the full regulations through the normal regulatory process with a target promulgation of September 2012. Additionally, pursuant to 29 **Del.C.** §10119(4), DW will receive, consider, and respond to petitions by any interested person(s) for the reconsideration or revision of this emergency order.

EFFECTIVE DATE OF ORDER

This Secretary's Order will renew the above-referenced order No. 2012-W-0006 and emergency regulations for an additional 60 days after the initial 120-day effective period pursuant to 29 **Del.C.** §10119. This emergency order shall take effect upon publication in the *Delaware Register* and shall remain in effect for 60 days from date of publication.

ORDER

It is hereby ordered that the *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State* under the original Secretary's Order No. 2012-W-0006 remain in effect for an additional 60 days pursuant to 29 **Del.C.** §10119(3).

Collin P. O'Mara, Secretary

7201 Regulations Governing the Control of Water Pollution

***Please Note: Due to the size of the Emergency regulation, it is not being published here. A copy of the regulation is available at:**

http://regulations.delaware.gov/register/july2012/emergency/16 DE Reg 14 07-01-12.htm

Symbol Key

Arial type indicates the text existing prior to the regulation being promulgated. Underlined text indicates new text. Language which is ~~stricken~~ through indicates text being deleted.

Emergency Regulations

Under 29 **Del.C.** §10119 an agency may promulgate a regulatory change as an Emergency under the following conditions:

§ 10119. Emergency regulations.

If an agency determines that an imminent peril to the public health, safety or welfare requires the adoption, amendment or repeal of a regulation with less than the notice required by § 10115, the following rules shall apply:

(1) The agency may proceed to act without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable;

(2) The order adopting, amending or repealing a regulation shall state, in writing, the reasons for the agency's determination that such emergency action is necessary;

(3) The order effecting such action may be effective for a period of not longer than 120 days and may be renewed once for a period not exceeding 60 days;

(4) When such an order is issued without any of the public procedures otherwise required or authorized by this chapter, the agency shall state as part of the order that it will receive, consider and respond to petitions by any interested person for the reconsideration or revision thereof; and

(5) The agency shall submit a copy of the emergency order to the Registrar for publication in the next issue of the Register of Regulations. (60 Del. Laws, c. 585, § 1; 62 Del. Laws, c. 301, § 2; 71 Del. Laws, c. 48, § 10.)

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF AIR AND WASTE MANAGEMENT

Statutory Authority: 7 Delaware Code, Chapter 60; (7 **Del.C.**, Ch. 60)

Secretary's Order No. 2012-W-0006

Regulations Governing the Discharges from the Application of Pesticides to Waters of the State

AUTHORITY AND FINDINGS:

The Department of Natural Resources and Environmental Control (DNREC) is authorized, pursuant to 29 **Del.C.** §10119, to adopt emergency regulations if an agency determines that an imminent peril to human health, safety, or welfare requires adoption, amendment, or repeal of a regulation with less than the notice required by 29 **Del.C.** §10115. I hereby find that there is evidence of an imminent peril to human health, safety, and welfare that requires adoption of these emergency regulations.

The proposed regulatory revision of Section 9.0, *Del.C., Chapter 60, General Permit Program*, to add Subsection 9.8, *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State*, is being promulgated as a result of the 2009 decision by the Sixth Circuit Court of Appeals (Court) that the application of biological pesticides and chemical pesticides with residuals to waters regulated under the provisions of the federal Clean Water Act must be regulated by a National Pollutant Discharge Elimination Program (NPDES) permit.

In 2009, the Court [National Cotton Council, et al. v. Environmental Protection Agency (EPA)] vacated EPA's 2006 Final Rule on Aquatic Pesticides, which determined that NPDES permits were not required for applications of pesticides to U.S. waters. As a result of the court's decision, discharges to waters of the U.S. from the application of pesticides will require NPDES permits when the court's mandate takes effect. On March 28, 2011, the Court granted EPA's request for an extension to allow more time for pesticide operators to obtain permits for pesticide discharges into U.S. waters from April 9, 2011, to October 31, 2011.

The State of Delaware has delegated authority from EPA for administration of the NPDES and issuance of the State's own NPDES permits. Delaware must, therefore, promulgate regulations to address the new NPDES permitting requirement for the application of pesticides on or near water bodies of the state.

The DNREC Division of Water (DW) has been working to draft regulations to address the new NPDES permitting requirements. However, the required court date of October 31, 2011, was not met by Delaware due to the time-intensive nature of the undertaking combined with staff shortages/turnover in addition to EPA's final rule not having been completed prior to the October 31 deadline. Therefore, DNREC currently is in violation of the federal requirements to have an NPDES program in place for the application of aquatic pesticides in or near Delaware waters.

The emergency *Regulations Governing the Discharges from the Application of Pesticides to Waters of the State* will allow pesticide applicators to obtain the required NPDES permits for applying aquatic pesticides from March–September 2012. Much of the aquatic pesticide spraying during this timeframe is concentrated on eliminating mosquito populations, which are a significant risk to human health and welfare due to their ability to transmit diseases and other blood-borne vectors.

The best known mosquito-borne diseases are West Nile Virus, Malaria, and Yellow Fever. Others, such as Dengue Fever and Encephalitides, are common within America but not as well-known throughout the general populous. Historically, mosquito-borne diseases have been at very low levels as the result of our nation's progressive and intensive mosquito-control effort; however, for the first time in nearly 50 years, endemic cases of Dengue Fever and Malaria have been documented in the United States, mostly as a direct result of the declining vector control programs combined with an increase in immigrants who transport such blood-borne diseases into the U.S. (http://www.mda.state.md.us/plants-pests/mosquito_control/mosquito_info/mosquitoes_disease/index.php; and http://www.cdc.gov/ncidod/dvbid/westnile/index.htm).

For this reason, it is vital to promulgate such emergency regulations within Delaware to not allow the lapse in Delaware's Mosquito Control Program offered through DNREC's Division of Fish and Wildlife. The DNREC's DW will continue to work with stakeholders toward completion of the full regulations through the normal regulatory process with a target promulgation of September 2012. Additionally, pursuant to 29 **Del.C.** §10119(4), DW will receive, consider, and respond to petitions by any interested person(s) for the reconsideration or revision of this emergency order.

EFFECTIVE DATE OF ORDER

This emergency order shall take upon promulgation in the *Delaware Register* and shall remain in effect for 90 days from date of publication or until regulations are implemented that eliminate the need for the emergency order.

ORDER

It is hereby ordered that the above-referenced emergency regulation is adopted pursuant to 29 **Del.C.** §10119.

Collin P. O'Mara, Secretary

7201 Regulations Governing the Control of Water Pollution

(Break in Continuity Within Section)

9.8 Regulations Governing Discharges from the Application of Pesticides to Waters of the State

9.8.1 **Authority.** These regulations are promulgated pursuant to the authority provided by 3 **Del.C.** §2200 et.al. and 7 **Del.C.** §6000 et.al, and 40 CFR 122 and 412.

9.8.2 **Definitions.** The following words and terms, when used in this Subsection, shall have the following meaning unless the context clearly indicates otherwise:

"Action Threshold" means the point at which pest populations or environmental conditions cannot be tolerated necessitating that pest control action be taken based on economic, human health, aesthetic, or other effects. An action threshold may be based on current and/or past environmental factors that are or have been demonstrated to be conducive to pest emergence

and/or growth, as well as past and/or current pest presence. Action thresholds are those conditions that indicate both the need for control actions and the proper timing of such actions.

"Active Ingredient" means any substance (or group of structurally similar substances if specified by the Agency) that will prevent, destroy, repel or mitigate any pest, or that functions as a plant regulator, desiccant, or defoliant within the meaning of FIFRA sec. 2(a). [40 CFR 152.3] Active ingredient also means a pesticidal substance that is intended to be produced and used in a living plant, or in the produce thereof, and the genetic material necessary for the production of such a pesticidal substance. [40 CFR 174.3]

"Adverse Incident" means an unusual or unexpected incident that an Operator has observed upon inspection or of which the Operator otherwise become aware, in which:

(1) There is evidence that a person or non-target organism has likely been exposed to a pesticide residue; and,

(2) The person or non-target organism suffered a toxic or adverse effect, either direct as a result of pesticide residue or indirect. The phrase toxic or adverse effects includes effects that occur within Waters of the State on non-target plants, fish or wildlife that are unusual or unexpected (e.g., effects are to organisms not otherwise described on the pesticide product label or otherwise not expected to be present), and may include: distressed or dead juvenile and small fishes; washed up or floating fish; fish swimming abnormally or erratically; fish lying lethargically at water surface or in shallow water; fish that are listless or nonresponsive to disturbance; stunting, wilting, or desiccation of non-target submerged or emergent aquatic plants; or other dead or visibly distressed non-target aquatic organisms (amphibians, turtles, invertebrates, etc.)

The phrase, toxic or adverse effects, also includes any adverse effects to humans (e.g., skin rashes) or domesticated animals that occur either from direct contact with or as a secondary effect from a discharge (e.g., sickness from consumption of plants or animals containing pesticides) to Waters of the State that are temporally and spatially related to exposure to a pesticide residue (e.g., vomiting, lethargy).

"Best Available Technology (BAT)" means a level of technology based on the very best (state of the art) controls and/or treatment measures that have been developed or are capable of being developed and that are economically achievable.

"Best Management Practices (BMPs)" means schedules of activities, prohibition of practices, maintenance procedures, and other management practices or measures to prevent or reduce the discharge of pollutants. BMPs include the following, among other practices and measures: structural and non-structural controls; treatment requirements; and operating procedures and practices to control site runoff, or spillage, or leaks, or drainage from raw materials storage.

"Biological Control Agents" means those agents that are organisms that can be introduced to Operator sites, such as herbivores, predators, parasites, and hyperparasites. [Source: US FWS IPM Guidance, 2004].

"Biological Pesticides (also called biopesticides)" includes microbial pesticides, biochemical pesticides and plant-incorporated protectants (PIP).

Microbial pesticide means a microbial agent intended for preventing, destroying, repelling, or mitigating any pest, or intended for use as a plant regulator, defoliant, or desiccant, that:

(1) Is a eukaryotic microorganism including, but not limited to, protozoa, algae, and fungi;

(2) Is a prokaryotic microorganism, including, but not limited to, Eubacteria and Archaebacteria; or,

(3) is a parasitically replicating microscopic element, including but not limited to, viruses. [40 CFR 158.2100(b)]

(1) Biochemical pesticide means a pesticide that:

Is a naturally-occurring substance or structurally-similar and functionally identical to a naturally-occurring substance;

Has a history of exposure to humans and the environment demonstrating minimal toxicity, or in the case of a synthetically-derived biochemical pesticides, is equivalent to a naturally-occurring substance that has such a history; and

Has a non-toxic mode of action to the target pest(s). [40 CFR 158.2000(a)(1)]

Plant-incorporated protectant means a pesticidal substance that is intended to be produced and used in a living plant, or in the produce thereof, and the genetic material necessary for production of such a pesticidal substance. It also includes any inert ingredient contained in the plant, or produce thereof.

"Chemical Pesticides" means all pesticides not otherwise classified as biological pesticides.

"Cultural Methods" means manipulation of the habitat to increase pest mortality by making the habitat less suitable to the pest.

"Declared Pest Emergency" means an event defined by a public declaration by a federal agency, state, or local government of a pest problem determined to require control through application of a pesticide beginning less than ten days after identification of the need for pest control. This public declaration may be based on:

(1) Significant risk to human health;

(2) Significant economic loss; or,

(3) Significant risk to endangered species, threatened species, beneficial organisms, or the environment.

"Department" means the State of Delaware Department of Natural Resources and Environmental Control.

"Discharge" when used without qualification, means the "discharge of a pollutant."

"Discharge of a Pollutant" means the addition of any pollutant, or combination of pollutants, to state waters or the contiguous zone, or the ocean, from any source or activity other than a vessel or other floating craft when being used as a means of transportation and in compliance with Section 312 of the Act. This definition includes additions of pollutants into State waters from: Surface runoff that is collected or channeled by man; discharges through pipes, sewers, or other conveyances which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into a treatment works other than a publicly owned treatment works (POTW).

"Facility" means any building, any structure, any complex of buildings or structures, or any process, production equipment or machinery, which makes it possible for an activity to be conducted.

"Federal Facility" means any buildings, installations, structures, land, public works, equipment, aircraft, vessels, and other vehicles and property, owned, operated, or leased by, or constructed or manufactured for the purpose of leasing to, the federal government.

"FIFRA" means the Federal Insecticide, Fungicide and Rodenticide Act (7 USC § 136 et seq.) as amended.

"For-Hire" means an individual or company that has been hired to apply pesticides and includes persons who make contractual pesticide applications for which they or their employer receives compensation (e.g., lawn care firms, pest control companies).

"Impaired Water" (or "Water Quality Impaired Water" or "Water Quality Limited Segment") means a water is impaired for purposes of this Subsection if it has been identified by a State, Tribe or EPA pursuant to Section 303(d) of the Clean Water Act as not meeting applicable State or Tribal water quality standards (these waters are called "water quality limited segments" under 40 CFR 130.2(j)). Impaired waters include both waters with approved or established TMDLs, and those for which a TMDL has not yet been approved or established.

"Inert Ingredient" means any substance (or group of structurally similar substances if designated by the Agency), other than an active ingredient, that is intentionally included in a pesticide product. Inert ingredient also means any substance, such as a selectable marker, other than the active ingredient, where the substance is used to confirm or ensure the presence of the active ingredient,

and includes the genetic material necessary for the production of the substance, provided that genetic material is intentionally introduced into a living plant in addition to the active ingredient.

"Integrated Pest Management" means an effective and environmentally sensitive approach to pest management that relies on a combination of common-sense practices. IPM uses current, comprehensive information on the life cycles of pests and their interaction with the environment. This information, in combination with available pest control methods, is used to manage pest damage by the most economical means, and with the least possible hazard to people, property, and the environment.

"Large Entity" means any:

(1) Public entity that serves a population greater than 10,000; or,

(2) Private enterprise that exceeds the Small Business Administration size standard as identified at 13 CFR 121.201 (size standards set by North American Industry Classification System codes, varies by industry type).

"Mechanical/Physical Methods" means mechanical tools or physical alterations of the environment for pest prevention or removal.

"Minimize" means to reduce and/or eliminate pesticide discharges to Waters of the State through the use of "control measures" to the extent technologically available and economically practicable and achievable.

"Non-target Organisms" means the plant and animal hosts of the target species, the natural enemies of the target species living in the community, and other plants and animals, including vertebrates, living in or near the community that are not the target of the pesticide.

"Operator" means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof associated with the application of pesticides which results in a discharge to Waters of the State that meets one of the following criteria:

Any entity who performs the application of a pesticide

Any entity who has day-to-day control of the application (i.e., they are authorized to direct workers for hire to carry out those activities).

"Person" means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.

"Pest" means any organism under circumstances that make it deleterious to man or the environment, if it is:

(1) Any invertebrate animal, including but not limited to, any insect, other arthropod, nematode, or mollusk such as a slug and snail, but excluding any internal parasite of living man or other living animals;

(2) Any plant growing where not wanted, including any moss, alga, liverwort, or other plant of any higher order, and any plant part such as a root; or,

(3) Any fungus, bacterium, virus, or other microorganism, except for those on or in living man or other living animals and those on or in processed food or processed animal feed, beverages, drugs (as defined in FFDCA sec. 201(g)(1)) and cosmetics (as defined in FFDCA sec. 201(i)).

"Pesticide Discharge Management Plan (PDMP)" means a document that identifies the control measures (including inspections, maintenance, monitoring, and corrective action) used to comply with the applicable requirements of the regulation and documents their implementation.

"Pest Management Area" means the area of land, including any water, for which an Operator has responsibility for and is authorized to conduct pest management activities as covered by this Subsection (e.g., for an Operator who is a mosquito control district, the pest management area is the total area of the district).

"Pest Management Measure" means any practice used to meet the effluent limitations that comply with manufacturer specifications as required under FIFRA, industry standards, and recommended industry practices related to the application of pesticides, relevant legal

requirements and other provisions that a prudent Operator would implement to reduce and/or eliminate pesticide discharges to waters of the State.

"Pesticide" means:

(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest,

(2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant; and,

(3) any nitrogen stabilizer, except that the term "pesticide" shall not include any article that is a "new animal drug" within the meaning of section 201(w) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(w)), that has been determined by the Secretary of Health and Human Services not to be a new animal drug by a regulation establishing conditions of use for the article, or that is an animal feed within the meaning of section 201(x) of such Act (21 U.S.C. 321(x)) bearing or containing a new animal drug.

The term "pesticide" does not include liquid chemical sterilant products (including any sterilant or subordinate disinfectant claims on such products) for use on a critical or semi-critical device, as defined in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321). For purposes of the preceding sentence, the term "critical device" includes any device that introduced directly into the human body, either into or in contact with the bloodstream or normally sterile areas of the body and the term "semi-critical device" includes any device that contacts intact mucous membranes but which does not ordinarily penetrate the blood barrier or otherwise enter normally sterile areas of the body [FIFRA Section 2(u)].

The term "pesticide" applies to insecticides, herbicides, fungicides, rodenticides, and various other substances used to control pests. The definition encompasses all uses of pesticides authorized under FIFRA including uses authorized under sections 3 (registration), 5 (experimental use permits), 18 (emergency exemptions), 24(c) (special local needs registrations), and 25(b) (exemptions from FIFRA).

The term "pesticide" is used when referring to the "pesticide, as applied." When referring to the chemical in the pesticide product with pesticidal qualities, the term "active ingredient" is used.

"Pesticide Product" means a pesticide in the particular form (including composition, packaging, and labeling) in which the pesticide is, or is intended to be, distributed or sold. The term includes any physical apparatus used to deliver or apply the pesticide if distributed or sold with the pesticide.

"Pesticide Research and Development" means activities undertaken on a systematic basis to gain new knowledge (research) and/or the application of research findings or other scientific knowledge for the creation of new or significantly improved products or processes (experimental development).

"Pesticide Residue" includes that portion of a pesticide application that is discharged from a point source to Waters of the US and no longer provides pesticidal benefits. It also includes any degradates of the pesticide.

"Pesticide Use Pattern" means the method and type of pest that is controlled, and includes the following: mosquito and other flying insect control (adulticide and larvaecide); weed and algae control; animal pest control; and forest canopy pest control.

"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 return flows from irrigated agriculture or agricultural stormwater runoff.

"Pollutant" means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste

discharged into water. For purposes of this definition, a "biological pesticide" is considered a "biological material," and any "pesticide residue" resulting from use of a "chemical pesticide" is considered a "chemical waste."

"Secretary" means the Secretary of the State of Delaware Department of Natural Resources and Environmental Control or his duly authorized designee.

"State" means the State of Delaware.

"Target Pest" means the organism(s) toward which pest management measures are being directed.

"Tier 3 Waters" means for anti-degradation purposes, pursuant to 40 CFR 131.12(a)(3), Tier 3 waters are identified by States or Tribes as having high quality waters constituting an Outstanding National Resource Water (ONRW), which may include waters of National Parks and State Parks, wildlife refuges, and waters of exceptional recreational or ecological significance.

"Total Maximum Daily Loads (TMDLs)" means the amount of a given pollutant that may be discharged to a waterbody from point, nonpoint and natural background sources and still allow attainment or maintenance of the applicable narrative and numerical water quality standards. A "TMDL" is the sum of the individual wasteload allocations or WLAs for point sources and load allocations or LAs for nonpoint sources of pollution and natural background. A "TMDL" may include a reasonable margin of safety (MOS) to account for uncertainties regarding the relationship between mass loading and resulting water quality. In simplistic terms, a "TMDL" attempts to match the strength, location and timing of pollution sources within a watershed with the inherent ability of the receiving water to assimilate the pollutant without adverse impact.

"Treatment Area" means the entire area, whether over land or water, where a pesticide application is intended to provide pest control benefits within the pest management area. In some instances, the treatment area will be larger than the area where pesticides are actually applied. For example, the treatment area for a stationary drip treatment into a canal includes the entire width and length of the canal over which the pesticide is intended to control weeds. Similarly, the treatment area for a lake or marine area is the water surface area where the application is intended to provide pest control benefits.

"Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based effluent limitations because of factors beyond the Operator's reasonable control. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

"Waters of the State" or "State Waters" means all water, on the surface and under the ground, wholly or partially within, or bordering the State, or within its jurisdiction including but not limited to:

(1) waters which are subject to the ebb and flow of the tide including, but not limited to, estuaries, bays and the Atlantic Ocean;

(2) all interstate waters, including interstate wetlands;

(3) all other Waters of the State, such as lakes, rivers, streams (including intermittent and ephemeral streams), drainage ditches, tax ditches, creeks; mudflats, sand flats, wetlands, sloughs, or natural or impounded ponds;

(4) all impoundments of waters otherwise defined as Waters of the State under this definition;

(5) wetlands adjacent to waters (other than waters that are themselves wetlands) identified in the above four statements; and,

(6) Although waste and stormwater treatment systems or waste storage structures including, but not limited to, treatment ponds or lagoons designed to meet the requirements of the Clean Water Act (other than cooling ponds which otherwise meet the requirements of this definition) are not considered to be "Waters of the State", coverage will be required if determined to discharge into Waters of the State.

"Water Quality Impaired" See 'Impaired Water'.

"Water Quality Standards" means any rule or limit established by the Secretary which consists of a designated use or uses for Waters of the State and the water quality criteria for such waters based upon such designated uses.

"Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas. Wetland areas are as delineated under and through 7 **Del.C.** Ch. 66 and the "Corps of Engineers Wetlands Delineation Manual", dated January, 1987.

9.8.3 Coverage

9.8.3.1 Any Operator that meets the applicability requirements identified in 9.8.4 is covered under this regulation. As such, more than one Operator may be responsible for compliance with this Subsection for any single discharge from the application of pesticides.

9.8.3.2 Coverage under this regulation shall be granted for a duration of five years unless determined otherwise by the Department. In no case shall coverage be valid for more than five (5) years.

9.8.3.3 Permittees are considered to be temporarily covered under this Subsection once the NOI has been received by the Department. Final coverage will be granted after NOI review by the Department, where the Department may require application resubmission at any time if the NOI is deemed inadequate or incomplete.

9.8.3.4 An issued permit coverage may be modified in whole or in part, revoked and reissued, or terminated by the Department during its term for cause as specified herein:

9.8.3.4.1 Violation of any term or condition of permit coverage, as contained within this Subsection;

9.8.3.4.2 Failure of the permittee to disclose fully all relevant facts in the NOI application or during the permit issuance process or the permittee's misrepresentation of any relevant facts at any time;

9.8.3.4.3 Failure to notify the Department by resubmission of a new NOI upon change in product use or substantial alterations or additions to the permitted activity;

9.8.3.4.4 A change in any condition that requires either a temporary or a permanent reduction or elimination of any discharge controlled by the permit (e.g., the promulgation of any applicable effluent standard or prohibition under the Clean Water Act, any change in State law that requires the reduction or elimination of the discharge, revisions to state Water Quality Standards or TMDLs etc.); or,

9.8.3.4.5 Information indicating that the permitted discharge poses a threat to human health or the environment.

9.8.4 Applicability

9.8.4.1 Activities Covered

Operators who discharge into Waters of the State or apply directly to Waters of the State from the application of (1) biological pesticides or (2) chemical pesticides that leave a residue (hereinafter collectively "pesticides"), when the Applicability under these regulations include all Operators who discharge into Waters of the State or apply directly to Waters of the State from the application of (1) biological pesticides or (2) chemical pesticides that leave a residue when the Operator meets one of the following criteria. See also Delaware Pesticide Law (State of Delaware Code Title 3, Part II Chapter 12) *§ 1206 (a) & (b)* and 601 Delaware Pesticide Rules and Regulations *Section 5.0 Licensing.*

9.8.4.1.1 A private applicator who purchases and applies "Restricted Use" pesticides;

9.8.4.1.2 A commercial applicator (for hire) who uses any pesticides on others' property in exchange for compensation; or,

9.8.4.1.3 A commercial applicator (not for hire) who uses any pesticides as part of their job duties on the following types of property owned or leased by them or their employers, and include schools, apartment buildings, nursing homes, hospitals, daycare centers.

9.8.4.2 Operators who fall under any one of the following pesticide use patterns: Mosquito and Other Flying Insect Pest Control (adulticide and larvaecide); Weed and Algae Control; Animal Pest Control; or Forest Canopy Pest Control.

9.8.4.2.1 Mosquito and Other Flying Insect Pest Control (Adulticide and Larvaecide)

To control public health/nuisance and other flying insect pests that develop or are present during a portion of their life cycle in or above standing or flowing water. Public health/nuisance and other flying insect pests in this use category include mosquitoes and black flies.

9.8.4.2.2 Weed and Algae Pest Control

To control weeds, algae, and pathogens that are pests in water and at water's edge, including ditches and/or canals.

9.8.4.2.3 Animal Pest Control

To control animal pests in water and at water's edge. Animal pests in this use category include fish, lampreys, insects, mollusks, and pathogens.

9.8.4.2.4 Forest Canopy Pest Control

Application of a pesticide to a forest canopy to control the population of a pest species (e.g., insect or pathogen) where, to target the pests effectively, a portion of the pesticide unavoidably will be applied over and deposited to water.

9.8.5 Limitations on Coverage

9.8.5.1 Discharges to Water Quality Impaired Waters

The Operator is not eligible for coverage for any discharges from a pesticide application to Waters of the State if the water is identified as impaired by that pesticide or its degradates. If the discharge is not eligible because the water is listed as impaired for that specific pesticide, but there is evidence that shows the water is no longer impaired, this information may be submitted to the Department and request that coverage be allowed.

9.8.5.2 Discharges to Waters Designated as Tier 3 for Anti-degradation Purposes

The Operator is not eligible for coverage for discharges from a pesticide application to waters designated by the Department as Tier 3 for anti-degradation purposes.

9.8.5.3 Discharges Currently or Previously Covered by another Permit or Discharges Covered Under the Pesticides General Permit (federal lands)

The Operator is not eligible for coverage if any of the following circumstances apply:

9.8.5.3.1 Pesticide applications taking place on federal lands or federal facilities covered under NPDES Pesticides General Permit administered by EPA

9.8.5.3.2 The discharges are covered by another NPDES permit, or

9.8.5.3.3 The discharges were included in a permit that within the last five years has been or is in the process of being denied, terminated, or revoked by the Department or EPA (this does not apply to the routine reissuance of permits every five years).

9.8.6 Notice of Intent (NOI)

9.8.6.1 All Operators who apply pesticides according to 9.8.4 will be required to submit an NOI within ninety (90) days of promulgation under only one of the following two provisions:

9.8.6.1.1 Any entity who performs the application of pesticides; or

9.8.6.1.2 Any entity who has day-to-day control of the application (i.e., they are authorized to direct workers for hire to carry out those activities).

9.8.6.2 All NOI submissions must follow Signatory Requirements as described in 9.8.14, and must be sent to the address as provided in 9.8.15, unless otherwise instructed.

9.8.6.3 Coverage under this Subsection shall be granted for five years, unless determined otherwise by the Department. In no case shall coverage be valid for more than five years.

9.8.6.4 Operator who has previously submitted an NOI undergoes a name change or change in ownership must submit a new NOI will be required to be submitted to the Department no later than (30) days after this change.

9.8.6.5 A change in Operator who was not listed on the original NOI must submit a new NOI to the Department no later than (30) days after this change.

9.8.6.6 Any person wishing to extend or renew coverage under this Subsection must submit a new NOI Form not less than 180 days prior to the expiration date of coverage, unless permission for a later date has been granted by the Department. In the event that the permittee submits a timely request to extend or renew existing coverage, and the Department through no fault of the permittee, is unable to make a final determination on the request before the expiration date of coverage, the terms and conditions of the existing coverage shall be continued and remain fully effective and enforceable until the Department makes a final determination on the request.

9.8.6.7 Changes in operations including the change of an Operator, change in active ingredients for products used, or change in Pest Management Area, as indicated on the NOI will require the submittal of a new NOI not to exceed thirty (30) days after the anniversary of the previous NOI submittal.

9.8.6.8 Failure to Notify

Persons who discharge pesticides and meet the criteria of 9.8.4.2 who fail to notify the Department of their intent to be covered under this Subsection, or who discharge to waters of the State without an individual NPDES permit, are in violation of 7 **Del.C.** Ch. 60 and the federal Clean Water Act and may be subject to penalties.

9.8.7 Notice of Termination (NOT)

9.8.7.1 Coverage under this Subsection continues until a completed Notice of Termination (NOT) form has been submitted to the Department. The NOT shall be submitted on a form provided by the Department. Failure to submit a complete and accurate NOT form will result in the facility being denied termination under this Subsection.

9.8.7.2 All NOT submissions must follow Signatory Requirements as described in 9.8.14, and must be sent to the address as provided in 9.8.15.

9.8.7.3 The NOT Form shall be submitted within 30 days after one or more of the following conditions have been met:

9.8.7.3.1 A new owner or Operator has taken over responsibility of the original Operator;

9.8.7.3.2 Operators have ceased applying and, therefore, are no longer discharging; or

9.8.7.3.3 Coverage under an individual permit has been granted by the Department.

9.8.8 Individual NPDES Permit Coverage

9.8.8.1 Requirements for Coverage under an Individual Permit

The Department may require the Operator to apply for and/or obtain authorization to discharge under an individual NPDES permit in accordance with Section 6.0 of the "Regulations Governing the Control of Water Pollution". If the Department requires Operator to apply for an individual NPDES permit, the Department will notify the Operator in writing that a permit application is required. This notification will include a brief statement of the reasons for this decision and will provide application information. In addition, if the Operator's discharges are authorized under this regulation, the notice will set a deadline to file the permit application, and will include a statement that on the effective date of the individual NPDES permit coverage under this regulation will terminate. The Department may grant additional time to submit the application if the Operator submits a request setting forth reasonable grounds for additional time. If the Operator is covered and fails to submit an individual NPDES permit application as required by the Department, then the applicability of this permit to the Operator is terminated at the end of the day specified by the Department as the deadline for

application submittal. The Department may take enforcement action for any unpermitted discharge or violation of any permit requirement.

9.8.8.2 Request for Coverage under an Individual NPDES Permit

The Operator may apply for an individual permit. In such a case, the Operator must submit an individual permit application in accordance with the requirements of Section 6.0 of the "Regulations Governing the Control of Water Pollution", with reasons supporting the request, to the Department. The request may be granted by issuance of an individual permit if the Operator's reasons are warranted.

When an individual NPDES permit is issued to the Operator to discharge a pollutant to Waters of the State as a result of a pesticide application, the Operator's authorization to discharge under this regulation is terminated on the effective date of the individual permit.

9.8.9 Operator's Responsibilities (All Operators)

9.8.9.1 Requirement to Use Best Management Practices

Operators are required to comply with all other applicable federal or state laws and regulations that pertain to application of pesticides.

If an Operator's discharge of pollutants results from the application of pesticide that is being used solely for the purpose of "pesticide research and development," as defined in 9.8.2, the Operator must use such pesticide consistent with any applicable research plan and experimental use permit.

To meet the requirements of this regulation, all Operators must implement 9.8.9.1 to minimize the discharge of pesticides to Waters of the State from the application of pesticides, through the use of Pest Management Measures, as defined in 9.8.2.

9.8.9.1.1 To the extent determined by the Operator, use only the amount of pesticide and frequency of pesticide application necessary to control the target pest, using equipment and application procedures appropriate for this task.

9.8.9.1.2 Maintain pesticide application equipment in proper operating condition, including requirement to calibrate, clean, and repair such equipment and prevent leaks, spills, or other unintended discharges.

9.8.9.1.3 Assess weather conditions (e.g. temperature, precipitation and wind speed) in the treatment area to ensure application is consistent with all applicable state and federal requirements.

9.8.9.1.4 Problem Identification for All Pest Management Options

Prior to the first pesticide application covered under this permit that will result in a discharge to Waters of the State, and at least once each calendar year thereafter prior to the first pesticide application for that calendar year, Operators that are required to have a PDMP as described in 9.8.10 must do the following for each pest management area, as defined in 9.8.2:

9.8.9.1.4.1 Mosquito and Other Flying Insect Pest Control (Adulticide and larvaecide)

Establish densities for larval and adult mosquito or flying insect pest populations or identify environmental condition(s), either current or based on historical data, to serve as action threshold(s) for implementing Pest Management Measures;

Identify target pest(s) to develop Pest Management Measures based on developmental and behavioral considerations for each pest;

Identify known breeding sites for source reduction, larval control program, and habitat management;

Analyze existing surveillance data to identify new or unidentified sources of mosquito or flying insect pest problems as well as sites that have recurring pest problems; and

In the event there are no data for the pest management area in the past calendar year, use other available data as appropriate to meet the conditions in 9.8.9.1.4.1.

9.8.9.1.4.2 Weed and Algae Pest Control

Identify areas with pest problems and characterize the extent of the problems, including, for example, water use goals not attained (e.g. wildlife habitat, fisheries, vegetation, and recreation);

Identify target pest(s);

Identify possible factors causing or contributing to the pest problem (e.g., nutrients, invasive species, etc.);

Establish any pest-and site-specific action threshold, as defined in 9.8.2, for implementing 9.8.9.2; and

In the event there are no data for the pest management area in the past calendar year, use other available data as appropriate to meet the permit conditions in 9.8.9.1.4.2.

9.8.9.1.4.3 Animal Pest Control

Identify areas with pest problems and characterize the extent of the problems, including, for example, water use goals not attained (e.g. wildlife habitat, fisheries, vegetation, and recreation);

Identify target pest(s);

Identify possible factors causing or contributing to the problem (e.g., nutrients, invasive species);

Establish any pest-and site-specific action threshold, as defined in 9.8.2 for implementing 9.8.9.2; and

In the event there are no data for the pest management area in the past calendar year, use other available data as appropriate to meet the permit conditions in 9.8.9.1.4.3.

9.8.9.1.4.4 Forest Canopy Pest Control

Establish any pest-and site-specific action threshold, as defined in 9.8.2, for implementing 9.8.9.2;

Identify target pest(s) to develop Pest Management Measures based on developmental and behavioral considerations for each pest;

Identify current distribution of the target pest and assess potential distribution in the absence of Pest Management Measures; and

In the event there are no data for the pest management area in the past calendar year, use other available data as appropriate to meet the permit conditions in 9.8.9.1.4.4.

9.8.9.2 Utilization of Best Available Technology for All Pest Management Options

Prior to the first pesticide application covered under this Subsection that will result in a discharge to Waters of the State and at least once each calendar year thereafter prior to the first pesticide application for that calendar year, Operators must select and implement efficient and effective means of Pest Management Measures that minimize discharges resulting from the application of pesticides to control mosquitoes or other flying insect pests, weed and algae pests, animal pests, and forest canopy pests. In developing the Pest Management Measures for each pest management area, the Operator must evaluate the following management options, including a combination of these management options, considering impact to water quality, impact to non-target organisms, feasibility, and cost effectiveness:

9.8.9.2.1 No action

9.8.9.2.2 Prevention

9.8.9.2.3 Mechanical or physical methods

9.8.9.2.4 Cultural methods

9.8.9.2.5 Biological control agents

9.8.9.2.6 Pesticides

If a pesticide is selected to manage pests and application of the pesticide will result in a discharge to a Waters of the State, Operators must:

Conduct surveillance in an area that is representative of the pest problem prior to each pesticide application to assess the pest management area and to determine when the action threshold(s) is met. Surveillance may include larval and/or adult life stages, or evaluation of existing larval surveillance data, environmental conditions, or data from adjacent areas; and

Reduce the impact on the environment and on non-target organisms by applying the pesticide only when the action threshold(s) has been met; and

In situations or locations where practicable and feasible for efficacious control, use larvicides as a preferred pesticide for mosquito or flying insect pest control when the larval action threshold(s) has been met; and

In situations or locations where larvicide use is not practicable or feasible for efficacious control, use adulticides for mosquito or flying insect pest control when the adult action threshold(s) has been met; and

Evaluate using pesticides against the most susceptible developmental stage.

9.8.9.3 Visual Monitoring Requirements

During any pesticide application with discharges authorized under this permit, all Operators must, when considerations for safety and feasibility allow, visually assess the area to and around where pesticides are applied for possible and observable adverse incidents, as defined in 9.8.2, caused by application of pesticides, including the unanticipated death or distress of non-target organisms and disruption of wildlife habitat, recreational or municipal water use.

9.8.9.4 Observational Monitoring Requirements

9.8.9.4.1 The amount of pesticide applied shall be monitored to ensure that the lowest effective amount is used to control the pest, consistent with reducing the potential for development of pest resistance without exceeding the maximum allowable rate of the product label.

9.8.9.4.2 Pesticide application activities shall be monitored to ensure that regular maintenance activities are being performed and that application equipment is in proper operating condition to reduce the potential for leaks, spills, or other unintended discharge of pesticides to surface waters.

9.8.9.4.3 Pesticide application activities shall also be monitored to ensure that the application equipment is in proper operating condition by adhering to any manufacturer's conditions and industry practices and by calibrating, cleaning, and repairing equipment on a regular basis.

9.8.9.5 Water Quality-Based Effluent Limitations and Monitoring

Although no numeric water-quality based effluent limits are established under this Subsection, all Operators must control discharges as necessary to meet applicable numeric and narrative state water quality standards, for any discharges authorized under this Subsection, with compliance required upon beginning such discharge.

If at any time an Operator becomes aware or the Department determines that the Operator's discharge causes or contributes to an excursion of any applicable water quality standard, the Operator must take corrective action as required in 9.8.11 up to and including the ceasing of the discharge, if necessary, and the Department can require water quality-based monitoring by the Operator deemed to be necessary at any time. In this circumstance, test procedures shall be approved under 40 CFR Part 136. Calculations for all limitations that require averaging of measurements must use an arithmetic mean unless otherwise specified by the Department.

9.8.10 Pesticide Discharge Management Plan (PDMP) Requirements

9.8.10.1 PDMP development applies to any one of the following:

9.8.10.1.1 Any Operator (including municipalities) that qualify as a Large Entity, as defined in 9.8.2; or,

9.8.10.1.2 All State of Delaware Operators, as an Operator has been defined in 9.8.2.

9.8.10.2 Except for any application made in response to a Declared Pest Emergency, as defined in 9.8.2, all entities as defined in 9.8.10.1 must prepare a Pesticide Discharge Management Plan (PDMP) within ninety (90) days of regulatory promulgation, or prior to the first pesticide application covered under this permit thereafter. It is the Operator's responsibility to keep the plan up-to-date for the duration of coverage, even if the Operator discharges subsequently fall below the applicable threshold. The Operator will be required to develop a PDMP consistent with the deadlines outlined in Table 2 below.

Table 2. Pesticide Discharge Management Plan Deadline

Category	PDMP Deadline
Operators who know prior to commencement of discharge that they will meet the criteria of being a Large Entity.	Within 90 days of regulatory promulgation or prior to first pesticide application covered under this permit.
Operators who do not know until after commencement of discharge that they will exceed the thresholds associated with becoming a Large Entity, as identified in 9.8.2.	Prior to exceeding thresholds associated with becoming a Large Entity.
Operators commencing discharge in response to a Declared Pest Emergency as defined in 9.8.2 that will cause the Operator to exceed thresholds associated with becoming a Large Entity.	No later than 90 days after responding to Declared Pest Emergency.

The PDMP does not contain numeric effluent limitations; non-numeric effluent limitations are specified in 9.8.9.3-9.8.9.5. The PDMP documents how Operators will implement the non-numeric effluent limitations, including the evaluation and selection of Pest Management Measures to meet those non-numeric effluent limitations in order to minimize discharges. In the PDMP, Operators may incorporate by reference any procedures or plans in other documents that meet the requirements of this regulation. If Operators rely upon other documents to comply with the non-numeric effluent limitations, such as a preexisting pest management plan, the Operator(s) must attach to the PDMP a copy of any portions of any documents that are used to document the implementation of the non-numeric effluent limitations.

9.8.10.3 Contents of the Pesticide Discharge Management Plan

The PDMP must include the following elements:

9.8.10.3.1 Address where PDMP, records, and associated documents are kept;

9.8.10.3.2 Copy of the up-to-date NOI submitted to the Department.

9.8.10.3.3 Pesticide Discharge Management Team:

The Operator shall identify all the persons (by name and contact information) who compose the team as well as each person's individual responsibilities, including:

Person(s) responsible for managing pests in relation to the pest management area;

Person(s) responsible for developing and revising the PDMP; and

Person(s) responsible for developing, revising, and implementing corrective actions and other non-numeric effluent limitation requirements;

9.8.10.3.4 Problem Identification;

Pest problem description. Document a description of the pest problem at the pest management area, including identification of the target pest(s), source(s) of the pest problem, and source of data used to identify the problem in 9.8.9.1.4.

Action Threshold(s). Describe the action threshold(s) for the pest management area, including data used in developing the action threshold(s) and method(s) to determine when the action threshold(s) has been met

General location map. In the plan, include a general location map (e.g., USGS quadrangle map, a portion of a city or county map, or other map) that identifies the geographic boundaries of the area to which the plan applies and location of the Waters of the State and

Water quality standards. Document any Tier 3 and any water(s) identified as impaired by a substance which either is an active ingredient or a degradate of such an active ingredient.

9.8.10.3.5 Pest Management Options Evaluation;

Operators shall document the evaluation of the pest management options, including combination of the pest management options, to control the target pest(s). Pest management options include the following: No action, prevention, mechanical/ physical methods, cultural methods, biological control agents, and pesticides. In the evaluation, Operators shall consider the impact to water quality, impact to non-target organisms, feasibility, cost effectiveness, and any relevant previous Pest Management Measures.

9.8.10.3.6 Response Procedures;

Operators shall document the following procedures in the PDMP;

9.8.10.3.6.1 Spill Response Procedures – At a minimum, Operators shall have;

Procedures for expeditiously stopping, containing, and cleaning up leaks, spills, and other releases to Waters of the State. Persons who may cause, detect, or respond to a spill or leak must be trained in these procedures and have necessary spill response equipment available. If possible, one of these individuals should be a member of the PDMP team.

Procedures for notification of appropriate facility personnel, emergency response agencies, and regulatory agencies.

9.8.10.3.6.2 Adverse Incident Response Procedures – At a minimum, Operators shall have;

Procedures for responding to any adverse incident resulting from pesticide applications;

Procedures for notification of the adverse incident, both internal to the Operator's agency/organization and external. Contact information for state/federal permitting agency, nearest emergency medical facility, and nearest hazardous chemical responder must be in locations that are readily accessible and available.

9.8.10.3.7 Documentation to support eligibility considerations under other federal laws;

9.8.10.3.8 Summary of how monitoring and effluent requirements are being met; and,

9.8.10.3.9 Signature page per requirements in 9.8.10.4 and 9.8.14.

9.8.10.4 Pesticide Discharge Management Plan Modifications

Operators shall modify the PDMP whenever necessary to address any of the triggering conditions for corrective action in 9.8.11 or when a change in pest control activities significantly changes the type or quantity of pollutants discharged. Changes to the PDMP must be made before the next pesticide application that results in a discharge, if practicable, or if not, no later than 90 days after any change in pesticide application activities. The revised PDMP must be signed and dated in accordance with 9.8.10.4.

9.8.10.5 Pesticide Discharge Management Plan Availability

The Operator shall retain a copy of the current PDMP, along with all supporting maps and documents, at the address provided in PDMP. The PDMP and all supporting documents must be readily available, upon request, and copies of any of these documents provided, upon request, to the Department. The Department may provide copies of the PDMP or other information related to this permit that is in its possession to members of the public. Any Confidential Business Information (CBI), as defined in 40 CFR Part 2, may be withheld from the public provided that a claim of confidentiality is properly asserted and documented in accordance with 40 CFR Part 2; however, CBI must be submitted to the Department, if requested, and may not be withheld from those staff within the Department cleared for CBI review.

9.8.10.6 Signature Requirements.

9.8.10.6.1 The Operator shall sign, date, and certify the PDMP in accordance with 9.8.14.

9.8.10.6.2 Any Pesticide Discharge Management Plan (PDMP), including changes to the PDMP to document any corrective actions taken as required by 9.8.12 and all requested reports submitted to the Department, must be signed by a person described in 9.8.11 or by a duly authorized representative of that person. A person is a duly authorized representative only if the following are true:

9.8.10.6.2.1 The authorization is made in writing by a person described in 9.8.14.

9.8.10.6.2.2 The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated activity such as the position of superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company. (A duly authorized representative may thus be either a named individual or any individual occupying a named position); and

9.8.10.6.2.3 The signed and dated written authorization is included in the PDMP. A copy must be submitted to the Department, if requested.

9.8.10.6.3 All other changes to the PDMP, and other compliance documentation required under this permit, must be signed and dated by the person preparing the change or documentation.

9.8.10.6.4 Any person signing documents in accordance with 9.8.14 above must include the following certification:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information contained therein. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information contained is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

9.8.10.6.5 The CWA provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance will, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than 6 months per violation, or by both.

9.8.11 Corrective Action

All Operators must comply with the provisions of 9.8.11 for any authorized discharges, with compliance required upon beginning such discharge.

9.8.11.1 Situations Requiring Revision of Control Measures

Operators must review and, as necessary, revise the evaluation and selection of Pest Management Measures, Best Management Practices, and utilization of Best Available Technology as described in 9.8.9.1 and 9.8.9.2 for the following situations:

9.8.11.1.1 An unauthorized release or discharge associated with the application of pesticides (e.g., spill, leak, or discharge not authorized by this or another NPDES permit) occurs.

9.8.11.1.2 Operators become aware, or the Department concludes, that Pest Management Measures are not adequate/sufficient for the discharge to meet applicable water quality standards.

9.8.11.1.3 Any monitoring activities indicate failure to meet applicable technology-based non-numeric effluent limitations in 9.8.9.5.

9.8.11.1.4 An inspection or evaluation of activities by an EPA official or the Department reveals that modifications are necessary to meet the non-numeric effluent limitations in this permit.

9.8.11.1.5 Any Operator observes or is otherwise made aware of an adverse incident as defined in 9.8.2.

9.8.11.2 Corrective Action Deadlines

If an Operator determines that changes to Pest Management Measures, Best Management Practices, and Utilization of Best Available Technology as in 9.8.9.1 and 9.8.9.2 are necessary to eliminate any situation identified, such changes must be made before or, if not practicable, as soon as possible after the next pesticide application that results in a discharge.

9.8.11.3 Effect of Corrective Action

The occurrence of a situation identified in 9.8.11.1 may constitute a violation of this Subsection. Correcting the situation according to 9.8.11.1 does not absolve the Operator of liability for any original violation. However, failure to comply with 9.8.11.1 constitutes an additional violation. The Department will consider the appropriateness and promptness of corrective action in determining enforcement responses to permit violations.

The Department or a court may impose additional requirements and schedules of compliance, including requirements to submit additional information concerning the condition(s) triggering corrective action or schedules and requirements more stringent than specified in this Subsection. Those requirements and schedules will supersede those of 9.8.11.1 if such requirements conflict.

9.8.11.4 Adverse Incident Documentation and Reporting

9.8.11.4.1 Twenty-Four (24) Hour Adverse Incident Notification

Except as provided for in 9.8.11.4.5, if an Operator observes or is otherwise made aware of an adverse incident as defined in 9.8.2, which may have resulted from a discharge from a pesticide application, the Operator must immediately notify the Department. Operators must also report any noncompliance which may endanger health or the environment with the same 24-hour timeframe.

Such notification must be made by telephone by calling the Spill Notification Hotline at 1-800-662-8802 within 24 hours of the Operator becoming aware of the adverse incident and must include at least the following information:

9.8.11.4.1.1 The caller's name and telephone number;

9.8.11.4.1.2 Operator name and mailing address;

9.8.11.4.1.3 The name and telephone number of a contact person, if different than the person providing the 24-hour notice;

9.8.11.4.1.4 How and when the Operator became aware of the adverse incident;

9.8.11.4.1.5 Location of incident, including the names of any waters affected and appearance of those waters (sheen, color, clarity, etc);

9.8.11.4.1.6 The pesticide product (including EPA pesticide registration number), rate of application, method of application for each product applied in the area of the adverse incident;

9.8.11.4.2.7 A description of the circumstances of the adverse incident including species affected, estimated number of individual and approximate size of dead or distressed organisms;

9.8.11.4.1.8 If known, the identity of any other Operators authorized for coverage under this Subsection for discharges from the pesticide application activities that resulted in the adverse incident; and

9.8.11.4.1.9 Description of any steps the Operator has taken or will take to correct, repair, remedy, clean up, or otherwise address any adverse effects.

If an Operator is unable to notify the Department within 24 hours, the Operator must do so as soon as possible and also provide the rationale for why the Operator was unable to provide such notification within 24 hours.

9.8.11.4.2 Requirement for Thirty (30) Day Adverse Incident Written Report

Except as provided for in 9.8.11.4.5, within 30 days of a reportable adverse incident or health to humans or the environment, Operators must provide a written report of the adverse incident to the Department to the address as provided in 9.8.15. The adverse incident report must include at least the following information:

9.8.11.4.2.1 All information also provided in 9.8.11.4.1 above;

9.8.11.4.2.2 Date and time the Operator contacted the Department notifying the Department of the adverse incident, who the Operator spoke with, and any instructions received;

9.8.11.4.2.3 Magnitude and scope of the affected area (e.g., aquatic square area or total stream distance affected);

9.8.11.4.2.4 Description of the habitat and the circumstances under which the adverse incident occurred (including any available ambient water data for pesticides applied);

9.8.11.4.2.5 If laboratory tests were performed, an indication of which test(s) were performed, and when; additionally, a summary of the test results must be provided within 5 days after they become available if not available at the time of submission of the 30-day report;

9.8.11.4.2.6 Description of actions to be taken to prevent recurrence of adverse incidents; and,

9.8.11.4.2.7 Signatory requirements in accordance with 9.8.14.

9.8.11.4.3 Notification and Reporting for Adverse Incidents Involving Multiple Operators

Where multiple Operators are authorized for a discharge that results in an adverse incident, notification and reporting by any one of the Operators constitutes compliance for all of the Operators, provided a copy of the written report required in 9.8.11.4.3 is also provided to all of the other authorized Operators within 30 days of the reportable adverse incident.

9.8.11.4.4 Instances when Notification is not Required for Adverse Incidents

Reporting of adverse incidents is not required under this permit in the following situations:

9.8.11.4.4.1 An Operator is aware of facts that clearly establish that the adverse incident was not related to toxic effects or exposure from the pesticide application;

9.8.11.4.4.2 An Operator has been notified by the Department, and retains such notification, that the reporting requirement has been waived for this incident or category of incidents;

9.8.11.4.4.3 An Operator receives information of an adverse incident, but that information is clearly erroneous; or

9.8.11.4.4.4 An adverse incident occurs to pests that are similar in kind to potential target pests identified on the FIFRA label.

9.8.11.5 Reportable Spills and Leaks

Where a leak, spill, or other release into Waters of the State containing a hazardous substance or oil in an amount equal to or in excess of a reportable quantity established under either 40 CFR Part 110, 40 CFR Part 117, or 40 CFR Part 302 occurs in any 24-hour period, an Operator must notify the Department immediately by calling the Spill Notification 24 hour HOTLINE at (800) 662-8802 in accordance with the requirements of 40 CFR Part 110, 40 CFR Part 117, and 40 CFR Part 302, and Title 7, Delaware Code, Section 6028(a) as soon as the Operator has knowledge of the release. Contact information must be in locations that are readily accessible and available in the area where the spill, leak, or other unpermitted discharge may occur.

State or local requirements may necessitate also reporting spills or leaks to local emergency response, public health, or drinking water supply agencies.

If an Operator becomes aware of a spill, leak, or other unpermitted discharge in an amount equal to or in excess of a reportable quantity established under 40 CFR Part 110, 40 CFR Part 117, or 40 CFR Part 302, the Operator must additionally follow the written reporting protocol as described in 9.8.11.4.3.

9.8.11.6 Other Corrective Action Documentation

For situations identified in 9.8.11.1, other than for adverse incidents (addressed in 9.8.11.4), or reportable spills or leaks (addressed in 9.8.11.5), Operators must document the situation triggering corrective action and planned corrective action within 30 days of becoming aware of that situation, and retain a copy of this documentation. This documentation must include the following information:

9.8.11.6.1 Identification of the condition triggering the need for corrective action review, including any ambient water quality monitoring that assisted in determining that discharges did not meet water quality standards;

9.8.11.6.2 Brief description of the situation;

9.8.11.6.3 Date the problem was identified;

9.8.11.6.4 Brief description of how the problem was identified and how the Operator learned of the situation and date the Operator learned of the situation;

9.8.11.6.5 Summary of corrective action taken or to be taken including date initiated and date completed or expected to be completed; and,

9.8.11.6.6 Any measures to prevent reoccurrence of such an incident, including notice of whether PDMP modifications are required as a result of the incident.

9.8.12 Recordkeeping

Operators must keep written records as required in this Subsection for all discharges covered under this Subsection. These records must be accurate and complete to demonstrate compliance with the conditions of this Subsection. Operators may rely on records and documents developed for other obligations, such as requirements under FIFRA, and state or local pesticide programs, provided all requirements of this Subsection are satisfied.

The Department recommends that all makers, who are or may be required to develop a PDMP, keep records of acres or linear miles treated for all applicable use patterns covered under this Subsection.

9.8.12.1 Recordkeeping for All Operators

9.8.12.1.1 All Operators must keep the following records:

9.8.12.1.1.1 A copy of this Subsection (an electronic copy is also acceptable);

9.8.12.1.1.2 A copy of any Adverse Incident Reports;

9.8.12.1.1.3 Rationale for any determination that reporting of an identified adverse incident is not required consistent with allowances identified in 9.8.11.4.2;

9.8.12.1.1.4 A copy of any corrective action documentation;

9.8.12.1.1.5 Proof of Aquatic Pesticides License through the Delaware Department of Agriculture;

9.8.12.1.1.6 A copy of any spill and leak or other unpermitted discharge documentation; and

9.8.12.1.1.7 Documentation of equipment calibration;

9.8.12.1.1.8 Description of each treatment area, including location and size (acres or linear feet) of treatment area and identification of any waters, either by name or by location, to which pesticide(s) are discharged;

9.8.12.1.1.9 Pesticide use pattern(s) (i.e., mosquito and other flying insects, weed and algae, animal pest, or forest canopy);

9.8.12.1.1.10 Target pest(s);

9.8.12.1.1.11 Name of each pesticide product used including the EPA registration number;

9.8.12.1.1.12 Quantity and rate of each pesticide product applied to each treatment area;

9.8.12.1.1.13 Pesticide application date(s); and,

9.8.12.1.1.14 Whether or not visual monitoring was conducted during pesticide application and/or post-application and if not, why not and whether monitoring identified any possible or observable adverse incidents caused by application of pesticides.

9.8.12.1.2 All required records must be documented as soon as possible but no later than 14 days following completion of each pesticide application. Operators must retain any records required under this permit for minimum of 5 years. Operators must make available to the Department, including an authorized representative of the Department, all records kept under this Subsection upon request and provide copies of such records upon request.

9.8.12.2 Recordkeeping for Operators Who Are For-Hire Only

9.8.12.2.1 Any Operator, who is a For-Hire, as defined in 9.8.2, must retain the following records:

9.8.12.2.1.1 Documentation of equipment calibration;

9.8.12.2.1.2 Description of each treatment area, including location and size (acres or linear feet) of treatment area and identification of any waters, either by name or by location, to which pesticide(s) are discharged;

9.8.12.2.1.3 Pesticide use pattern(s) (i.e., mosquito and other flying insects, weed and algae, animal pest, or forest canopy);

9.8.12.2.1.4 Target pest(s);

9.8.12.2.1.5 Name of each pesticide product used including the EPA registration number;

9.8.12.2.1.6 Quantity of each pesticide product applied to each treatment area;

9.8.12.2.1.7 Pesticide application date(s); and,

9.8.12.2.1.8 Whether or not visual monitoring was conducted during pesticide application and/or post-application and if not, why not and whether monitoring identified any possible or observable adverse incidents caused by application of pesticides.

9.8.12.2.2 All required records must be documented as soon as possible but no later than 14 days following completion of each pesticide application. Operators must retain any records required under this permit for minimum of 5 years. Operators must make available to the Department, including an authorized representative of the Department, all records kept under this Subsection upon request and provide copies of such records upon request.

9.8.12.3 Recordkeeping for Any Operator Considered a Large Entity

9.8.12.3.1 All Operators are considered a Large Entity by 9.8.2 must keep the following records:

9.8.12.3.1.1 All information as described in 9.8.12.1 above;

9.8.12.3.1.2 A copy of the most recent PDMP; and,

9.8.12.3.1.3 Copy of annual reports submitted to the Department as described in 9.8.13.

9.8.12.3.2 All required records must be documented as soon as possible but no later than 14 days following completion of each pesticide application. Operators must retain any records required under this permit for minimum of 5 years. Operators must make available to the Department, including an authorized representative of the Department, all records kept under this Subsection upon request and provide copies of such records upon request.

9.8.13 Annual Reporting

9.8.13.1 Annual Reporting Requirements

Operators who are considered a Large Entity as defined in 9.8.2 must submit an annual report to the Department. Once an Operator meets the obligation to submit an annual report, the Operator must submit the annual report each calendar year thereafter for the duration of coverage under this Subsection, whether or not the Operator has discharges from the application of pesticides in any subsequent calendar year. The annual report must be submitted no later than January 1 of the following year for all pesticide activities covered under this Subsection occurring during the previous calendar year. Annual reporting requirements begin with those discharges occurring during calendar year 2012.

The annual report must contain the following information:

9.8.13.1.1 Operator's name and contact information;

9.8.13.1.2 Delaware Department of Agriculture Applicator Certification Number;

9.8.13.1.3 Contact person name, title, e-mail address (if any), and phone number; and,

9.8.13.1.4 For each treatment area, report the following information:

9.8.13.1.4.1 Description of each treatment area, including location and size (acres or linear feet) of treatment area and identification of any Waters of the State, either by name or by location, to which pesticide(s) are discharged;

9.8.13.1.4.2 Pesticide use pattern(s) (i.e., mosquito and other flying insects, weed and algae, animal pest, or forest canopy);

9.8.13.1.4.3 Company name(s) and contact information for pesticide Operator;

9.8.13.1.4.4 Total amount of each pesticide product applied for the reporting year by the EPA registration number(s) and by application method (e.g., aerially by fixed-wing or rotary aircraft, broadcast spray, etc.);

9.8.13.1.4.5 Whether this pest control activity was addressed in the PDMP prior to pesticide application;

9.8.13.1.4.6 If applicable, an annual report of any adverse incidents as a result of these treatment(s), for incidents, as described in 9.8.11.4; and,

9.8.13.1.4.7 If applicable, description of any corrective action(s), including spill responses, resulting from pesticide application activities and the rationale for such action(s).

9.8.13.2 Annual Reporting for All Other Operators

Annual reporting will not be required for Operators other than as specified above in 9.8.13.1.

9.8.14 Signatory Requirements

9.8.14.1 For a corporation: By a responsible corporate officer. For the purpose of this subsection, a responsible corporate officer means: (i) a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation, or (ii) the manager of one or more manufacturing, production, or operating facilities, provided, the manager is authorized to make management decisions that govern the operation of the regulated activity including having the explicit or implicit duty of making major capital investment recommendations, and initiating and directing other comprehensive measures to assure long-term environmental compliance with environmental laws and regulations;

the manager can ensure that the necessary systems are established or actions taken to gather complete and accurate information for permit application requirements; and where authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

9.8.14.2 For a partnership or sole proprietorship: By a general partner or the proprietor, respectively; or

9.8.14.3 For a municipality, state, federal, or other public agency: By either a principal executive officer or ranking elected official. For purposes of this subsection, a principal executive officer includes (i) the chief executive officer of the agency, or (ii) a senior executive officer having responsibility for the overall operations of a principal geographic unit or the agency (e.g., Section Manager or Division Director).

9.8.15 Address for Written Notifications to the Department

Written correspondence to the Department should be addressed to:

Delaware Department of Natural Resources and Environmental Control
Division of Water
Surface Water Discharges Section – NPDES
89 Kings Highway
Dover, DE 19901

9.8.16 Standard Conditions

9.8.16.1 Penalties for Violations

Any person who violates conditions of this Subsection may be subject to penalties in accordance with 7 Del.C. Chapter 40, 7 Del.C. Chapter 60, or both. Violation of this Subsection is also a violation of the Clean Water Act and may be subject to penalties established under that statute.

9.8.16.2 Need to Halt or Reduce Activity Not a Defense

It shall not be a defense for an Operator in an enforcement action that it would have been necessary to halt or reduce the permitted activity to maintain compliance with the conditions of this Subsection.

9.8.16.3 Duty to Mitigate

Operators must take all reasonable steps to minimize or prevent any discharge in violation of this Subsection, which has a reasonable likelihood of adversely affecting human health or the environment.

9.8.16.4 Other State and Federal Laws

Nothing shall be construed to preclude the institution of any legal action or relieve any person subject to this regulation from any responsibilities, liabilities, or penalties established pursuant to any applicable State or Federal law or regulation.

9.8.16.5 Proper Operation and Maintenance

Operators must at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which the Operators installs or uses to achieve compliance with the conditions of this Subsection. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of backup or auxiliary facilities or similar systems which the Operator installs only when the operation is necessary to achieve compliance with the conditions of this Subsection.

9.8.16.6 Property Rights

Coverage under this Subsection does not convey any property rights of any sort, any exclusive privileges, any authorization to damage, injure or use any private property, any authority to invade personal rights, any authority to violate federal, State, or local laws or regulations, or any taking, condemnation or use of eminent domain against any property owned by third parties. The Department does not warrant that the Operator's compliance

with this Subsection and operation under this Subsection will not cause damage, injury, or use of private property, an invasion of personal rights, or violation of federal, state, or local laws or regulations. The Operator is solely and severably liable for all damage, injury or use of private property, invasion of personal rights, infringement of federal, State, or local laws and regulations, or taking or condemnation of property owned by third parties, which may result from actions taken under the Subsection.

9.8.16.7 Duty to Provide Information

The Operator shall furnish to the Department, within a reasonable timeframe, any information which the Department may request to determine cause for modifying, revoking and reissuing, or terminating coverage, or to determine compliance with this Subsection. The Operator shall also furnish to the Department upon request, copies of records required to be maintained by this Subsection.

9.8.16.8 Inspection and Entry

Operators must allow the Department upon presentation of credentials and other documents as may be required by law, to do the following:

9.8.16.8.1 Enter upon an Operator's premises where a regulated activity is located or conducted, or where records must be kept under the conditions of this permit;

9.8.16.8.2 Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;

9.8.16.8.3 Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and,

9.8.16.8.4 Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the CWA, any substances or parameters at any location.

9.8.16.9 Upset

9.8.16.9.1 Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based non-numeric effluent limitations if the requirements of 9.8.9.1-9.8.9.5 (where applicable) are met. Any determination made during administrative review of claims that noncompliance was caused by an upset, and before an action for noncompliance, is not final administrative action subject to judicial review.

9.8.16.9.2 Conditions necessary for a demonstration of upset. An Operator who wishes to establish the affirmative defense for an upset must demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

9.8.16.9.2.1 An upset occurred and that the Operator can identify the cause(s) of the upset;

9.8.16.9.2.2 The permitted activity was at the time being properly operated;

9.8.16.9.2.3 The Operator submitted notice of the upset as required in 9.8.11.4 (24 hour notice); and,

9.8.16.9.2.4 The Operator complied with any remedial measures required under this Subsection.

9.8.16.9.3 Burden of proof. In any enforcement proceeding, the Operator, as the one seeking to establish the occurrence of an upset, has the burden of proof.

9.8.16.10 Severability. Invalidation of a portion of this regulation does not render the whole regulation invalid. The Department's intent is that the regulation will remain in effect to the extent possible; in the event that any part of this regulation is invalidated, the remaining parts of the regulation will remain in effect unless the Department issues a written statement otherwise.

9.8.16.11 Continuation of Regulatory Requirements. The requirements of this Subsection shall continue in force and effect until this regulation is re-promulgated.