COMMISSIONER'S RESPONSE TO PUBLIC COMMENT

The executive director of the Texas Commission on Environmental Quality (commission or TCEQ) files this Response to Public Comment (Response) on Texas Pollutant Discharge Elimination System (TPDES) Permit to Authorize Point Source Discharge of Biological Pesticides and Chemical Pesticides that Leave a Residue in Water General Permit Number TXG870000. As required by Texas Water Code (TWC), §26.040(d) and 30 Texas Administrative Code (30 TAC) §205.3(c), before a general permit is issued, the executive director must prepare a response to all timely, relevant and material, or significant comments. The response must be made available to the public and filed with the Office of the Chief Clerk at least ten days before the commission considers the approval of the general permit. This response addresses all timely received public comments, whether or not withdrawn. Comments received after the end of the comment period on January 18, 2011 are not responded to in this Response. Timely public comments were received from the following persons and entities:

ADAPCO (supports comments of Texas Mosquito Control Association), American Electric Power (AEP), City of Baytown (Baytown), Brazoria County, Burnett Consulting, Caddo Lake Institute, Carol and Blackman, Inc. (CB), Coastal AG Consulting, Cotton and Grain Producers of the Lower Rio Grande Valley (GPLRGV), Sid Chambers, Eastman Chemical Company (ECC), Ray Gomez, Hancock Forest Management (HFM), David Hansen, Harris County, Harris County Flood Control District (HCFCD), Jefferson County Mosquito Control District (JCMCD), Justin Seed Company, Inc. (JSC), The Lake Doctor (Mark Palmer), Lake Pro, Inc. (Lake Pro), Lake Management Services (LSM), Lower Colorado River Authority (LCRA), Lower Neches Valley Authority (LNVA), Lloyd Gosselink Rochelle & Townsend, P.C. (Lloyd Gosselink), Lone Star Chapter of the Sierra Club (Sierra Club) (supports comments of Caddo Lake Institute), Nearly Wild Texas (NWT), Oncor Electric Delivery Company, LLC (ONCOR), Orange County Mosquito Control District (OCMCD), San Jacinto River Authority (SJRA), City of Shoreacres (Shoreacres), Shores Air-Ag, Inc. (Shores Air-Ag), South Texas Cotton and Grain Association (STCGA), Texas Ag Industries Association (TAIA), Texas AgriLife Extension Service (TAES), Texas Aquatic Plant Management Society (TAPMS), Texas Boll Weevil Eradication Foundation, Inc., (TBWEF), Texas Citrus Mutual (TCM), Texas Department of Agriculture (TDA), Texas Farm Bureau (TFB), Texas Forestry Association (TFA), Texas Industry Project, (TIP), Texas Mosquito Control Association (TMCA), Texas Parks & Wildlife Department (TPWD), Texas Pest Control Association (TPCA), Texas Vegetation Management Association (TVMA), West Nueces – Las Moras Soil and Water Conservation District Number236 (WN Number 236), and Williamson County Grain, Inc. (WCG).

Also comments were received from the following related to golf courses: the Vaquero Club, Gentle Creek Golf Club (GC), TPC Craig Ranch, Pecan Grove GC, Lone Star Golf Course Superintendents Association, Horseshoe Bay Resort, River Ridge GC, Shadow Hawk/Houstonian GC, Stephen F. Austin GC, Redstone GC, and Texas Alliance of Recreational Organizations (Golf Courses).

If you need more information about this permit or the wastewater permitting process, please call the TCEQ Office of Public Assistance at 1-800-687-4040. The complete Commissioner's Response to Public Comment may be found at the following website: http://www10.tceq.state.tx.us/epic/CCD/. Additionally, general information about the TCEQ can be found at our website at www.tceq.texas.gov.

Background

Over the past ten years, several courts addressed the question of whether the Clean Water Act (CWA) requires National Pollutant Discharge Elimination System (NPDES) permits for pesticide applications. These cases resulted in some confusion among the regulated community and other affected citizens about the applicability of the CWA to pesticides applied to waters of the U.S.

On November 27, 2006, EPA issued a final rule ("2006 NPDES Pesticides Rule") clarifying two specific circumstances in which a NPDES permit was not required to apply pesticides to or around water. They were: the application of pesticides directly to water to control pests and the application of pesticides to control pests that are present over, including near water where a portion of the pesticides will unavoidably be deposited to the water to target the pests, in both instances provided that the application is consistent with relevant Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) requirements.

On January 9, 2009 the United States (U.S.) Sixth Circuit Court of Appeals held in *National Cotton Council, et al., v. EPA*, 553 F.3d 927 (January 07, 2009) that CWA permits are required for all biological pesticides and chemical pesticides applications that leave a residue in water when such applications are made into or over, including near waters of the U.S. In response to this decision, EPA has developed a draft NPDES pesticides general permit (PGP) and required NPDES authorized states to develop their own PGPs.

The timeline was for EPA to finalize their PGP by December 2010 and for the state issued general permit to be issued and effective by April 9, 2011. However, EPA did not meet their December deadline and have not yet issued the federal version of the PGP.

Procedural Background

TCEQ published notice of the draft PGP to solicit public comment in the *Beaumont Enterprise, Dallas Morning News, Houston Chronicle, Midland Reporter Telegram* and *San Antonio Express* on December 13, 2010 and in the *Texas Register* on December 17, 2010. During the comment period, TCEQ conducted a public meeting on January 12, 2011 to take oral and written testimonies. The public comment period ended on January 18, 2011. TCEQ also took public comment via letter and electronic-comment, receiving written testimony from 5 interested parties and 4 oral comments. This permit is subject to the procedural requirements adopted pursuant to House Bill 801, 76th Legislature, 1999.

COMMENTS and RESPONSES

General Comments

Comment 1:

TDA comments that much thought and hard work went into the development of the PGP and appreciates that TCEQ took into consideration the size of possible pest management areas in the state and for incorporating present pesticide application record keeping requirements in this permit where possible. Therefore, TDA supports the permit.

TMCA and ADAPCO comment that some of their member agencies provided public comment regarding specific aspects of the draft permit and that some of the comments and suggestions were incorporated into the permit. Therefore, TMCA and ADAPCO favor most of the changes that were made and support the changes in the final draft version of the PGP.

TPWD is grateful that TCEQ made a significant effort to engage TPWD and other stakeholders in the process of drafting the permit. TPWD notes that the current version of the permit addresses comments made in response to earlier versions and is grateful for TCEQ's responsiveness to TPWD's concerns.

TPCA comments that TCEQ was attentive to stakeholder input and worked hard on the draft permit. Therefore, TPCA supports the proposed PGP and looks forward to distributing TCEQ educational materials that implement the permit.

TVMA, TAIA, Shores Ag-Air, JSC, and WCG comment that they appreciate the tremendous undertaking by staff at TCEQ to formulate and work with EPA to develop the proposed general permit. They also appreciate the effort made by TCEQ to convince EPA to increase the amount of area treated before a notice of intent (NOI) must be filed.

Response 1:

The Commission acknowledges these comments.

Comment 2:

Caddo Lake Institute and Sierra Club comment that there should be more public participation in the development process of this permit.

WN Number 236 and NWT suggest that a public notice regarding the permit be posted in major newspapers across the state to inform all citizens of this significant environmental regulation and public comment period be extended by 60 days to allow the citizens of Texas time to review the permit and provide comments.

Response 2:

30 TAC §205.3 provides the minimum public participation requirements for development of a general permit. They include:

(a) Notice shall be published as follows

(2) For draft general permits with statewide applicability, notice shall be published in the *Texas Register* and in at least one newspaper of statewide or regional circulation.

(3) The public notice shall be published not later than the 30th day before the commission considers the approval of a general permit.

(c) The contents of a public notice of a draft general permit shall:

(2) include an invitation for written comments by the public regarding the draft general permit;

(3) specify a comment period of at least 30 days

(d) Requirements relating to public meetings are as follows.

(1) The agency may hold a public meeting to provide an additional opportunity for public comment and shall hold such a public meeting when the executive director determines, on the basis of requests, that a significant degree of public interest in a draft general permit exists.

(2) Notice of a public meeting shall be by publication in the *Texas Register* not later than the 30th day before the date of the meeting.

These notice requirements were exceeded in the public participation process for the PGP by:

1. Forming a stakeholder group specifically for development of the PGP,
2. Conducting four stakeholder meetings, posting an initial draft permit on the TCEQ website to solicit comments from stakeholders, and
3. Publishing the notice in five newspapers in the state in addition to publication in the *Texas Register*.

Comment 3:

TIP comments that TCEQ correctly used the federal regulatory definition of waters of the U.S. and correctly explained the exemptions from waters of the U.S. for waste treatment systems and constructed storm water retention and detention ponds in the permit. Therefore, TIP strongly supports limiting permit applicability to discharges directly to waters of the U.S. and the water's edge as the *National Cotton Council* case only relates to point source discharges of pesticides to waters of the U.S. and to waters so near waters of the U.S. that the pesticide will be unavoidably deposited in waters of the U.S.

Response 3:

The Commission acknowledges this comment.

Comment 4:

TPCA commented that they support the definition of “operator,” which allows either the property owner or a decision-making commercial applicator to be eligible for coverage under PGP.

Response 4:

The Commission acknowledges this comment.

Comment 5:

TPCA comments that the Association supports the distinction made between pesticide toxicity levels in the permit.

Response 5:

The Commission acknowledges this comment.

Comment 6:

TAES comments that the general permit could be interpreted by the non-regulated community to subject agricultural producers, pest management professionals, and homeowners to additional liabilities, litigation, added fees, and recordkeeping requirements under the CWA.

TVMA, TAIA, Shores Ag-Air, JSC, WCG, and Coastal AG Consulting comment that the permit is more restrictive than the proposed EPA PGP placing additional costs on maintaining right-of-ways. These costs would have to be passed on to the consumer's electric bill, transportation fuel, heating fuel, transporting freight, taxes, and a never ending list of additional costs.

TAPMS, SJRA, David S. Hansen, TFB, and Coastal AG Consulting comment that the permit will cause economic distress to landowners and private applicators due to the cost and time requirements for monitoring treatments, recordkeeping, and reporting. WN Number 236 and Mr. Hansen are concerned that the permit will be an additional burden to smaller producers of livestock and oppose the permit. WN Number 236 recommends that the permit be issued by TDA and not TCEQ; and that it is a waste of state dollars to have two agencies regulating and monitoring the same activity.

Golf Courses request that the golf industry should be exempt and not subject to this general permit.

WN Number 236 comments that the permit is broader and more stringent than the EPA's proposed PGP and recommends that the state permit not go beyond the federal PGP.

LMS comment that the pesticides permitting process would cause significant problems for TCEQ, the operator, and the owner of the aquatic impoundments that treat for pesticides and cause unnecessary delays for control of pests, which in turn would result in significant increased costs.

Lloyd Gosselink request that TCEQ add a subsection to Part II to clarify that coverage under the permit is not required for applications of pesticides to areas that do not include "waters of the U.S."

TIP suggests that TCEQ create a new section to add a statement to the permit clarifying that the permit is not intended to and does not require discharge authorization for any pesticide application beyond that required by the CWA.

Response 6:

The requirement to obtain permits for point source discharges from pesticide applications to waters of the U.S. stems from a recent decision by the Sixth Circuit Court of Appeals. In its ruling on *National Cotton Council, et al. v. EPA*, the Court ruled that NPDES permits were required for applications of pesticides to, over, or near waters of

the U.S. waters when in compliance with the FIFRA label. The scope of the TPDES PGP is limited to discharges of biological pesticides and chemical pesticides that leave residue in water when such applications are made into, over, or near waters of the U.S. Any operator that discharges biological pesticides or chemical pesticide that leaves a residue in water into, over or near waters of the U.S. must obtain authorization under this permit or an alternate permit for compliance with CWA.

This permit provides coverage for pesticides applications into, over, or near waters of the U.S. for mosquito and other insect pest control, vegetation and algae control, animal pest control, area-wide pest control, and forest canopy pest control. Operators that cannot obtain coverage under this permit will be required to apply for an individual permit if they apply pesticides near waters of the U.S. where pesticides will unavoidably get into those waters. The scope of the permit is broad enough to allow most operators to be able to obtain coverage under a general permit rather than an individual permit.

An economic impact analysis was not done to determine the impact of the permit on the regulated entity. However, EPA performed a draft economic impact analysis for the PGP and found the economic impact on covered entities, including small businesses, to be minimal. Also, the burden to farmers is expected to be minimal because the CWA exempts agricultural storm water and irrigation return flow from NPDES permitting requirements.

In 1998, EPA delegated NPDES authority to TCEQ. TDA is not authorized to issue NPDES permits.

Comment 7:

Golf Courses request that spray drift be exempt from obtaining authorization under this permit.

TMCA and ADAPCO comment that insecticide drift is an important aspect of mosquito control in order to kill mosquitoes, and suggest that a 300 feet limit from the point of pesticide application be specified to define what adjacent means in the permit for ground based ultra low volume spraying.

Response 7:

The PGP authorizes pesticides in, over, and near waters of the U.S. Spray drift resulting from applications that are not made in, over, or near waters of the U.S. are not required to obtain authorization under this permit.

Comment 8:

TIP comments that the language of the PGP and Fact Sheet should be revised to clarify the intent of the permit and that questions and answers guidance document be provided. Golf Courses, TVMA, TAIA, Shores Ag-Air, JSC, WCG, and NWT request that TCEQ develop and implement outreach and education programs across the state to educate all pesticide operators, landscapers, and homeowners about the PGP requirements, prior to the implementation and enforcement of the new permit.

Response 8:

The Fact Sheet for the permit summarizes the terms and intent of the PGP. TCEQ was actively involved in outreach programs throughout the public participation process of

the PGP development (five stakeholders meetings), spreading the word in groups and association meetings, and the pesticides stakeholders website. TCEQ will continue and expand these efforts after the PGP is issued.

Comment 9:

TFB, TAES, TAIA, Coastal AG Consulting, and TCM request adding the term "point source" to the title and first sentence of the permit so that it would not be interpreted that nonpoint source contributions of pesticides also fall under the TPDES general permit.

Response 9:

In response to the comment, the title of the permit was revised to add the phrase "authorize point source" so that it now reads: "General Permit to Authorize Point Source Discharge of Biological Pesticides and Chemical Pesticides That Leave a Residue in Water." Additionally, the first sentence of the cover page was also changed to read: "This general permit authorizes the point source discharge of biological pesticides or chemical pesticides (including insecticides, nematicides, rodenticides, fungicides and herbicides) that leave a residue in water when such applications are made into or over, including near waters of the United States (U.S.) including exceptional, high, intermediate, limited or no significant aquatic life use receiving waters as designated in the Texas Surface Water Quality Standards only according to limitations, requirements and other conditions set forth in this general permit, as well as the rules of the Texas Commission on Environmental Quality (TCEQ), the laws of the State of Texas, and other orders of the TCEQ (Commission). "

Comment 10:

TAES comments that agricultural and silvicultural storm water runoff and return flows from irrigated agriculture should be excluded from obtaining coverage under this permit and that language be added to clearly state the exemption.

Response 10:

In response to the comment, the following sentences were added at the beginning of Part II.C. of the permit: "Irrigation return flows from agriculture or agricultural storm water runoff or nonpoint source silvicultural activities are exempt from this permit even when they contain pesticides or pesticide residues. The CWA specifically exempts these categories of discharges from requiring TPDES permit coverage."

Comment 11:

TFB, STCGA, CGPLRGV, and TIP comment that the application of pesticides "near" waters of the U.S. do not constitute a discharge to waters of the U.S and as such, every instance of "including near" proceeded by waters of the U.S be deleted from the permit. Additionally, TIP recommends that "near" not be applied to vegetation control, algae control, and nuisance animal control use patterns.

Response 11:

If the pesticides application is for treating pests in close proximity to waters of the U.S. where unavoidably the chemicals will get into the water, the pesticide application is a point source or a direct discharge to water. Such discharges must be authorized by this

permit. This rationale applies to all use patterns with the exceptions of the limitations on coverage in Part II.C. of the permit.

Comment 12:

TMCA and ADAPCO comment that the applicability of this permit to other storm water dischargers, e.g. point-source industrial storm water discharges needs to be clarified and conflicting definitions and language need to be addressed.

Response 12:

Irrigation return flows and agricultural storm water runoff do not require TPDES permits even when they contain pesticides or pesticide residues. The CWA exempts these categories of discharges from requiring TPDES permit coverage. Other storm water runoff is either: (a) already required to obtain TPDES permit coverage as established in CWA §402(p) or (b) classified as a non-point source discharge so that TPDES permit coverage is not required.

Comment 13:

WN Number 236 comments that it is impossible to apply a general use pesticide, restricted use pesticide, state limited use (SLU) pesticide, or regulated herbicide to less than one acre of water without it dispersing and it being potentially subjected to runoff.

Response 13:

Operators that will be applying a restricted use pesticide, state-limited-use (SLU) pesticide, or regulated herbicide to areas less than the annual threshold, but greater than one acre are included in Level II. Only operators that will be applying general use pesticides to less than one acre of water of the U.S. in one calendar year are included in Level III.

The PGP establishes the various levels based on the annual threshold, the type of pesticides used, and whether there is public or private access. These factors represent risk levels to human health and the environment. Due to a smaller treatment area, Levels II and III pose a lower risk to human health and the environment. The ED believes that lower risk can be associated with less stringent requirements without impacting human health or the environment. The requirement for Level III is that the operator follows the label instructions.

Comment 14:

NWT suggests that attaching copies of pertinent forms, including the NOI, NOT, and NOC to the PGP would help the regulated community familiarize themselves with these documents.

Response 14:

All forms will be made available after the PGP is issued on TCEQ's website.

Comment 15:

Baytown respectfully requests that TCEQ consider delaying the issuance of a final PGP until EPA issues the federal PGP.

Response 15:

As a NPDES delegated state, TCEQ is required to comply with a court mandated deadline for NPDES permits for discharges of biological pesticides and chemical pesticides that leave a residue in water when such application are into, over, or near waters of the U.S. While TCEQ would prefer to wait for EPA to finalize their permit, TCEQ must comply with the Court deadline.

Part I. Definitions

Comment 16:

Lloyd Gosselink comments that all defined terms that are utilized in the permit should be capitalized wherever they are used for easy reference in the permit.

Response 16:

The permit, as written, is grammatically correct. Therefore, defined words follow proper grammar and normal capitalization rules.

Comment 17:

Harris County and HCFCD comment that in the definition of "action threshold" the list of considerations for taking pest control action is not fully inclusive with the term "other effects." They suggested including "other governmental infrastructure for crucial functions of health and safety" to the list under the definition of "action threshold."

Response 17:

The term "action threshold" was revised for clarity. It now reads: "The point at which pest populations or environmental conditions cannot be tolerated necessitating that pest control action must be taken based on economic, human health, aesthetics, 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 those actions."

The conditions vary depending on whether it is for health hazard or set of conditions requiring that actions be taken before any pest or pest damage appears. The definition although not exhaustive is sufficient. The permit allows operators to determine their action thresholds and document the trigger for the pest control activity in the pesticides discharge management plan. The requirements of the Integrated Pest management (IPM) plan in Part III.B.1.(b) presents a clear statement of intentions before a pest event occurs. The IPM plan prevents operators from under or over reacting to pest problems.

Comment 18:

The Golf Courses and AEP comment that the phrase "may have been exposed" under the definition of "adverse incident" leaves the door wide open for any kind of falsely-alleged exposure claim. Therefore, they recommend replacing the phrase with "there is evidence that" a person or non-target organism "has likely" been exposed to a pesticide residue. Additionally, AEP comments that the definition of "adverse incident" is too broad and could be construed to mean any effect that a TCEQ Investigator perceives in a negative nature.

Response 18:

In response to the comment the definition of adverse incident was revised for clarity purpose. It now reads: "An unusual or unexpected incident, that an operator has observed upon inspection or that the permittee or permitting authority otherwise becomes aware that**:**
(a) There is evidence that a person or non-target organism has likely been exposed to a pesticide or pesticide residue, and
(b) The person or non-target organism suffered a toxic or adverse effect documented by the appropriate TCEQ Regional Office."

TCEQ will have to document that a toxic or adverse effect has occurred i.e., effects that occur within waters of the U.S. on non-target plants, fish, or wildlife that are unusual or unexpected as a result of exposure to a pesticide residue (e.g., effects to organisms not otherwise described on the pesticide product label or otherwise not expected to be present).

Comment 19:

NWT recommends revising the definition of "adverse incident" for consistency with the definition in the EPA draft PGP.

Response 19:

The reference listed effects in the proposed EPA PGP are examples of what is considered adverse incidents. The examples are not included in TCEQ's PGP so as not to limit TCEQ investigators and allow them to consider any other non-listed observable effects when trying to verify a potential adverse effect.

Comment 20:

TAPMS, SJRA, and TAES comment that the definition of "biological control agents" should be clarified as it relates to triploid grass carp and salvinia weevils.

Response 20:

Biological control agents as defined by the permit in Part I are organisms that can be introduced to a site for the control of a target pest, such as herbivores, predators, parasites, and hyperparasites. Biological control agents are not biological or chemical pesticides. It is an alternative pest control method that relies on predation, parasitism or herbivory, or other natural mechanisms. Introducing grass carp to water bodies can be likened to using a "lawn mower" to control vegetation in water.

Comment 21:

TMCA and ADAPCO recommend deleting the term "hyperparasite" from the definition of "biological control agents" because hyperparasites are not biological control agents.

Response 21:

TCEQ declines to make the change because hyperparasites can be employed as biological control agents. *See* U.S. Fish & Wildlife Service Integrated Pest Management Guidance, 2004.

Comment 22:

Baytown recommended that the following phrase "significant threat to quality of life" be added to the list of situations that the need for pest control be based under the definition

of “declared pest emergency situation.” Baytown notes that after Hurricanes Rita and Ike, mosquito landing rates throughout the city were 100+ per minute. The species involved were salt-marsh and floodwater. These are not typically known to be a vector for disease, but the impact on recovery and quality of life was devastating and required emergency spraying.

Response 22:

In response to the comment the definition of “declared pest emergency situation” was changed to include the following: “(d) Significant threat to quality of life.”

Comment 23:

TFB comments that the definition of “discharge of pollutant” in the PGP will negatively impact agricultural best management practices such as terraces, grassed waterways, sediment control basins, and other structures that help reduce storm water runoff from agricultural fields. TFB points out that these could be construed as point source discharges. TFB recommends deleting “surface runoff that is collected or channeled by man” from the definition.

TIP suggests revising the definition to remove the reference at the end to "leading into privately owned treatment works" because wastewater conveyances to privately owned treatment works are part of a wastewater treatment system and are exempt from the definition of waters of the U.S. Also, to avoid confusion with other uses of "conveyances" in the permit, TIP recommends that "conveyances" be deleted from the definition.

Response 23:

The definition of “discharge of a pollutant” in the PGP includes any addition of any “pollutant” or combination of pollutants to waters of the U.S. from any “point source.” As noted by the definition of “point source,” storm water from agricultural runoff is exempt from TPDES permit requirements.

Irrigation return flows and agricultural storm water runoff do not require a TPDES permit, even when they contain pesticides or pesticide residues as the CWA specifically exempts these categories of discharges from requiring permit coverage. Additionally, other storm water runoff is either already required to obtain TPDES permit coverage as established in CWA §402(p) or classified as a non-point source discharge that does not require TPDES permit coverage. Storm water runoff that may contain pesticides would not be eligible for coverage under the PGP, and is not required to obtain TPDES permit coverage, unless it was already required to do so or EPA designates it as a source for future storm water permitting.

Comment 24:

NWT comments that a definition should be included in the PGP for “effluent” or “effluent limitations.”

Response 24:

TCEQ declines to add a definition of “effluent limitation” to this permit. However, this term is defined in 30 TAC §305.2(13) as: “Any restriction imposed on quantities, discharge rates, and concentrations of pollutants which are discharged from point

sources into waters in the state." That definition is applicable to the term as used in this permit.

Comment 25:

Harris County and HCFCD comment that the term "executive director" should be defined in the PGP.

Response 25:

TCEQ declines to add a definition of "Executive Director" to the PGP. However, this term is defined in 30 TAC §3.2(16) as: "The executive director of the Commission, or any authorized individual designated to act for the Executive Director." That definition is applicable to the term as used in this permit.

Comment 26:

NWT suggests that the definition of "integrated pest management" be expanded to emphasize that the least toxic pesticides should be employed when all other measures fail.

Response 26:

The permit defines Integrated Pest Management Practices (IPM) as follows: "Is 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."

TCEQ believes that the last sentence of this definition addresses the concern raised by the commenter.

Comment 27:

NWT suggests defining "impaired waters" in the PGP for consistency with EPA's definition.

Response 27:

TCEQ declines to add the requested definition because Part II.C.2.(a)of the PGP explains what constitutes impaired waters.

Comment 28:

TPCA, Caddo Lake Institute, and Sierra Club suggest adding a definition for "near water." The Caddo Lake Institute and Sierra Club also recommend that the definition also provide for a distance threshold surrounding all waters to provide a conservative approach and so that operators/permitees will have a better understanding of the term.

Baytown, Rey Gomez, Golf Courses, and TAES comment that "near" be defined or be replaced with a more specific term that will not need an interpretation. The Golf Courses also recommend that the term "adjacent" and "near" be eliminated from the permit and replaced with a clearly defined term for "water's edge."

Response 28:

Although the Court did not define the term "near" in the context of pesticide discharges, EPA explains near as the unavoidable discharge to waters of the U.S. in order to target pests in close proximity to water. An example is treating vegetation along the bank of a ditch when water is flowing through it. However, the term "water's edge" is used to mean the same as "near" in the PGP and is defined as: "The surface area of the channel that is not covered by water during low flow conditions immediately bordering: (1) waters of the U.S., or (2) a conveyance to waters of the U.S. along which water (e.g., runoff, irrigation waters, or floodwaters) flows."

Comment 29:

TMCA and ADAPCO recommend changing the term "non-native plants" to either "noxious plants" or "invasive plants" because not all non-native plants are noxious or invasive. TMCA and ADAPO also recommend referencing TPWD's list of noxious plants, as amended.

Response 29:

As used in the permit, "non-native plants" means an unwanted non-native plant. Noxious or invasive plants could be both native and non-native. Therefore, non-native plants cannot be replaced with either of the terms.

Comment 30:

TMCA, ADAPCO, and NWT comment that the PGP is inconsistent because the terms "operator" and "permittee" are used interchangeably, even though they have different definitions. They suggest deleting the term "permittee" from the PGP.

Response 30:

TCEQ declines to make the suggested changes. An "operator" becomes a "permittee" after obtaining coverage under the PGP.

Comment 31:

TFA, HFM, and NWT comment that the definition of "operator" is confusing, but they support the ability for land managers (agents), acting on behalf of their clients who are the actual landowners, to obtain permit coverage under this permit.

Response 31:

The permit defines an operator as: "The person legally responsible for pest management activities resulting in the discharge of pesticides to waters of the U.S. Legally responsible in this context means the person who controls the timing, location, method and means of pest management. Employees, agents and for-hire commercial applicators are not operators but, if hired by an operator covered under the general permit, such employees, agents and for-hire commercial applicators will be authorized and covered under the general permit without the need to obtain individual coverage. However, for-hire commercial applicators, acting on their own accord without consultation with the landowner, are operators for purposes of this general permit if they are legally responsible for pest management activities and must individually seek coverage under the general permit as operators."

The permit requires that decision makers (landowners, cities, counties) submit an NOI for authorization under the PGP if they exceed the annual thresholds. For hire commercial applicators are not required to submit NOIs, but are automatically covered by the permit if hired by an operator authorized under the PGP. According to the PGP, the landowner is the permittee. If permit violations occur, TCEQ must hold the responsible party liable for corrective actions. Therefore, TCEQ wants to authorize whoever is financially responsible for remediation and/or violations.

Comment 32:

TVMA, TAIA, Shores Ag-Air, JSC, and WCG comment that the PGP is unclear about who is responsible for applying for authorization, paying fees, or keeping records for right-of-way applications. They ask for clarification in determining the operator for right-of-ways whether it is the land owner, the entity that has the easement, the company maintaining the right-of-way, or the State of Texas.

Response 32:

Operators are persons who control the timing, location, method, and means of pest management; and are therefore responsible for the permit requirements. In the case of right-of-ways, the company maintaining the right-of-way is responsible for the timing, location, method, and means of pest management and would be the operator. The operator is responsible for obtaining coverage under the PGP and complying with the appropriate requirements based on whether they are in Level IA, IB, II, or III.

Comment 33:

TFA, HFM, TFB, Golf Courses, and ECC suggest that the definition of “pest management area” should include examples of features that would separate contiguous areas, such as roads, streets, and utility right of ways.

Response 33:

A publicly owned road or street does not make an area non-contiguous. Rights of way and easements do not make a pest management area non-contiguous. Natural occurring forested areas are still part of the pest management area (PMA) and do not break up contiguous areas. In response to the comment the definition of pest management area was revised. It now reads: “A contiguous area of land, including any waters of the U.S., where the permittee is responsible for and is authorized to conduct pest management activities as covered by this permit (e.g., for an operator who is a mosquito control district, the pest management area is the total area of the district).”

Comment 34:

TDA recommend that the inclusion of "biological control agents" under the definition of "pesticide" be clarified to exclude them from permit coverage and suggest that the wording on page 8 be amended to read: "Biological control agents, except for certain microorganisms labeled as pesticides, are exempted from regulation as pesticides under this general permit and FIFRA (Biological control agents include beneficial predators such as birds or ladybugs that eat insect pests, parasitic wasps, fish, etc. that may be considered in the course of considering IPM)."

Response 34:

In response to the comment, the phrase "labeled as pesticides" was added to the third sentence in the "note" under the definition of "pesticides." That sentence now reads: "Biological control agents, except for certain microorganisms labeled as pesticides, are exempted from regulation as pesticides under this general permit and FIFRA."

Comment 35:

NWT, Caddo Lake Institute, and Sierra Club suggest that fertilizers containing pesticides such as weed and feed products that contain 2,4-D should be included in the definition of "pesticides" and considered a pesticide for purposes of the PGP.

Response 35:

Fertilizer product containing 2,4-D would fall under the current definition of "pesticides" in the PGP. If the fertilizer is applied into, over, or near water, it would be covered by the PGP.

Comment 36:

CB comments that the definition of "pesticide residue" does not list what pesticides do not leave a residue. CB Inc. notes that it is difficult and not possible in some cases to determine permit eligibility with the current definition.

Response 36:

At this point, TCEQ anticipates that all chemical pesticides used in, over or near waters of the U.S. will leave a residue. Determination that the pesticide does not leave a residue will be done on a case-by-case basis and should be documented by the operator.

Comment 37:

NWT comments that pesticide residue can impact people and the environment and that it can be from active and inactive ingredients; and additives such as surfactants or oils may degrade water quality and even contribute to impairment.

Response 37:

TCEQ agrees with the comment. The permit authorizes the discharge of biological pesticides and chemical pesticides that "leave a residue" in water. However, no changes were made to this permit in response to this comment.

Comment 38:

NWT requests that the definition of "point source" be clarified as it relates to return flows from irrigated agriculture or agricultural storm water runoff; and nonpoint source silvicultural activities. The Golf Courses requested clarification in the definition of "point source" regarding the status of agriculture and suggested that the maintenance of golf courses be covered under the definition.

Response 38:

The CWA exempts agricultural storm water and irrigation return flow from NPDES/TPDES permitting requirements. Those exemptions remain unchanged. The definition of "point source" in the PGP does not include return flows from irrigated agriculture or agricultural storm water runoff or nonpoint source silvicultural activities.

Comment 39:

Harris County, HCFCD, TMCA, and ADAPCO comment that the definition of "potentially invasive plants" in the PGP appears contradictory and recommend that the word "potentially" be removed.

Response 39:

“Potentially invasive plants” is defined in the PGP as: “Plants that are not indigenous to Texas, and have been shown to have invasive tendencies.” As used in the PGP, it means that the plants have the tendency to spread beyond where they are wanted and are difficult to control. By including the word “potential,” it allows inclusion of plants without having to provide conclusive evidence of invasion.

Comment 40:

Lloyd Gosselink recommends including a definition of "private access" in the PGP.

Response 40:

For the purpose of this permit, private access means the public does not have access to the land without the land owner’s permission. However, no changes are made to the permit as a result of this comment.

Comment 41:

NWT requests that a more comprehensive definition be provided for “restricted use pesticides (RUP)” that includes EPA’s determination that the RUP may be hazardous to human health or to the environment even when used according to the label. NWT states that this is so that operators who apply these pesticides can understand the hazard posed by RUP to facilitate minimizing or eliminating their use in or near waters of the U.S.

Response 41:

The PGP requires that pesticide application be carried out by a certified pesticide applicator if the pesticide is classified as a RUP, state-limited-use (SLU) pesticide, or regulated herbicide. Pesticides that will be applied directly to surface water must be registered by EPA as an aquatic pesticide. FIFRA, EPA, and TDA require that applicators demonstrate practical knowledge of the principles and practices of pest control; and safe use of pesticides. These include: Drift from targeted areas, dissipation and persistence rates of chemicals in water, comprehending label instructions as to maximum gallons per surface acre per depth allowed, expected movement of chemicals within a cove, or unusual water body characteristics.

FIFRA requires that all persons who apply pesticides classified as RUP be certified according to the provisions of the act or that they work under the supervision of a certified applicator. Commercial and public applicators must pass a core examination to demonstrate a practical knowledge of the principles and practices of pest control and safe use of pesticides. In addition, applicators using or supervising the use of any RUP purposefully applied to standing or running water (excluding applicators engaged in public health related activities) must pass an additional exam to demonstrate competency as described as follows:

"Aquatic applicators shall demonstrate practical knowledge of the secondary effects which can be caused by improper application rates, incorrect formulations, and faulty application of restricted pesticides used in this category. They shall demonstrate practical knowledge of various water use situations and the potential of downstream effects. Further, they must have practical knowledge concerning potential pesticide effects on plants, fish, birds, beneficial insects and other organisms which may be present in aquatic environments. Applicants in this category must demonstrate practical knowledge of the principles of limited area application." *See* 40 CFR §171.4.

No changes were made to the PGP in response to the comment.

Comment 42:

NWT suggests that the definition of "state limited use pesticide (SLU)" be expanded to include any pesticide or pesticide use which, when used as directed or in accordance with a widespread and commonly recognized practice, requires additional restrictions to prevent unreasonable adverse effects on the environment, including humans, land, beneficial insects, animals, crops, and wildlife (other than pests).

Response 42:

SLU pesticides are pesticides containing certain active ingredients, with the potential to cause adverse effects to non-targeted vegetation, and are classified as SLU pesticides when distributed in containers larger than one quart liquid or 2 pounds dry or solid. The current definition in the PGP for SLU is consistent with TDA and is considered sufficient for purposes of the permit.

Comment 43:

NWT suggests that the definition of "total maximum daily loads (TMDLs)" be expanded.

Response 43:

The definition of TMDL is consistent with 30 TAC §307.3. Therefore, no changes were made in response to the comment.

Comment 44:

Brazoria County comments that the county supports the definition of "treatment area" in the PGP.

Response 44:

The Commission acknowledges this comment.

Comment 45:

NWT suggests that the term "upset" be defined in the permit.

Response 45:

The term "upset" is not used in the permit, so no definition of the term is necessary.

Comment 46:

Caddo Lake Institute, Sierra Club, and NWT comment that the definition of "water's edge" is too narrow in scope, and is not protective of waters of the U.S. They recommend that a quantitative standard be used to account for the variable weather conditions in

Texas. Therefore, they recommend that the definition of "water's edge" should specify that for lakes, the water's edge should include at least up to the flood pool level for any reservoir. The water's edge near wetlands should be defined as at least as high as the highest level where there is evidence of wetland vegetation or rising waters.

Baytown, ECC, TMCA, and ADAPCO comment that the definition of "water's edge" be clarified to specify whether curbs, gutters, streets, and ditches that are used as a conveyance for storm water should be included and exemptions be provided for pesticides that are applied to storm water conveyances, such as storm drains or ditches where mosquitoes are found if a TPDES Phase I or II municipal separate storm sewer system (MS4) Permit is currently held.

CB comments that the definition of "water's edge" should only include surface area of the channel that is covered by water during low flow conditions immediately bordering waters of the U.S. CB also notes that the second part of the definition includes the language "a conveyance to waters of the U.S.," which in their opinion broadens the definition of "waters of the U.S." because a lot of things could be considered a conveyance.

TIP requests that TCEQ improve the definition of "water's edge" by adding a specific statement that the definition is intended to describe the scope of "near waters of the U.S." and suggested revising the definition of water's edge as follows: "The area near waters of the U.S. is the surface area of the channel that is not covered by standing water during low flow conditions immediately bordering waters of the U.S."

Furthermore, TIP requested that if the TCEQ adds a definition of conveyance as suggested above, TIP would support inclusion of the conveyance concept in the definition as follows: "Water's Edge - The area referred to as near waters of the U.S. is the surface area of the channel that is not covered by water during low flow conditions immediately bordering: (1) waters of the U.S., or (2) a conveyance."

The Golf Courses and Rey Gomez comment that a definition of "hydrologic surface connection" should be provided and that it should clarify whether this consists of a physical water connection at the time of a pesticide application or the potential for a physical water connection at any point in time.

The Golf Courses and TIP comment that the definition of "water's edge" is too broad and could allow for an unintentional expansion of the limits of waters of the U.S. They suggest that "a conveyance to waters of the U.S. along which water (e.g., runoff, irrigation waters, or floodwaters) flows" be deleted from the definition or that a definition be provided.

Response 46:

TCEQ agrees that the definition of water's edge is complex. However, the definition provided in the permit provides the best protection for water quality and is clear enough to provide for effective enforcement.

Comment 47:

TAPMS, SJRA, and TAES comment that the definition of "waters of the U.S." includes "intrastate lakes," but does not differentiate between a lake and a pond. Furthermore, the definition states that natural ponds are included when there are no natural ponds in

the state of Texas. The commenters request that the definition be clarified if pond owners are exempt since all impoundments in the state of Texas are man-made.

JCMCD, TBWEF, Harris County, and HCFCD comment that "waters of the U.S." should be defined as navigable waters to clear up any discrepancies as to what constitutes waters of the U.S. TBWEF comment that recent case law has broadened the scope of the definition of waters of the U.S. by creating uncertainty into what areas may constitute waters of the U.S. Therefore, TBWEF suggests that either the definition be clarified or TCEQ provide clear guidance on how to practically determine whether a particular body of water meets the definition.

WN Number 236 comments that the definition and the wording in the exceptions to "waters of the U.S." covers all land in the state of Texas.

Harris County and HCFCD comment that the definition of "waters of the U.S." should be clarified to account for the many storm water detention basins throughout the state, which may or may not have a surface hydrologic connection to waters of the U.S.

Baytown and ECC comment that "waters of the U.S." should be clarified to address whether storm water conveyances such as ditches, curbs, gutters, streets, and storm drains are to be considered local waters. Baytown also recommends adding storm water conveyances as an exception.

CB asks whether operators are required to consider dry stream beds, ditches, or manmade drainage ditches when calculating coverage areas related to permit thresholds.

TIP requests that TCEQ state in the preamble to the final permit that storm water and wastewater conveyances, sumps, retention basins, and impoundments that are identified in an application for an individual TPDES permit or in a storm water pollution prevention plan (SWP3) associated with a TPDES general storm water permit are not waters of the U.S. or near waters of the U.S. In particular, TIP requests that TCEQ clarify that the application of pesticides to such conveyances (whether or not they contain flowing water) or to slopes adjacent to such conveyances are not intended to be regulated by the PGP.

Response 47:

It is agreed that the definition of "waters of the U.S." is complex. However, the definition in the PGP is verbatim from the federal definition in 40 CFR §122.2 and is clear enough to provide for effective enforcement. The citation at the beginning of the definition now reads: "EPA regulations at 40 CFR 122.2 define Waters of the United States as follows:"

The permit applies to waters of the U.S., only. If the man-made impoundments are waters of the U.S. and pesticides will be applied to the waters then they are not exempt from the permit requirements. TCEQ can address questions about whether a particular water body meets the definition of "waters of the U.S." on a case-by-case basis.

Comment 48:

Mark Palmer comments that the definition of "waters of the U.S." states that it is not limited to intrastate lakes. In the PGP on page 12, part A the sentence uses the term "interstate." Mr. Palmer asks which term is correct.

Response 48:

There are cases where both intrastate and interstate waters can be defined as waters of the U.S. as noted in the definition below.

The definition of "waters of the U.S." includes:

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(i) That are or could be used by interstate or foreign travelers for recreational or other purposes;

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) That are used or could be used for industrial purposes by industries in interstate commerce."

TCEQ can address questions about whether a particular water body meets the definition of "waters of the U.S." on a case-by-case basis.

Comment 49:

Mr. Palmer asks how to obtain a Texas stream segment number map.

Response 49:

Segment names and numbers may be obtained from the "Atlas of Texas Surface Waters." This document is available by contacting the TCEQ publications at 512-239-0010 and is available on the web at www.tceq.texas.gov.

Comment 50:

Caddo Lake Institute and Sierra Club comment that the PGP should provide coverage for waters of the state that meet the eligibility criteria and not limit the permit to waters of the U.S., only.

Response 50:

The court decision, CWA, and EPA permit only address waters of the U.S., so TCEQ is not proposing to include waters of the state at this time. However, water bodies that fall into the definition of water in the state, but not waters of the U.S. could be regulated for pesticides application in the future.

Comment 51:

LNVA asks if state irrigation canals meet the definitions of waters of the U.S.

Response 51:

Irrigation canals that are not isolated would be waters of the U.S. In this context, isolated means the irrigation canal is cut off and does not have contact with waters of the U.S. or to a tributary to waters of the U.S.

Comment 52:

TIP recommends that a definition be added to the permit for "conveyances" to identify the linear bodies of water that could be regulated by the permit as near waters of the U.S. and suggest the following sentence would be appropriate: "The portion of linear bodies of water downstream from any regulated discharge of pollutants pursuant to an individual or general TPDES permit that contains flowing water at the time of the pesticide application provided that a hydrologic connection exists between the flowing water and waters of the U.S. at the time of the pesticide application."

Response 52:

The purpose of defining terms is because such terms are assumed to be not commonly understood by the public or have unique meaning in the permit. TCEQ thinks that the term conveyance is understood and as such not in need of a definition in the PGP.

Comment 53:

NWT requests adding a definition of "wetlands" in the PGP.

Response 53:

30 TAC §305.2 defines wetlands as 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 and constitute water in the state. The term is used in the definition of waters of the United States and was clarified in the context of the definition. The focus of this permit is the direct application of pesticides into, over, or near waters of the U.S.

Comment 54:

NWT comments that the definition of "water quality standards" should be expanded in the permit.

Response 54:

The definition of "water quality standard" in the PGP is consistent with how that term is uses in 30 TAC Chapter 307 and is sufficient for purposes of this permit.

Part II. Permit Applicability and Coverage

Comment 55:

TIP recommends revising Part II.A.4 for consistency as follows:

(a) Public or private entities applying GUP regardless of the number of applications, to less than one (1) acre of waters of the U.S. in one calendar year where there is public or private access; and

(b) Who do not meet the pesticide use pattern thresholds in Part II.A.1 .(b).

Response 55:

In response to the comment, Part II.A.4 of the permit was revised as suggested.

Comment 56:

TIP supports the use of thresholds stated in the permit that are intended to recognize that the same areas will be treated during a year and also support the proposed thresholds as they relate to pesticides used and pesticide use patterns.

Response 56:

The Commission acknowledges this comment.

Comment 57:

AEP and ONCOR request adding a use pattern called "Electrical Power Generation, Transmission, and Distribution Line Vegetation Control" to the PGP for the application of pesticides to control vegetation in and around power plants, power plant substations, and right-of-ways for transmission and distribution electric power lines. ONCOR also suggests that the annual threshold for the use pattern be 200 linear miles at water's edge per project or treatment area.

Response 57:

The control of vegetation, as described in the comment would meet the vegetation and algae control use pattern. The ED believes that an additional use pattern is not necessary.

Comment 58:

TAIA comments that flying was omitted from "Mosquitoes and Other Insect Pest" use pattern, thereby expanding the coverage of this permit.

Response 58:

Flying was removed from the permit to provide coverage for operators to control other non-flying insect pests present in, over, or near water without having to obtain an individual permit.

Comment 59:

TVMA, TAIA, Shores Air-Ag, JSC, WCG, TAES, TFB, TCM, and TDA request adding "aquatic" to vegetation, algae, and nuisance animal pest control use patterns so as not to expand coverage to non-point source pesticide applications. They note that this was included in an earlier version of the PGP provided to stakeholders, but removed in the officially proposed TPDES PGP.

Response 59:

"Aquatic" was removed from the use patterns to provide coverage for pesticide applications that treat pests that are not aquatic, but are found near or in close proximity to water, and in the process of treating such pests, unavoidably the pesticide will get into water. Authorization is still limited to applications in, over, or near waters of the U.S.

Comment 60:

Lake Pro, Mark Palmer, Golf Courses, ECC, TAES, TAPMS, SJRA, TFB, and TAES request clarification regarding calculating the thresholds. For example, they ask whether the annual thresholds are additive or cumulative. Lake Pro and Mr. Palmer

asked if multiple lakes that do not connect, meaning separate ponds or lakes, would be considered together in a pest management area or considered different treatment areas whether the lakes are owned by one owner or not. TAPMS, SJRA, TFB, and TAES ask whether the treatment area is only the area that the pesticide is actually applied to or does it include the entire body of water. For example, if an application is made on 20 acres area of pond weeds, but the lake itself is 110 acres, then is the application above threshold that requires a permit or not.

The Golf Courses suggest that the threshold be defined in Part I of the PGP or the method for calculation be made explicit to ensure compliance and eliminate confusion. They also request that the PGP clearly state threshold quantities and how they are calculated in the far left column of the PGP Requirement Matrix.

TAES suggests that TCEQ clearly state that multiple treatments of a single area are not cumulative towards meeting a threshold. For example, an individual treating a 10 acre pond would be a Level II operator under the permit. TAES asks if they treat that same pond four times will that make them a Level IB operator.

ONCOR asks for clarification on how a linear project crossing hundreds of miles with intermittent pesticide application is classified under the PGP since they apply pesticides in limited areas across their service area. ONCOR requests that each pesticide application should be considered a separate treatment area.

Response 60:

To clarify calculating the threshold for vegetation and algae control and animal pest control use patterns, Part II.A.1.(b)(ii) and Part II.A.1.(b)(iii) of the permit were revised to add the phrase "a treatment area" and now reads as follows:

"(ii) Vegetation and Algae Control- Operators treating a treatment area greater than or equal to 100 acres in water or greater than or equal to 200 linear miles at water's edge;
(iii) Animal Pest Control- Operators treating a treatment area greater than or equal to 100 acres in water or greater than or equal to 200 linear miles at water's edge;..."

For vegetation and algae control, and animal pest control the annual threshold is 100 acres or more of surface water or 200 linear miles or more at water's edge, regardless of whether the operator is treating both sides of a river or stream. These thresholds must be met or exceeded within a treatment area to qualify as Level I.

To calculate the surface acres treated, at least one treatment area must meet or exceed 100 acres. So, if a Pest Management Area (PMA) has two separate lakes that are being treated, the PMA would have two treatment areas. Suppose Lake A is 50 acres and Lake B is 150 acres. The operator treats 20 acres in Lake A and 70 acres in Lake B so the treatment would be 20 acres and 70 acres, respectively. Neither treatment area meets or exceeds the 100 acre threshold so the operator would not be in Level I, regardless of the number of times these acres are treated. However, if the operator treated 125 acres in Lake B this would exceed the annual threshold, putting the operator in Level I.

To calculate the linear miles at water's edge, the calculation should include the linear extent of the application made at water's edge within each treatment area, regardless of whether the operator is treating both sides of the river or stream. For example, if each side of a river is treated and the operator treats 12 river miles, the treatment area

remains 12 miles, regardless of whether they are treating one side or both sides of the river or stream. At least one treatment area must meet or exceed 200 linear miles. Another example, if an operator has a linear PMA such as a right-of-way that is 100 yards wide, which crosses three (3) waters of the U.S., the operator will have 3 treatment areas, each 100 yards in length. None of the treatment areas meet or exceed the 200 linear miles. The three treatment areas are not added together.

These examples are intended to help the regulated community understand how to calculate treatment size to determine when the annual threshold is met or exceeded.

Comment 61:

Caddo Lake Institute and Sierra Club commented that the PGP should cover incidental pesticide applications to row crops or forests that might involve direct application of chemicals to a total of more than 1 or possibly 5 acres of waters and water's edge, including areas with wetlands that come and go; and ephemeral streams.

Response 61:

This permit authorizes all discharges of biological pesticides and chemical pesticides that leave a residue in water when such applications are made into, over, or near waters of the U.S. This includes incidental applications to waters of the U.S. when applying to crops and forests.

Comment 62:

Caddo Lake Institute and Sierra Club comment that the annual threshold for the use patterns should be based on 1,000 acres containing no more than 10 acres of waters of the U.S. for mosquito and other insect pests, area-wide pest control, and forest canopy pest control, 10 acres in water and 20 acres at water's edge for vegetation, algae, and nuisance animal control.

Response 62:

In most instances, pesticide applications are repeated five times or more to control most pests. Therefore, for calculating the annual pest management or treatment area totals for this permit, EPA thresholds (640 acres, 20 acres and 20 linear miles) were increased ten-fold for the mosquito and insect pests, area wide pest control, and forest canopy use patterns; and five-fold for vegetation, algae, and animal pest controls. Each pesticide application activity is not considered as a separate activity as long as it is carried out on the same pest management or treatment area due to the number of applications required to control the pests in certain areas. Therefore, only the operators that meet or exceed the annual thresholds are required to submit a NOI if the operators are applying restricted use pesticides, state limited use pesticides, or regulated herbicides to waters of the U.S.

To calculate the annual threshold for vegetation, algae, and animal pest control in water, calculations should include the area of the applications made to: (1) waters of the U.S. and (2) conveyances with a hydrologic surface connection to waters of the U.S. at the time of pesticide application. For calculating annual threshold for vegetation, algae, and animal pest control at water's edge, calculations should include the area of the application made at water's edge adjacent to: (1) waters of the U.S. and (2) conveyances

with a hydrologic surface connection to waters of the U.S. at the time of pesticide application.

The annual threshold for mosquito and other insect pest, area-wide pest, and forest canopy pest controls include land and water. If an operator has 6,400 acres or more of land that constitutes the PMA and has a creek or an intermittent stream within it, the operator is required to submit a NOI for authorization under the PGP. However, if there is no creek or intermittent stream in the pest management area, the operator is not required to submit a NOI.

It is believed that in the course of applying the pesticide to the PMA that the operator will not turn off the nozzle when they get to the creek to continue on the other side of the creek. Therefore, the pesticide will be applied directly to water to control pests that are present near waters.

Comment 63:

CB supports the current thresholds in the draft permit.

Response 63:

TCEQ acknowledges this comment.

Comment 64:

TFA and HFM comment that the thresholds for area-wide pest control and forest canopy pest control should be based on the treatment area and not on the PMA so as not to expand the coverage to include discharge from non-point sources.

Response 64:

The threshold (6,400 acres) for mosquito and other insect pests control, area-wide pest control, and forest canopy pest control use patterns is the land area that is under the control of the operator. Only operators that have waters of the U.S in the 6,400 acres meet the threshold. In order to target pests in close proximity to water, there would be unavoidable discharge to waters of the U.S. Therefore, both the land and water acreage in the PMA are calculated in the annual threshold.

Comment 65:

Mark Palmer asks if the lakes that he treats do not need permit coverage, whether he is required to file an NOI and or develop a Pesticide Discharge Management Plan (PDMP).

Response 65:

Only operators that meet Level I are required to submit a NOI or self certification form; and develop a PDMP. Operators that meet Level II or III are not required to submit an NOI, self certification form, or develop a PDMP.

Comment 66:

The Golf Courses comment that PGP should allow golf courses to fall within the Level II or III Compliance matrix.

Response 66:

The PGP establishes the levels based on the annual threshold, the type of pesticides used, and whether there is public or private access. These factors represent risk levels to

human health and the environment. Using risk based factors to determine administrative and technical requirements is more appropriate than the classification by industry type.

Comment 67:

TVMA, TAIA, Shores Ag-Air, JSC, WCG, TFB, and Coastal AG Consulting suggest removing state-limited-use (SLU) pesticides from the PGP and limiting it to only the listed federally restricted use pesticides to be consistent with the EPA PGP. They also comment that no SLU pesticide was added to the TDA's SLU list because of water quality concerns and these should not be covered by the PGP.

Response 67:

The EPA PGP does not include any requirements that apply only to a specific pesticide or type of pesticide. The TCEQ PGP regulates discharges from the application of any pesticide used to control pests for five pesticide use patterns. Restricted use pesticide, state limited use (SLU) pesticides, and regulated herbicides present a higher risk to human health and the environment. Therefore, those use patterns are regulated by the PGP. The increased risk, coupled with risks due to public access are the basis for multiple levels of administrative and technical requirements of this permit.

Comment 68:

LCRA comments that operators that will be applying restricted use pesticides, SLU pesticides, or regulated herbicides to less than one (1) acre of waters of the U.S. in one calendar year are not covered under the proposed PGP. LCRA requests that restricted use pesticides, SLU pesticides, and regulated herbicides be added to Level III operators.

TIP requests clarifying that the use of non-general use pesticides for treatment of termites in homes and buildings would not prevent Level III classification.

Response 68:

All operators that will be applying restricted use pesticides, SLU pesticides, or regulated herbicides to any amount of acres of waters of the U.S that is less than the annual thresholds are categorized as Level II. Only operators applying general use pesticides to less than 1 acre of waters of the U.S qualifies as Level III.

Comment 69:

Lloyd Gosselink, TFA, and HFM recommend revising Part II.A.2.(a) of the PGP by replacing the phrase "to an area" with "to waters of the U.S."

Response 69:

In response to the comment, Part II.A.2.(a) of the permit was revised to add the phrase "waters of the U.S." so that it now reads: "Public entities applying general use pesticides (GUP) to waters of the U.S. where there is public or private access, private entities applying GUP to waters of the U.S. where there is public access, or private entities applying GUP, RUP or SLU pesticide or RH to waters of the U.S. where there is only private access."

Comment 70:

Lloyd Gosselink recommends that "Annual Threshold Use" referenced in the matrix be defined to differentiate it from "Action Threshold Use."

Response 70:

In response to the comment, the PGP Requirement Matrix in Part II.A. was revised to eliminate "use" from the "Above Annual Threshold Use" and "Below Annual Threshold Use." The section now reads: "Above Annual Threshold" and "Below Annual Threshold."

Comment 71:

TIP requests that TCEQ revise the middle column on the next to last line of the PGP Requirement Matrix table for Level II operators to read: "1 Acre "of waters of the U.S." or more annually;..." and for Level III operators to read: "Less than 1 Acre "of waters of the U.S." annually."

Lloyd Gosselink recommends revising the matrix to replace "on land" with "to waters of the U.S." under the "Below Annual Threshold Use" column. Also, they comment that the reference to "small volumes of pesticides for control" is unnecessary since the applicability of Level II and Level III coverage is driven by the Annual Threshold Use.

Response 71:

In response to the comment, the PGP Requirement Matrix in Part II.A. was revised to eliminate "(public or private entities on land with public or private access applying small volumes of pesticides for control)" from Below Annual Threshold Use.

Additionally, the last line of the PGP Requirement Matrix was revised as follow: "General Use Pesticide 1 Ac or more of waters of the U.S annually, and General Use Pesticide Less than 1 Ac of waters of the U.S. annually, for Level II and Level III, respectively."

Comment 72:

The Golf Courses, TFA, HFM, TAPMS, SJRA, and TAES ask if there is a difference between the self certification letter and the self certification statement; and whether they will be made available to the public.

Response 72:

In response to the comment, the permit was revised to replace both "letter" and "statement" with "form" throughout the permit. The self certification form will be made available after the PGP is issued and will be available on the TCEQ website.

Comment 73:

NWT comments that operators who meet or exceed the annual threshold and will be applying any biological or chemical pesticides on public or private land, or any Level II operators that will be applying restricted use pesticides, SLU pesticides, or regulated herbicides should be required to submit an NOI for authorization. NWT also suggests eliminating Level IB from the permit. Furthermore, NWT comments that neither the public or private access provisions are protective of water quality, fish, wildlife, or people. Therefore, they suggest requiring operators that do not belong to any of the divisions to obtain coverage under an individual permit if they will be applying restricted use pesticides, SLU pesticides, or regulated herbicides.

Lloyd Gosselink suggest requiring Level IB coverage for public entities applying restricted use pesticides, SLU pesticides, or regulated herbicide to waters of the U.S.

where there is only "private access" since private entities making such applications to waters of the U.S. where there is only "private access" must obtain Level IB coverage.

CB comment that TCEQ should eliminate the four levels from the permit and revise the permit to be consistent with EPA's PGP by requiring one level of permitting with the thresholds that are currently in the draft TPDES PGP and removing Level III from the permit since the permit requirements are similar to the other levels.

Response 73:

All operators above the annual threshold must comply with the same non-numeric effluent limitations. The only difference between levels IA and IB is that Level IB operators are not required to submit an NOI or annual report.

The permit is protective of the human and natural resources of the state of Texas. The PGP covers the entire state and operators will belong to one of the four (4) levels. The only time that an applicant will be required to obtain coverage under an individual permit is stated in Part II.C. of this permit. The four levels are split up based on whether they are above the acreage threshold, the type of access, and the type of pesticides used. Each of these criteria is related to an increased risk either to human health, the environment, or both.

The four levels identified in the permit are established based on 3 risk factors: The size of the treatment area (which is directly correlated to the volume of pesticides used which will vary proportionately with the size of the treatment area), public access, and pesticide type. Restricted use pesticides, SLU pesticides, and regulated herbicides pose a higher risk to human health and the environment than general use pesticides.

However, the size of the treatment area and public access are other factors that are considered when determining the non-numeric effluent limits. Pesticides applications to an area with public access will affect more people than an area with only private access. Level IA is for operators that will be covering larger areas and using pesticides with very high toxicity to both human and aquatic lives. On the other hand, Level IB is for operators that will be applying general use pesticides with lower toxicity levels to large areas.

Level II is for operators that will be covering smaller areas and using pesticides with very high toxicity (restricted use pesticides, SLU pesticides, or regulated herbicides) to both human and aquatic lives; and operators that will be covering greater than 1 acre of waters of the U.S. and using general use pesticides. Level III is for operators that will be covering less than 1 acre of waters of the U.S. and using general use pesticides. These risk factors are appropriate criteria to determine administrative and technical requirements under the PGP.

Comment 74:

ECC comments that the area-wide pest control use pattern in Part II.B.4. of the PGP should be included in the definitions.

Response 74:

TCEQ declines to add a definition for area-wide pest control because it is already explained in Part II.B.4 of the permit. Area-wide pest control is described in Part II.B.4. of the PGP. It states: "Aerial and ground application of a pesticide to control the

population of a target pest where control technologies over large areas are most effective to avoid substantial and widespread economic or social impact. These efforts involve aerial and ground pesticide applications to areas that include a wide range of diverse habitats such that a portion of the pesticide applied will unavoidably be applied over and deposited to waters of the U.S. to target the pests effectively."

Comment 75:

TMCA and ADAPCO comment that the restrictions in Part II.C.2 - Discharges to Water Quality-Impaired Receiving Waters, should apply only to the specific pesticide causing the impairment and not the class of the pesticide.

Response 75:

The permit restriction does not apply to the class of pesticides, rather it applies to the specific pesticide or the degradate(s) of the pesticide(s) that may have greater, equal, or lesser toxicity than the parent compound causing the impairment(s). For example, if a water body is impaired for atrazine, the permit restriction would apply to atrazine and its degradates: De-ethyl-atrazine, deisopropyl atrazine, or di-aminotriazine.

The PGP does not authorize coverage for point source discharges of pesticides or their degradates to surface waters already impaired by those specific pesticides or degradates. If the operator chooses to continue to use those pesticides, then the operator would need to obtain coverage under an individual permit.

Comment 76:

Lloyd Gosselink comment that the limitations on permit coverage for discharges to water quality impaired receiving waters where EPA has not approved or established a TMDL be removed from the permit because the limitation will prohibit permit coverage for any discharge from a pesticide application.

Response 76:

The limitation in Part II.C.2.(a)only applies to constituents of concern where the water body is listed as impaired. As of the issue date of the PGP, there are no Texas waters identified as impaired by a pesticide.

Comment 77:

TMCA and ADAPCO comment that TCEQ should provide guidance materials regarding the list of impaired waters and Tier 3 waters. NWT suggests that Tier 3 Waters be defined in the permit.

Response 77:

The §303(d) list of impaired waters is currently available on TCEQ's website at:

http://www.tceq.texas.gov/compliance/monitoring/water/quality/data/wqm/305_303.html

There are currently no Tier 3 waters in Texas. The PGP provision is for any future designated Tier 3 waters.

Comment 78:

NWT, Caddo Lake Institute, and Sierra Club comment that information regarding public access to NOIs and other records required by the PGP should be provided in the permit.

Response 78:

Public access to documents such as the NOI is governed by the Texas Government Code Chapter 552. The permit identifies certain recordkeeping requirements that the permittee must keep onsite. These records must be made available to the ED upon request.

Comment 79:

Lloyd Gosselink suggests that TCEQ amend Part II.D.2 of the permit to allow any political subdivision to submit an NOI to obtain coverage for its entire jurisdictional boundaries.

Response 79:

The ED agrees that a county-wide NOI can apply to any persons or entities that have multiple pest management areas within a single county. Therefore, Part II.D.2.c. was revised as a result of this comment and now reads as follows: "The operator shall submit a NOI for each pest management area that meets the requirements of Part II.A.1. Public or private entities with more than five (5) pest management areas within a single county or a county whose pest management area is the same as its jurisdictional boundary may submit a single NOI for a county-wide permit. Persons or entities with more than ten (10) pest management areas may submit a single NOI for a statewide permit."

Comment 80:

Lloyd Gosselink suggest that TCEQ include a reasonable time limitation for the ED to respond to NOIs submitted under the PGP to ensure that permittees are timely informed that coverage under the general permit was granted or denied.

Response 80:

Part II.D.4 clearly states: "Provisional authorization to discharge under the terms and conditions of this general permit begins 48 hours after a completed NOI is postmarked for delivery to the TCEQ. For electronic submittal of NOIs, provisional authorization begins 24 hours following confirmation of receipt of the electronic NOI form by the TCEQ." This allows the operator to be provisionally authorized very quickly. Therefore, the length of time taken by the TCEQ to finalize its administrative review of NOIs should not delay pest management activity.

Comment 81:

Shoreacres requests that TCEQ clarify if the county where the city is located can continue to provide pest control activities for the city.

Response 81:

The PGP allows a city to obtain coverage if they meet the definition of operator or for a county to provide pest control services to the cities within the county.

Comment 82:

NWT comments that a fee should be assessed on all operators applying pesticides. They suggest that lower fees be assessed for smaller operators, alternative fee payment plans be provided to assist individuals who may need payment options, and higher fees be assessed from larger applicators. TFB comments that only entities that submit NOIs be required to pay fees. WN Number 236 comments that the fees involved ($100 annual Water Quality Fee and the $75 to $100 per NOI) is a burden to producers.

Response 82:

The fees assessed in Part II.D.5 include an application fee with the NOI and an annual water quality fee from operators that submit an NOI to obtain authorization under the PGP. An annual water quality fee for permittees authorized under TCEQ general permits is specifically allowed by 30 TAC §205.6.

Operators in Levels IB, II, or III are not required to pay either an application fee or an annual water quality fee. TCEQ thinks that this fee structure is appropriate.

Comment 83:

NWT comments that information on alternative and individual permit conditions be provided. NWT also comments that operators should not be eligible for coverage under a general permit for discharges to Tier 3 waters, but should be required to get coverage under an individual permit.

Response 83:

Alternative or individual permit are permits to a specific person or persons and are custom fitted to the particular operator and operation. Part II.C. of the PGP clarifies under what conditions an alternative or individual permit is required. The operator must apply for and receive an individual permit or other applicable general permit authorization prior to discharging. In the event that an individual permit or alternative permit is required, that permit would be subject to public notice as prescribed in 30 TAC Chapter 39. Currently, there are no water bodies in the state classified as Tier 3 waters.

Comment 84:

TVMA, TAIA, Shores Ag-Air, JSC, and WCG comment that TCEQ should emphasize that the PGP does not replace or eliminate any operator's responsibilities under Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

Response 84:

According to Part III.B.1.(a)(1), Part IV.B.1.(a), and Part V.B.(a) of the PGP, operators are required to apply pesticides in accordance with state law and the pesticide label. A pesticide user must comply with all applicable FIFRA requirements listed on pesticide product labels. The PGP includes additional requirements that are not inconsistent with pesticide product labels and the permit does not replace any existing FIFRA labeling requirements.

Comment 85:

Caddo Lake Institute and Sierra Club suggest that TCEQ should require operators seeking coverage under the PGP for vegetation control to coordinate with TPWD to assure compatibility with the State Aquatic Vegetation Management Plan and any local

plans. Additionally, they recommend requiring that operators file NOIs and the Pesticide Discharge Management Plans (PDMPs) with TPWD; and that NOIs and PDMPs should be provided to the public for meaningful review and incorporated into the PGP.

Response 85:

TCEQ worked closely with the TPWD to develop the PGP and they support the permit as written. This permit does not replace other state requirements, but is in addition to any existing requirements. It is the responsibility of the permittee to determine if there are any other applicable laws or requirements and comply with them.

Part III.D. of this permit requires that a PDMP be developed and implemented within 90 days after the PGP is issued. The PDMP is a tool for the permittee to use as a guide to pest management at a given site. It establishes what the target pests are, when, where and how to treat the pests; and it contains procedures and records of past pesticide activities to help determine effectiveness, problems, and the need for revisions to pest management strategies. It is a working document that is subject to changes and updates.

Part III.D.3 of the permit requires that permittees must retain a copy of the PDMP either onsite or at the address provided on the NOI; and that these documents must be available to the Executive Director upon request. Documents in the public record file of the Commission are available to the public upon request.

Provisions are made for both electronic and paper submittals to allow for some flexibility so that operators that do not have access to the web or email can submit a paper form.

Comment 86:

Caddo Lake Institute and Sierra Club comment that TCEQ should address area-wide pest control with individual permits or in a separate general permit that allows for addressing the preventive nature, large area, and other complications that arise in this permit when it also applies to such preventative treatments. Clearly, the requirements for use of integrated pest management (IPM) and other best management practices need to be modified if preventative applications or treatments are allowed.

Response 86:

TCEQ thinks that individual permits are not necessary because the use of preventive pesticide application falls within Integrated Pest Management Practices and the scope of the PGP. The IPM requires that permittees establish target pest density that serve as an action threshold and Part III.1.b.(3)(i) – "Pesticide Use requires that if pesticide application is used as a pest management strategy, the permittee shall apply pesticide only when the action threshold(s) have been met or disease is present."

Comment 87:

Mark Palmer, Lloyd Gosselink, TVMA,TAIA, Shores Ag-Air, JSC, WCG, and NWT comment that it will be very difficult or impossible to get the proper paperwork processed quickly between the for-hire applicators and the landowners. Therefore, the commenters are requesting a grace period between when the permit is issued and the

submittal of NOIs or other required forms by operators to obtain authorization; and for the regulated community to familiarize with the program before enforcing the permit.

Response 87:

In response to the comments, the PGP was revised to provide provisional authorization for 90 days after the effective date of the permit. All operators required to submit an NOI or self certification form must do so prior to the expiration of this deadline to continue authorization under the PGP. This provision was added to Part II.D.4.(c) of the PGP.

Comment 88:

TFB is opposed to requiring PDMPs for agricultural lands and thinks that such regulatory measures exceed the authority of the CWA. Moreover, TFB comments that the additional use pattern for area-wide pest control will expand the scope of the permit to include land application rather than aquatic applications only. Therefore, the use pattern should be eliminated from the permit. CB comments that the area wide pest control use pattern is duplicative of some of the other patterns and requested that it be removed from the permit.

Response 88:

Although EPA did not include an area-wide use pattern in its PGP, TCEQ determined that it is appropriate to include this use pattern to provide coverage for agricultural operations that apply chemical pesticides to waters of the U.S.

Part II.B.4 explains the use pattern for area-wide pest control and includes examples of activities that would meet this use pattern. The PGP states that these efforts involve aerial and ground pesticide applications to areas that include a wide range of diverse habitats such that a portion of the pesticide applied will unavoidably be applied over and deposited to waters of the U.S. Agricultural operators that take measures to prevent application in, over, or near waters of the U.S would not qualify for the area-wide use pattern or any portion of the permit. TCEQ encourages all operators, including agricultural operators, to evaluate application methods to eliminate unnecessary discharges if possible.

An additional use pattern was added to provide coverage for pesticide applications other than forest canopy pest control, mosquito, and other insect pest control that will unavoidably be applied over and deposited to waters of the U.S. Without this use pattern, these types of pesticide applications would require an individual permit to discharge.

Comment 89:

TBWEF, STCGA, and GPLRGV comment that boll weevils should be deleted from the examples under the area-wide pest control use pattern in Part II.B.

Response 89:

Boll weevil control is provided as an example of applications that could meet the criteria for area-wide pest control use pattern. Not all boll weevil control activities require permit authorization. This permit only authorizes the discharge of pesticide in, over, or near waters of the U.S. Other discharges do not require permit authorization.

In response to the comments, boll weevil control was deleted from the list of examples referenced by the commenters and the examples in Part II.B.4. were revised to add the phrase "aerial crop dusting" so that it now reads: "Examples include, but are not limited to, aerial crop dusting, aerial and ground application for the control of nuisance and disease borne mosquitoes using pesticides, ground application of pesticides for the maintenance of rights-of-ways, drainage ditches, and other governmental infrastructure for crucial functions of health and safety; urban landscaping, treating orchard pests, or controlling fruit flies."

Comment 90:

TFA and HFM comment that "ground" applications should be added to the forest canopy pest control use pattern in Part II.B.

Response 90:

In response to the comments, the first sentence of Part II.B.5. of the permit was revised to add the phrase "and ground" and now reads as follow: "Aerial and ground application of a pesticide over 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 into water."

Comment 91:

TPCA and Burnett's Consulting support the addition of area-wide pest control use pattern to the permit.

Response 91:

The Commission acknowledges this comment.

Comment 92:

Caddo Lake Institute and Sierra Club comment that all operators (Levels I, II, and III) authorized under this permit should be required to submit NOIs, PDMPs, Self Certification forms, NOCs, and reports to TCEQ.

Response 92:

The PGP establishes the levels based on the annual threshold, the type of pesticides used, and whether there is public or private access. These factors represent risk levels to human health and the environment, using risk based factors to determine administrative and technical requirements is more appropriate.

Part III. Level I Operators

Comment 93:

Harris County, HCFCD, and AEP comment that the permit requirements in Part III.B.1.(b), identifying the problem, the pest management strategies and the pesticide use, will be similar for most treatment areas and as such should be streamlined in the permit for identical treatment areas to reduce administrative burden and repetitive reporting. AEP comments that the requirement is too prescriptive.

Response 93:

IPM must be established for each pest management area and for each use pattern, not necessarily for each treatment area. An IPM can cover multiple treatment areas if they are identical. Revision to IPMs can be done, as needed, so long as the PGP conditions are met.

The PGP should be prescriptive enough that each permittee knows what is expected of them. To simply require an IPM without establishing what the IPM should include would leave the permittee vulnerable to subjective determinations of sufficiency.

Comment 94:

TAES, TAPMS, and SJRA comment that the application of aquatic herbicides always causes reductions in dissolved oxygen concentrations. Therefore, they recommend that the permit should state that "temporary" deterioration of water quality will occur and is acceptable" after the direct application of pesticides to affect the control of the specific target pests for any of the use patterns. TAES also comments that the phrase discharges that would cause or contribute to a violation of water quality standards" may be too broad, given that any addition of chemicals could be considered to "contribute" to a potential violation of water quality standards. The purpose of a pesticide application consistent with the FIFRA label and TDA application standards should not be subject to interpretation as a violation of the permit. Language to clarify the permits exemption from being a potential violation will facilitate comprehension and compliance.

Harris County and HCFCD comment that TCEQ should provide a definition for the word “excursion” as used in Part III.B.2.(a) and III.B.2.(b) - Effluent Limitations to clarify what is considered a permit violation that would require corrective action.

Response 94:

The PGP addresses potential pollutant impacts through non-numeric effluent limitations because setting specific water quality-based effluent limitations is not feasible. The provisions that are expected to result in compliance with water quality criteria and protection of attainable water quality include technology-based effluent limitations set forth in Part III.B.1., which require the operator to minimize discharge of pesticides to waters of the U.S. through the use of control measures to the extent technologically available, economically achievable, and practicable for the category of point sources covered under this permit taking into account any unique factors relating to the operators to be authorized under the PGP.

All operators must minimize discharges of pesticides by using the lowest effective amount of pesticide product per application and optimum frequency of pesticide applications necessary to control the target pest taking into account pest resistance concerns, perform regular maintenance activities, including calibrating, cleaning, and repairing application equipment.

In addition to the technology-based effluent limitations, Part III, IV, and V of the PGP contain the water-quality-based effluent limitations. TCEQ expects that compliance with the narrative effluent limitations and other terms and conditions in this permit will meet applicable water quality-based effluent limitations.

Comment 95:

AEP comments that Part III.B.1.(b)(2) should be tailored for electric utilities to reflect the existence of vegetation management plans required under "NERC Standard FAC-003-1 Vegetation Management." AEP comments that there is a general lack of specificity in the direction to evaluate the management options (prevention, mechanical/physical methods, etc.) and it is unclear what considerations (ranging from environmental impacts to water quality to economic impacts of cost) determine progression through the various management options. Also, AEP comments that there is lack of definition concerning how pest population densities are to be determined and that the suggestion or recommendation of more specific population density or estimation methodologies would be beneficial.

Response 95:

Many factors, some that are site and use pattern specific, should be considered when selecting the appropriate pest management strategy. Due to the site specific nature of these considerations, it is impractical to specify if or when each strategy must be used.

Due to the variability in the control measures that can be used to meet the effluent limitations in this permit, the PGP is not mandating the specific control measures operators will use to meet the limitations. For example, mosquito control operators are required to consider mechanical or physical methods of control or source reduction to eliminate or reduce mosquito habitat. How this is achieved will vary by operator. For some, this may be achieved through water management, wetlands management, or regular mowing while for others mowing will not be feasible. A given control measure may be acceptable and appropriate in some circumstances, but not in others. The operator determines what measure is appropriate for the operator's situation in order to meet the non-numeric effluent limitations. Operators are required to implement site-specific control measures to meet these limitations. The permit provides examples of control measures, but operators are required to tailor these to their situations as well as improve upon them as necessary to meet permit limits. If an operator finds their control measures are not minimizing discharges of pesticide adequately, the control measures must be modified as practicable and documented in the PDMP.

Part III.D. of the PGP requires that permittees develop a PDMP within 90 days of permit coverage. The PDMP contains schedules and procedures pertaining to control measures used to comply with the non-numeric effluent limitations (e.g., application rate and frequency, spill prevention, pesticide application equipment, pest surveillance, and assessing environmental conditions) and pertaining to other actions necessary to minimize discharges (e.g., spill response procedures, adverse incident response procedures, and pesticide monitoring schedules and procedures). A permittee may refer to procedures in other documents that meet the requirements of the permit in the PDMP, but a copy of the referenced document must be kept in the PDMP and should be made available for review when requested by TCEQ staff. It is the duty of the permittee to document methodologies in their PDMP.

Comment 96:

ECC, TMCA, ADAPCO, Golf Courses, and TIP request that TCEQ clarify "lowest effective amount" as used in the permit. They comment that operators should be allowed to follow the pesticide product label by using the amount indicated on the pesticide label as

the lower end of the effective range. TMCA and ADAPCO recommend adding the phrase "as determined by either local product testing or using generally accepted industry minimums and standards as determined for the target pest." TMCA and ADAPCO also comment that the permit requirements in Part III.D.1.c.6.ii. are too expensive and time consuming.

Golf Courses comment that the PGP should be worded in such a way that the operator will have the authority to use best professional judgment in making decisions on the appropriate label rates for the control of target pest.

TIP suggests clarifying the sentence to read: "(1) operators will be deemed to be in compliance with the requirement if they initially use the amount indicated on the pesticide label as the lower end of the effective range, and (2) operators may depend upon the guidance or instructions of a licensed pesticide applicator with whom the operator has contracted to apply the pesticide."

Response 96:

In response to the comment, Part III.B.1.(a)(1) and Part IV.B.1(a) of the permit were revised. The sections now read as follows:

"In accordance with state law and the pesticide label, use only the amount of pesticide and frequency of pesticide applications necessary to control the target pest, using equipment and application procedures appropriate for this task. In no case exceed the maximum application rate, established under FIFRA, referenced on the pesticide product label. To minimize the total amount of pesticide applied, the operator shall consider different application rates, frequencies, or both to accomplish effective control in accordance with the following:"

TCEQ can only verify the testing that was carried out by EPA on any pesticides and can confirm or verify the information that is on the product label should there be an adverse incident. Therefore, the suggested phrase is not applicable. When EPA approves a pesticide for a particular use, EPA imposes restrictions through labeling requirements governing such use. The restrictions are intended to ensure that the pesticide serves its intended purpose and avoids unreasonable adverse effects.

Comment 97:

Harris County, HCFCD, Brazoria County, TMCA, and ADAPCO comment that the five day time frame required in Part III.D.2.(b) is restrictive and does not take into instances where this will not be practical, such as an emergency event. They recommend that the phrase "a reasonable time period" be used to replace the five day time frame.

Response 97:

It is considered that "a reasonable time period" will be difficult to enforce by TCEQ inspectors due to its vagueness. A specific timeframe is used in the PGP to standardize when compliance is required.

Comment 98:

NWT comments that pesticide discharge to waters of the U.S. for research and development should be covered under an individual permit.

Response 98:

The TPDES pesticides permit is consistent with EPA's draft PGP with respect to discharges related to pesticide research and development. For research purposes, pesticide discharges may be necessary, regardless of pest density. Research and development activities should not be limited by requiring alternative pest management strategies prior to using pesticides.

Comment 99:

NWT comments that all levels of operators should follow IPM practices to minimize pesticide discharges to waters of the U.S.

Caddo Lake Institute and Sierra Club comment that TCEQ should require that PDMPs developed under the permit to incorporate the principles of IPM in the same way that those principles are required in pesticide applications for schools and other public areas. They also comment that TCEQ should require the use of the least toxic alternative or require that non-toxic methods of pest control be tried first; and set objective standards for allowable pesticide use.

Response 99:

All permittees, at all levels, must minimize discharges using Best Management Practices (BMPs) that are technologically available, economically practicable, and achievable. As noted previously, the levels are split based on risk factors. The higher risk levels require more prescriptive BMPs. TCEQ thinks this is an appropriate method to determine administrative and technical requirements.

In addition, requiring IPM from smaller operators (Level III) might not be economically achievable because of concerns about potential unintended consequences of such a requirement, such as an inability to conduct essential public health and safety operations due to a reduction of available funds or manpower.

The PGP establishes the levels based on the annual threshold, the type of pesticides used, and whether there is public or private access. These factors represent risk levels to human health and the environment; using risk based factors to determine administrative and technical requirements is more appropriate. Levels II and III pose a lower risk to human health and the environment because they are treating a smaller area than Level I. TCEQ thinks that lower risk can be associated with less stringent requirements without impacting human health or the environment.

Comment 100:

TFB comments that only operators subject to NOIs should be responsible for developing and maintaining a PDMP, self-certification statement, or any other form of record-keeping under this permit. NWT comments that all operators who meet the annual threshold and are required to submit an NOI should also be required to develop a PDMP.

Response 100:

All operators in Level I (IA and IB) are required to develop and implement a PDMP within 90 days of obtaining coverage under this permit. Level IA will submit an NOI to obtain authorization and prepare and keep onsite an annual report, while Level IB will

submit a completed self certification to the applicable TCEQ Regional Office. Records are required for Levels I and II to assist the permittee in keeping track of what pesticides were applied along with the volume and effectiveness of the applications. They can also help determine compliance with the PGP requirements.

Comment 101:

Lloyd Gosselink comments that PDMP should be defined in the permit.

Response 101:

TCEQ declines to define PDMP because it is explained in Part III.D. of the PGP. The PDMP must be prepared within 90 days after the permit is issued by Level I operators. The PDMP documents the implementation (including inspection, maintenance, monitoring, and corrective action) of control measures being used to comply with the conditions of the permit. The purpose of the PDMP is to ensure that operators have: (1) taken steps to identify the pest problem, (2) evaluated pest management options, and (3) appropriate control measures to control pesticide discharges. The content of the PDMP can be found in Part III.D. of the permit.

Comment 102:

Baytown recommends that TCEQ mirror EPA's draft PGP requirement for visual evaluation because of the following reasons:

(1) After significant rain events and tropical storms, there are areas in the City that experience extreme hatch-offs of saltwater and floodwater species of mosquitoes. Requiring a visual evaluation prior to each pesticide application is not practical or necessary after these hatch-offs, and

(2) The City's adulticide operations (night spraying) take place in the evening and performing a landing rate at night during the application is not feasible, practical, or safe. If TCEQ does not mirror EPA's Draft PGP for this requirement, the City recommends removing this requirement for evening adulticide applications.

Response 102:

Visual evaluation prior to pesticide application will help assist in compliance with the permit by ensuring that the action threshold is met. Also knowing the extent of the pest problem (location and number of pests) will help determine the type of pest management strategy that is appropriate. As noted by the Commenter, visual evaluation at night may not be feasible. The permit requires visual evaluation during the pesticide application when consideration for safety and feasibility allow. Post application visual evaluation will assist the permittee to determine effectiveness of application and will be used to check for toxic or adverse effects.

Comment 103:

Baytown suggests removing the recordkeeping requirement in Part III.E.(6) to maintain the pesticide application records in the PDMP as the records are currently maintained according to TDA requirements so as not to duplicate effort.

CB recommends that TCEQ recognize the TDA's existing licensing and training programs as permit compliance; and consider developing a memorandum of

understanding or some other instrument in order to fully acknowledge and accept TDA compliance activities as compliance with the PGP.

Response 103:

The TDA requirements do not include all of the records required by Part III.E.(6)(a-l). TCEQ thinks that these records are necessary to document compliance with requirements of this PGP.

Comment 104:

Harris County Mosquito Control District and Brazoria County commented that the 48 hours timeframe to document Pesticide Application in the PDMP is too restrictive.

Response 104:

In response to the comment, the timeframe to document pesticide application was revised from 48 hours to within fourteen (14) days after pesticide application.

Comment 105:

NWT comments that additional reporting requirements should be added for reporting adverse incident to endangered species and critical habitat as outlined by EPA.

Response 105:

Toxic or adverse effects must be reported, regardless of whether or not the affected species is listed as an endangered species or the habitat is for an endangered species.

Comment 106:

Caddo Lake Institute and Sierra Club comment that TCEQ should require that the information collected during monitoring and observations be included in the information made available to the public.

Response 106:

Recordkeeping is used by the permittee to determine effectiveness of their pest management activities and helps identifies when changes to pest management activities are needed. These records are available to TCEQ investigators to determine compliance with requirements of the PGP.

Comment 107:

AEP comments that there is no elaboration concerning how recordkeeping data will be used beyond data collection and submission. Also, AEP comments that TCEQ should justify the need for operators to provide an annual report of pesticide use and recommend that TCEQ allow for the integration of records kept as normal business practice to suffice for purposes of implementing the permit.

Response 107:

Currently, there is very little information available regarding pesticide use. The annual report will be used to compile data on pesticide use that could be used in future refinements to the PGP.

Comment 108:

NWT commented that Levels I and II operators should be required to submit annual reports on pesticide use. Pesticide use could be collected in an online database from purchase to application. NWT asks TCEQ to consider quarterly or semi-annual submission of reports.

Response 108:

Only Level IA operators are required to prepare and keep onsite an annual report on pesticide use and these records are available to TCEQ investigators to determine compliance with permit requirements. TCEQ thinks that compliance with the technical requirements of the permit provides environmental protection and that imposing additional administrative requirements would not increase environmental protection. All operators are required to report adverse incidents.

Comment 109:

TMCA, ADAPCO, Harris County, and HCFCD comment that there is inconsistency between Part III.E.6.j., which states "any observed toxic or adverse effects to non-target organisms" must be reported "within 48 hours after implementing pest management strategies" and Part III.C.4., which states "spot checks" for "observable toxic or adverse effects" be conducted "within a reasonable period of time after each pesticide application, not to exceed the time required for maximum effect indicated on the product label."

Response 109:

TCEQ disagrees that there are inconsistencies in the referenced sections of the permit. Part III.E.6. states: "Pesticide Application Records: The following information must be recorded in the PDMP for each treatment area as soon as possible but no later than 48 hours after implementing pest management strategies (non-pesticide methods and pesticide application)." This provision refers to the timeframe for pesticide application to be recorded in the PDMP. It is set at 48 hours after the actual activity to prevent operators from forgetting or confusing the details of the activity that was carried out. The requirement to keep the record will demonstrate compliance with the conditions of the permit and help the TCEQ investigators to verify compliance with permit conditions.

Part III.E.6.j. states in part: "...any observed toxic or adverse effects to non-target organisms..." This provision refers to recording observed adverse effects to non-target organisms discovered during visual evaluations.

Part III.C.4. states: "Visual Evaluation Requirements: Within a reasonable period of time after each pesticide application, not to exceed the time required for maximum effect indicated on the product label." This provision refers to when to conduct post-pesticide application visual evaluation.

Comment 110:

ECC asks that the TCEQ clarify what is meant by the term "spot checks" in Part III.C. and asks what the frequency of "spot checks" should be. ECC and TIP comment that the requirement to revisit a treatment area doubles the manpower time associated with conducting treatment and adds unneeded costs to pesticide treatment actions.

Therefore, they suggest that TCEQ revise the requirement to be consistent with EPA's PGP requirement.

Response 110:

TCEQ disagrees with the comment. Part III.C. requires the permittee to conduct visual evaluations of the treatment area prior to, during, and after pesticide application. The term "spot checks" as used in this permit means that the permittee is not required to conduct visual evaluation of the pest management area, but only inspect the treatment area where pesticide was applied. Part III.C.1-4 explains what the permittee must be looking for during each visual evaluation.

Comment 111:

ECC and TIP comment that the non-numeric effluent limitations in the PGP that reference equipment cleaning, calibration, and maintenance of equipment should be revised because some operators will be contracting with licensed applicators for most pesticide applications and will not be in a position to witness the cleaning, calibration, and maintenance of equipment. Therefore, they should not have to maintain records for maintenance and calibration of pesticide equipment.

TIP requests that the permit requirements in Part III.B.1.(a)(3) and Part IV.B.1.(c) be revised to state that operators will be compliant with the requirements if they contract with licensed applicators to apply pesticides in accordance with the requirements of the paragraph.

Response 111:

The operator assumes full responsibility for permit compliance. For example, a mosquito control district that controls the pest management program in its district would be considered the operator, even if a hired contractor is the one actually applying the pesticide. It is the mosquito control district's responsibility to ensure that the hired contractor complies with the conditions of the permit when pesticides are being applied. The contract licensed applicators can provide records of equipment cleaning, calibration, and maintenance to the operator that they are in compliance with the permit.

Comment 112:

Golf courses ask whether the licensed contract applicators or the property owner is responsible for the pesticides applications and recordkeeping.

Response 112:

Operator is defined in the PGP as the person legally responsible for pest management activities resulting in the discharge of pesticides to waters of the U.S. In this context, "legally responsible" means the person who controls the timing, location, method, and means of pest management. Employees, agents, and for-hire commercial applicators are not operators but, if hired by an operator covered under the PGP, such employees, agents, and for-hire commercial applicators will be authorized and covered under the PGP without the need to obtain individual permit coverage.

However, for-hire commercial applicators, acting on their own accord without consultation with the landowner, are operators for purposes of the PGP if they are

legally responsible for pest management activities and must individually seek coverage under the PGP as operators. Whoever meet the definition of “operator” in the PGP is responsible for compliance with the permit requirements.

Comment 113:

ECC and TIP comment that the post application visual evaluation requirement in Part III.C.4 should be deleted from the PGP because one pesticide product label reviewed did not indicate when the "maximum effective time" would be. According to ECC and TIP, some pesticides lose some amount of pesticide effectiveness over time once they are opened and the actual "maximum effective time" changes, which is not specifically described on the product label.

Response 113:

Post application visual evaluations are necessary to determine pesticide application effectiveness and if toxic or adverse effects to non-target organisms have occurred. Toxic or adverse effects leading to an adverse incident or lack of effectiveness could trigger revisions to the PDMP or changes to pest management strategies.

Comment 114:

The Caddo Lake Institute and Sierra Club comment that the requirements in Part III.C. of the PGP are not adequate. According to the Caddo Lake Institute and the Sierra Club, TCEQ should require applicants to document impacts, effectiveness of application, and any adverse effects. Additionally, the Caddo Lake Institute and Sierra Club recommend that TCEQ should require Level II operators to implement IPM as stated in Part III.B.(b) of the PGP and also comply with the requirements in Part III.C. of the PGP.

Response 114:

Part III.E.6.e. of the PGP requires the permittee to record the dates of pre-and post-pesticide applications, visual evaluations, and any observed toxic or adverse effects. Level II applicators are not required to implement an IPM. The IPM establishes action thresholds that trigger pesticide application. The pre-pesticide application visual evaluation required for Level I will determine if the action thresholds are met. Level II has a lower risk since it is below the annual threshold. Lower risk reduces the need for additional technical requirements.

Comment 115:

The Caddo Lake Institute and Sierra Club comment that TCEQ should require several levels of self reporting on adverse incidents or potential adverse incidents.

Response 115:

Level III operators (operators that apply general use pesticides only belong to this group) are not required by the PGP to report adverse incidents or potential adverse incidents. However, they are required to follow all pesticides label instructions for applying and handling the pesticide. These operators are applying general use pesticide to less than one acre and pose the lowest risk to human health and the environment.

All other operators (IA, IB, and II) are required to notify the TCEQ within 24 hours of any potential adverse incident. TCEQ will determine if an adverse incident has occurred.

Comment 116:

TMCA and ADAPCO comment that TCEQ should clarify if the permit requirement in Part III.E.6.(j) to document "observed toxic or adverse effects to non-target organisms" is expected for effects resulting from the permittee's pesticide application activity or some other responsible party's activity.

Response 116:

The definition of toxic or adverse effect limits the scope to the effects as a result of exposure to a pesticide residue.

Comment 117:

TMCA and ADAPCO recommend that "potential" be removed from the title of Part III.F.2, and "should have known" be removed from the text in Part III.F.2. TMCA, ADAPCO, and Brazoria County recommend removing the phrase "has been informed" from the text in Part III.F.2. so that the permittee is only required to report confirmed adverse incidents within the required 24 hour period.

AEP suggests that the concept of "adverse impacts" for reporting and notification be abandoned in favor of the standardized language already found in NPDES permits that requires the permittee to determine and report those events that may endanger human health and the environment.

Response 117:

Parts III.F.(2) and IV.F.(1). of the PGP require operators to notify the appropriate TCEQ Regional Office within 24 hours of any potential adverse incident related to the application of pesticides covered under the permit. Since the incident will not have been confirmed by the Commission at that point, it is considered a potential adverse incident. The incident becomes an adverse incident after it is verified, confirmed, and documented by TCEQ.

The phrase "has been informed of" suggests that an adjacent land owner or neighbor could inform the operator of the potential adverse incident.

Comment 118:

Harris County and HCFCD comment that maintaining records for five years is longer than the three years required for NPDES permits. TAES recommends that the PGP require that pesticide records be maintained by the applicator for two years from the date of application of each pesticide to be consistent with TDA applicator retention requirements.

WN Number 236 comments that the PGP will require producers who have a pesticide license through TDA to keep two different sets of records; one set for two years to comply with the TDA's requirements and another set for five years for to comply with TCEQ's requirements.

Response 118:

According to 30 TAC §205.5, a general permit may be issued for a term not to exceed five years. The PGP is effective for five years. Therefore, permittees are required to keep their records for the five year duration of the permit.

Comment 119:

Mark Palmer asked for the length of time there needs to be between a chemical application and an incident (i.e. fish kill) that must be reported to TCEQ.

Response 119:

The length of time will vary based on the type of pesticide used. Due to the number of pesticides available for use, it is impractical for TCEQ to establish a specific length of time.

Comment 120:

Harris County and HCFCD comment that the requirement to maintain pesticide application records in the PDMP is not necessary since the EPA draft PGP does not require that these records be maintained in the PDMP. They recommend that TCEQ mirror the EPA draft PGP requirements for pesticide application recordkeeping.

Response 120:

The PDMP is a tool for a permittee to use as a guide to pest management. The PDMP establishes what the target pests are and when, where, and how to treat the pests. The PDMP also contains procedures and records of past pesticide activities to help determine the effectiveness of the pesticide used, problems, and the need for revisions to pest management strategies. The PDMP is a working document that is subject to changes and updates. Records in the PDMP are available to TCEQ authorized representatives and will provide the proof of compliance with permit conditions.

Comment 121:

Harris County, HCFCD, TMCA, and ADAPCO comment that there is inconsistent language when referring to "possible" "potential" or "observable" toxic or adverse effects. Harris County, HCFCD, TMCA, and ADAPCO recommend TCEQ use consistent terms to clarify the intent in the following sections of the permit: Part III.E.6.(j) - "observed toxic or adverse effects," Part IV.C. "possible and observable toxic or adverse effects," Part IV.D.(e) "a toxic or adverse effect," and Part IV.F.(1)"Potential Adverse Incident Notification."

Response 121:

The terms as used in the various sections mentioned refer to specific effects and words such as “possible”, “potential” or “observable” describe the different situations.

Toxic or adverse effect is defined in Part I of the PGP as: “Effects that occur within waters of the U.S. on non-target plants, fish or wildlife that are unusual or unexpected as a result of exposure to a pesticide residue (e.g., effects to organisms not otherwise described on the pesticide product label or otherwise not expected to be present). Adverse effects to small organisms may not be directly observable.”

Part III.E.6.(j) Any observed toxic or adverse effects to non-target organisms. The reference here is to toxic or adverse effects observed during post application visual evaluation.

The word “possible” as used in Part IV.C. is meant to ensure that the permittee carefully considers all unusual or unexpected effects, regardless of the source of the effect prior to

making a final determination of whether the effects meet the definition of a toxic or adverse effect.

The word “potential” as used in Part III.F.(2) and Part IV.F.(1) means that the incident is not considered an adverse incident until TCEQ confirms the incident. Since the incident has not been confirmed by the Commission, it is considered a potential adverse incident. It becomes an adverse incident after it is verified, confirmed, and documented. The provision states: “If a permittee knows or should have known or has been informed of an adverse incident, the permittee shall notify the appropriate TCEQ Regional Office within 24 hours of becoming aware of the potential adverse incident or call the TCEQ 24–hour Spill Reporting Line at 1-800-832-8224.”

The word “observed” as used in Part IV.D.(e) refers to toxic or adverse effects observed by the permittee or someone else who observed the effects and notified the permittee.

Part IV. Level II Operators

Comment 122:

Rey Gomez asks if threshold numbers can be included in the permit for Level II.

Response 122:

The eligibility criteria for Level II operators is stated in Part II.A.3.(a) and (b) of the permit. The provision states:

Level II: Operators that meet the following criteria:

(a) Public or private entities applying RUP or SLU pesticides or RH to waters of the U.S. where there is public or private access, or public or private entities applying GUP to one (1) acre or more of waters of the U.S. in one calendar year where there is public or private access; and
(b) Who do not meet the pesticide use pattern thresholds in Part II.A.1(b).

Comment 123:

LCRA states that TCEQ should allow submission of electronic copies of Adverse Incident Reports and Self Certification form. LCRA recommends revising Part IV.E.2 and 3 to add in parentheses (an electronic copy is acceptable).

Response 123:

Adverse incident reports must be submitted in writing to TCEQ. Currently, there is no mechanism for electronic submission of these documents. The PGP does not specify the format (paper vs. electronic) for onsite records. However, all records must be readily available to authorized representatives of TCEQ, regardless of the format of the records.

Part VI. Standard Permit Conditions

Comment 124:

TMCA and ADAPCO recommend adding the following sentence to Part VI - Standard Permit Conditions: "Nothing in this General Permit is intended to negate any person's ability to assert the force majeure (acts of God, war, strike, riot, or other catastrophes).”

Response 124:

30 TAC §70.7 – Force Majure, is applicable to all enforcement actions taken by TCEQ, including enforcement of the PGP whether stated in the permit or not. 30 TAC §70.7 states: "(a) If a person can establish that an event that would otherwise be a violation of a statute, rule, order, or permit was caused solely by an act of God, war, strike, riot, or other catastrophe , the event is not a violation of that statute, rule, order, or permit. (b) The owner or operator of the affected facility shall have the burden of proof to demonstrate that any pollution or discharge is not a violation as provided by subsection (a) of this section. (c) If force majeure is claimed as an affirmative defense to an action brought under this chapter, the permittee must submit notice to the executive director as provided by §305.125(9) of this title (relating to Standard Permit Conditions)."

Fact Sheet and Executive Director's Preliminary Decision

Part I. Summary

Comment 125:

NWT comments that the Fact Sheet and PGP should be drafted so that they are consistent with the regulatory language. According to NWT, if the Fact Sheet and PGP are consistent with the regulatory language, then all regulated entities could understand and follow systematically without jumping back and forth from the draft to the fact sheet.

Response 125:

The Fact Sheet summarizes the PGP requirements. The requirements in the PGP are what the permittees must comply with. TCEQ believes that the requirements in both the Fact Sheet and the PGP are understandable.

Comment 126:

TIP comments that TCEQ incorrectly characterized Level III operators in the last line of the summary on page one of the Fact Sheet. Therefore, TIP suggests that the sentence be revised to: "Level III operators are public and private entities that apply GUP to less than one acre of waters of the U.S. per calendar year and are required to follow the FIFRA label."

Response 126:

In response to the comment, the last sentence of Part I. Summary of the Fact Sheet was revised as follows: "Level III operators are public or private entities that apply GUP to less than 1 acre of waters of the U.S. per calendar year and are required to follow the FIFRA label."

Comment 127:

Harris County, HCWCID, TMCA, and ADAPCO recommend that "were previously" be changed to "are currently" in Part I. Summary of the Fact Sheet.

Response 127:

In response to the comment, the second sentence in the first paragraph of Part I. Summary of the Fact Sheet was revised as follows: "These operations are currently

regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) of the U.S. EPA."

Comment 128:

TFA and HFM comment that a complete description of Level IB operators should be included in the second paragraph in Part I. Summary of the Fact Sheet. This segment includes private entities applying restricted use pesticide, SLU pesticide, or regulated herbicide to private access.

Response 128:

In response to the comment, the second paragraph of Part I. Summary of the Fact Sheet was revised to: "Level IB consists of operators that meet the pest management or treatment area threshold but will be applying General Use pesticides (GUP) or private entities applying GUP, RUP, SLU pesticide or RH to waters of the U.S where there is only private access and therefore are required to submit a complete Self Certification Form to the Commission to obtain permit coverage."

Part III. Permit Applicability

Comment 129:

TFA and HFM comment that the last paragraph on page 4 of Part III.A.2 of the Fact Sheet should be clarified by stating: "Level IA operators with 6,400 acres of contiguous land (pest management area) that apply pesticides to waters of the U.S. are required to submit NOIs so as to be consistent with the permit."

Response 129:

The Fact Sheet summarizes the PGP requirements. The requirements in the PGP are what the permittees must comply with. The PGP defines who qualifies as a Level IA operator in Part II.A.1. TCEQ declines to make the suggested change to the Fact Sheet.

Comment 130:

TFA, HFM, and TIP comment that operators do not turn off the spray nozzle when they reach an intermittent stream to continue on the other side may be true for aerial spraying, but not true for operators who are conducting area-wide pest control by ground application because the operators can choose to avoid spraying over water. Therefore, TIP requested that a sentence be added to the third paragraph of Part III.A.2. of the Fact Sheet stating that "a person conducting ground application of pesticides is not within the jurisdiction of the CWA or regulated by this permit if the person turns off the nozzle when they get to the creek such that the operator does not apply pesticides near waters of the U.S."

Response 130:

The Fact Sheet does not make a definitive statement about the operator turning off the spray nozzle over the waterway. The sentence in question states that "it is believed that in the course of applying the pesticide to the pest management area that the operator will not turn off the nozzle when they get to the creek to continue on the other side of the creek. Therefore, the pesticide will be applied directly to water to control pests that are present near waters. "

The PGP authorizes the discharge of biological pesticides or chemical pesticides that leave a residue in water when such applications are made into, over or near waters of the U.S to control pests. If the operator applies pesticide such that the pesticide does not discharge into, over, or near waters of the U.S. then PGP coverage is not required.

Comment 131:

TIP comments that the discussion in Part III.A.2. of the Fact Sheet (page 4) regarding 10-fold and 5-fold thresholds may be confusing and suggests that TCEQ revise the last sentence of the first paragraph to read: "Therefore, only operators that meet the thresholds of treating 6,400 contiguous acres or more have been required to submit a NOI if the operators will be applying restricted use or state-limited-use pesticides or regulated herbicides to waters of the U.S."

Response 131:

In response to the comment, the last sentence of the first paragraph of Part III.A.2. of the Fact Sheet was revised as follows: "Therefore, only the operators that meet the annual thresholds are required to submit a NOI if the operators will be applying restricted use or state-limited-use pesticides or regulated herbicides to waters of the U.S."

Comment 132:

TIP suggests revising the second paragraph of Part III.A.2. of the Fact Sheet to read: "To calculate the annual threshold for vegetation and algae and animal pest control in water, calculations should include the area of the applications made to (1) waters of the U.S. and (2) for conveyances, the application made to flowing water having a hydrologic surface connection to waters of the U.S. at the time of pesticide application."

Response 132:

TCEQ agrees that the definition of water's edge is complex. However, no changes were made to the Fact Sheet. The definition provided in the permit provides the best protection for water quality and is clear enough to provide for effective compliance and enforcement.

Comment 133:

TFA and HFM recommend that "and nonpoint source silvicultural activities" be added to the first sentence after "storm water" in Part III.B – Permit Limitations of the Fact Sheet for consistency with the definition of point source in the PGP.

Response 133:

In response to the comment, the first sentence of Part III.B. of the Fact Sheet was modified and now reads: "Irrigation return flows from agriculture or agricultural storm water runoff or nonpoint source silvicultural activities is exempt from this permit, even when they contain pesticides or pesticide residues, as the CWA specifically exempts these categories of discharges from requiring TPDES permit coverage."

Part IV. Permit Coverage

Comment 134:

TIP comments that TCEQ incorrectly characterized Level III operators as homeowners or gardeners, thereby excluding public and private entities who may choose to use only GUP so that they will be eligible to be Level III operators.

Response 134:

In response to the comment, Part IV.4. of the Fact Sheet was revised to read: "Operators in this group include but are not limited to state agencies, cities, and counties, farmers on stock ponds, homeowner's association around lake, pest control company doing pest control in neighborhoods."

Part VI. Legal Basis

Comment 135:

NWT comments that additional background information on the CWA, NPDES permits, and the history of pesticide regulation and leading the various court decisions should be provided in the Fact Sheet.

Response 135:

TCEQ thinks that sufficient background information was provided in the Fact Sheet in Parts VI (Legal basis) and VII (Regulatory Background and Legal History).

Part VIII. Integrated Pest Management Practices

Comment 136:

Harris County and HCFCD comment that the statement in Part VIII.2 of the Fact Sheet that states that pesticide application can only be carried out by a trained, certified, pesticide applicator if the pesticide is classified as restricted use excludes applicators being supervised by a licensed applicator. Therefore, they suggest that the language be changed to include applicators being supervised by a licensed applicator.

Response 136:

It is not the intent of the PGP or Fact Sheet to identify who must be licensed to apply restricted use pesticides, SLU pesticides, or regulated herbicides; or if supervised individuals can apply without a license. Pesticides licensing requirements are beyond the scope of the PGP. Licensing requirements are found in 4 TAC Chapter 7, Subchapter C.