

Response to Public Comment Regarding the Draft §401 Water Quality Certification of the Pesticide General Permit IDG87####

DEQ conducted a 31-day public comment period (April 8 through May 9, 2016) on the draft §401 Water Quality Certification on the federal Pesticide General Permit for Discharges from the Application of Pesticides. DEQ received comments from Idaho Conservation League (ICL) and Idaho State Department of Agriculture (ISDA).

1. Comments from ICL:

EPA's 2016 Draft NPDES PGP, irrigation control districts (or similar public or private entities) are required to submit a Notice of Intent (NOI) regardless of their annual treatment area threshold. As part of the NOI submittal, operators are required to submit a list of the receiving stream(s). Given Idaho's situation regarding leaking canals, DEQ should include provisions in their 401 Certification requiring canal operators to also identify which aquifers are likely to be affected by pesticide application. Additionally, DEQ should require a robust groundwater monitoring program to be included as part of a canal operator's Pesticide Discharge Management Plan (PDMP) to ensure pesticide application does not pose a risk to human health and remains compliant with Idaho's ground water quality standards defined in IDAPA 58.01.11.200. In addition, infiltration from leaky canals that recharges the Eastern Snake Plain Aquifer (ESPA) will eventually discharge into the Snake River through springs along the ESPA's western margin. These springs, as well as the tributaries and main stem of the Snake River, represent critical habitat for four species of snails listed as either threatened or endangered under the Endangered Species Act (ESA), including:

- Banbury Springs lanx (*Lanx sp.*) - Endangered
- Bliss Rapids snail (*Taylorconcha serpenticola*) - Threatened
- Bruneau hot springsnail (*Pyrgulopsis bruneauensis*) - Endangered
- Snake River physa snail (*Haitia (Physa) natricina*) – Endangered

Pursuant to Section 1.6 in EPA's Draft PGP, EPA will be required to collaborate with the U.S. Fish and Wildlife Service (FWS) to perform an ESA consultation for the aforementioned species. DEQ's Draft 401 Certification should not be approved until these consultations have been performed. Once completed, DEQ's Final 401 Certification should incorporate and reflect the findings from the FWS analysis.

DEQ's Response:

Section 401(d) allows States to include conditions in certifications necessary to assure compliance with WQS and any "other appropriate requirement of State law." This authority, however, is restricted to including conditions based upon other State law that is related to surface

water quality protection. See *Arnold Irrigation District v. Department of Environmental Quality*, 717 P.2d 1274 (Or. App. 1986); *Wetlands and 401 Certifications* (EPA 1989) at page 25-27. DEQ does not believe it has authority to include in the Section 401 water quality certification provisions to assure compliance with other State laws related to ground water protection, such as the Ground Water Quality Rule.

While the logic of infiltration to ground water from porous canals is reasonable, DEQ has been presented no data to indicate that pesticides are indeed leaching into ground water and then migrating to springs thus endangering threatened or endangered snails. More importantly, it is EPA's obligation to consult with the U.S. Fish and Wildlife Service under the Endangered Species Act, not DEQ's. This comment is being directed at EPA's NPDES permit rather than DEQ's Section 401 water quality certification, and so should be directed toward EPA rather than DEQ.

Furthermore, DEQ would like to reiterate what is stated on page 4 of the Section 401 water quality certification:

In examining the environmental or human health effects, EPA considers whether the pesticide has the potential to cause adverse effects on non-target organisms, wildlife, fish, and plants, as well as possible contamination of surface water or ground water from leaching, runoff, and spray drift. If a pesticide posed unacceptable acute or chronic risk, then EPA would not register the pesticide for use.

Concerns regarding the adequacy of EPA's pesticide registration analysis should be addressed to EPA.

DEQ concludes it has no basis to delay the certification of the Pesticide General Permit.

2. Comments from ICL:

DEQ's actions are noncompliant with the requirement to perform Tier II analyses on a water body by water body basis, as stated in IDAPA 58.01.02.052.05, nor do they comply with the requirement for DEQ to provide the public notice and an opportunity to review the antidegradation analysis, as stated in IDAPA 58.01.02.052.08.e.iii. DEQ's 401 Certification should read that all identified Tier II water bodies will receive a proper Tier II analysis specific to the water body and surrounding watershed, as is clearly stated in WQS. The public should be notified of any review performed, and given an opportunity to scrutinize the review and provide comments if necessary. Specifically, we ask that DEQ provide information on the following:

- What analyses will DEQ perform to assess the chemical, physical, biological and other information as part of identifying Tier II water bodies?
- How will DEQ quantify the assimilative capacity of individual streams, particularly those without an associated TMDL?
- What will the time frame be for performing these analyses?

- How will DEQ confirm that the highest statutory and regulatory requirements are being met throughout the watershed prior to approval?

DEQ's Response:

IDAPA 58.01.02.052.03 provides that DEQ will conduct an antidegradation review, including any required Tier II analysis, at the time at which general permits are certified. For general permits that DEQ determines adequately address antidegradation, review of individual applications for coverage will not be required unless it is required by the general permit. Further, if supported by the permit record, DEQ may also presume that discharge authorized under a general permit are insignificant or that the pollution controls required in the general permit are the least degrading alternative as specified in Subsection 052.08c.

In accordance with IDAPA 58.01.02.052.03, DEQ has conducted its antidegradation review during its review of the general permit. As a result of this review, DEQ has acknowledged that pesticides may be applied to Tier II waters and that there may be circumstances where a pesticide application has the potential to result in a significant lowering of water quality in a Tier II water. Therefore, DEQ conducted a Tier II analysis, in which DEQ determined that any potential significant degradation of high quality water is necessary to accommodate important economic or social development and that the highest statutory and regulatory controls on point source discharges and cost-effective and reasonable best management practices of nonpoint sources of pesticides are being achieved in the State. Therefore, DEQ's Section 401 water quality certification meets the antidegradation requirements applicable to high quality waters.

3. Comment from ISDA:

Section 401 Water Quality Certification: Page 9, Section 1: If the application is directly into navigable waters subject to the jurisdiction of the CWA (waters of the U.S.) that contain public drinking water system (PDWS)⁵ surface water intake(s), the Operator must notify (see Condition #6) the appropriate DEQ Regional Office Administrator as well as the PDWS operator(s)/owner(s) at least fourteen (14) days prior to the application if: According to this definition, a treatment in at the southern end of Lake Pend Oreille would require notification for all water intakes in the entire water system. It would be more appropriate to require notifications for "PDWS's that are within restriction zones of treated areas."

DEQ's Response:

In order for this condition to be applicable, two requirements need to be met. First, the pesticide applied has to contain one of the four chemicals named in our certification: endothall, diquat, glyphosphate, or 2,4-D. Secondly, the targeted pest control area or as referenced in your comment "restriction zones of treated areas" as being within 600 feet of the intake or within the distance restrictions (associated with domestic use) specified on the label, whichever distance is greater. The target pest control area is defined as the area within the waters of the U.S. where the

aquatic, chemical pesticide is expected to perform its intended purpose. A treatment in the southern end of Pend Oreille Lake, with a pesticide that contains at least one of the four named chemicals, would require notification of only those public drinking water systems whose intakes were within the specified distance of the pest treatment area.

4. Comment from ISDA:

The Section 401 Water Quality Certification: Page 10, section 2c: Water quality monitoring must begin within 3 days after the pesticide application, unless an alternative waiting period is specified by DEQ. This requirement does not take into account existing monitoring requirements as outlined on the FIFRA label. This can lead to the collection of costly samples during periods when residues would be expected to far exceed standards for releasing restrictions. It would be useful to change the existing language to refer to monitoring outlined on the FIFRA product label.

DEQ's Response:

DEQ recognizes that pesticides have varying half-lives, ranging from hours to months, which is why DEQ added the ability for the Operators to request an alternative waiting period from DEQ, when appropriate. If an alternative waiting period is requested, DEQ would expect the Operator to refer to the monitoring requirements outlined on the FIFRA product label.

5. Comment from ISDA:

The Section 401 Water Quality Certification: Page 10, section 2d: Water quality monitoring shall be conducted at least weekly following the initial day of treatment or at an alternative frequency that is specified by DEQ. Depending on the results of the first sampling event, frequency of sampling often is projected to be more than 7 days to have expectations of releasing restrictions. This can lead to expensive and unnecessary sampling.

DEQ's Response:

DEQ recognizes that pesticides have varying half-lives, ranging from hours to months, which is why DEQ added the ability for the Operators to request an alternative frequency from DEQ, when appropriate.