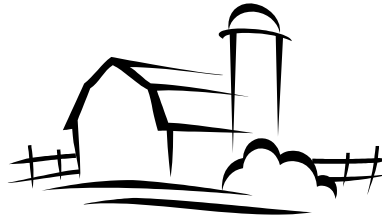

Occupational Regulation Review

Nebraska Pesticide Act Licenses

Commercial Applicator

Non-Commercial Applicator

Private Applicator



**Report of the Agriculture Committee Pursuant to the
Occupational Board Reform Act (§§84-933 to 84-948)**

Date: December 15, 2023

Introduction

The Occupational Board Reform Act (§§84-933 to 84-948 of the Nebraska Revised Statutes) was enacted by the Nebraska Legislature to establish a process for systematic examination of occupational regulations in Nebraska. The Act assigns a primary responsibility to the standing committees of the Legislature to perform periodic evaluation of those occupational regulations that fall within the subject matter jurisdiction of each committee.

Such evaluation is to include identifying the underlying public welfare objectives intended to be served by a set of occupational regulations and whether such public welfare concerns remain valid or have evolved. The goal of the Occupational Board Reform Act is to realize the public welfare interests with the least burdensome forms of regulation. The evaluation is to determine whether existing regulations impose an excessive or unnecessary barrier to entry into, or burden to participate in, an occupation that limits competition, entrepreneurial opportunities or availability of services in relation to the public welfare benefits intended.

§84-940 defines occupational regulation to mean “a statute, rule, regulation, practice, policy or other state law requiring an individual to possess certain personal qualifications or to comply with registration requirements to use an occupational title or work in a lawful occupation.” Beginning in 2019, each standing committee of the Legislature shall annually review and analyze approximately twenty percent of the occupational regulations within the jurisdiction of the committee and prepare and submit an annual report electronically to the Clerk of the Legislature by December 15 of each year. Each report shall include the committee's recommendations regarding whether the occupational regulations should be terminated, continued, or modified.

Licensing of pesticide applicators under the Nebraska Pesticide Act are occupational regulations that fall within the jurisdiction of the Agriculture Committee. This report is submitted to fulfill the requirements of the Agriculture Committee under §84-948 of the Occupational Board Reform Act with respect to this occupational regulation.

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Occupation: Pesticide Applicator

Occupational Board: Nebraska Department of Agriculture

Statutory Citation: Nebraska Pesticide Act (§§2-2622 to 2-2659)

Description of Occupation:

A pesticide applicator is any individual who performs the physical application of pesticides as a commercial service to property owners, for management purposes on their own property, or who apply pesticides as a duty of their employment in both the public and private sectors. While a large percentage of the public use pesticides occasionally or regularly, for purposes of this report, occupational regulations apply only to persons when applying restricted use pesticides and some types of general use pesticides in certain situations, and when performing applications for hire on the property of others. Applicators utilize training and experience to identify pests, to be familiar with the variety of pesticide products available to mitigate or avoid damage by pests, to operate specialized equipment or devices that perform actual applications, familiarity with pesticide product chemistry and characteristics, and applicable regulations governing their use to optimize safety and efficacy of pesticide treatments.

Description of Occupational Regulation:

Pesticide applicators are regulated under the Nebraska Pesticide Act. The Act requires persons applying any restricted-use pesticide, and persons applying certain categories of general use pesticides¹ for hire on the property of another, to meet certification requirements to lawfully engage in the activity. The Nebraska Department of Agriculture (NDA) is responsible for the certification and licensing of pesticide applicators in Nebraska. Certification of pesticide applicators is intended to assure that persons who use certain pesticides or who make specific types of pesticide applications have a fundamental understanding of how to do so safely and effectively.

Nebraska Pesticide Act

The Act sets out three categories of applicator licensure as follows (descriptions of certification requirements are pasted from the Department's website which can be viewed here: [Pesticide Applicator Certification and Licensing | Nebraska Department of Agriculture](#)).

Commercial Applicator (§2-2638) --

- (1) An individual who uses restricted-use pesticides on the property of another person in the State of Nebraska for hire or compensation . . .*
- (2) Any person who uses lawn care or structural pest control general-use pesticides on the property of another person in the State of Nebraska for hire or compensation, except as provided in subsection (3) of section 2-2636, regardless of whether such person uses any restricted use pesticide.*

¹ Pesticides are classified as restricted use if the EPA determines the potential for the product to cause unreasonable adverse effects on human health or the environment without additional restrictions, including limiting their possession and application to persons certified as demonstrating competency to handle and apply the product safely. Unclassified and general use pesticides are those whose labeling is sufficient to enable the general public to use the product without adverse impacts on health or the environment.. See 40 CFR 152.170

Commercial applicator certification in Nebraska is divided into various categories. These categories relate to the specific types of pesticide applications made by an individual. To acquire certification as a commercial pesticide applicator in Nebraska, an individual must successfully complete a general standards exam and at least one specific category exam. A minimum score of 70% is required to pass an exam. The general category exam addresses the principles pertaining to the use of pesticides, which should be known by all pesticide applicators. The category exams address information and material pertinent to specific types of pesticide applications. Once certified, a commercial pesticide applicator must pay the \$90 license fee to become licensed. The commercial license is valid for 3 years.

A commercial pesticide applicator is limited to applications in just the specific categories the applicator is certified in. A commercial applicator certified in, for example, structural and health pest control would not be authorized to apply pesticides in ornamental and turf pest control unless also certified in the latter category even if applying pesticide products that are registered for use in both categories.

Noncommercial Applicator (§2-2624(29)):

- (a) any applicator who is not a commercial applicator or a private applicator and uses restricted-use pesticides only on property owned or controlled by his or her employer or for a federal entity, state agency, political subdivision of the state, or postsecondary educational institution in this state*
- (b) any employee or other person acting on behalf of a political subdivision of the state who is not a commercial applicator or a private applicator who uses pesticides for outdoor vector control*

Non-commercial applicators are certified in one of 14 categories in the same manner as commercial applicators. There is no fee for non-commercial applicator licenses.

Private Applicator: (§2-2624(36)):

an applicator who is not a commercial applicator or a noncommercial applicator and uses or supervises the use of any restricted-use pesticide for purposes of producing any agricultural commodity on property owned, rented by, or under the general control of him or her or his or her employer, or, if applied without compensation other than trading of personal services between producers of agricultural commodities, on the property of another person.

To acquire certification as a private applicator, the applicator must either attend a private applicator training program sponsored by their local county extension office, complete the self-study materials in coordination with their local county extension office, or successfully complete a private applicator exam administered by the NDA. Private applicators are required to recertify once every three years. To become licensed, a private applicator must be certified and remit a \$25 fee for a 3-year license.

Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)

FIFRA section 3 (7 USC 136a) provides for the registration and classification of pesticides. This section further prohibits the use of products classified as restricted use other than by certified applicators or persons acting under a certified applicator's direct supervision. Pesticide applicator certification authorized under the Nebraska Pesticide Act, as well as other provisions pertaining to pesticide product registration and enforcement of pesticide distribution, storage/ handling, and use violations,

endow the Department of Agriculture with necessary authorities to authorize the EPA to delegate primary FIFRA implementation in this state as authorized by FIFRA section 26 (7 USC 136w-1). In the event that a state plan or its implementation is deemed inadequate to uphold federal standards, and procedures specified in FIFRA to attempt to bring a state program into compliance are exhausted, the EPA would be authorized to withdraw approval of the state plan and assume FIFRA enforcement in that state. ²

Under FIFRA section 11 (7 USC 136i), states may assume certification of applicators under a pesticide applicator certification plan submitted by the Governor and approved by the EPA administrator that, among other requirements, “contains satisfactory assurances that State standards for the certification of applicators of pesticides conform with those standards prescribed by the Administrator” The standards established by EPA for pesticide applicator certification are found at 40 CFR 171 [[eCFR :: 40 CFR Part 171 -- Certification of Pesticide Applicators](#)] In addition to approving state applicator certification programs, EPA is authorized under FIFRA section 23 (7 USC 136u) “to assist states in developing and administering state programs . . . to train and certify applicators consistent with the standards the EPA administrator prescribes.” FIFRA section 23 authorizes EPA to provide cost share assistance of up to 50% of a state’s costs to administer applicator certification programs. EPA may also enter into agreements to provide direct technical and funding assistance for the purpose of certified applicator training.

Occupational Board Information:

Report contents specified under subdivisions (3)(a) through (f) of §84-948 are not applicable to the occupations reviewed in this report. The Nebraska Department of Agriculture, a code agency, is solely responsible for the receipt and processing of applicator licensure applications, and the issuance, monitoring and discipline of licensees and lack of licensure. These functions are not delegated to an industry board and are largely prescribed by statute and applicable federal regulations.

Regulatory Activity and Costs:

To assist the Agriculture Committee in preparing this report for purposes of the Occupational Board Reform Act with respect to regulations governing pesticide applicator occupations, Chairman Steve Halloran submitted an inquiry form to the Director of the Department of Agriculture. The information in this section consists of information provided in the Department’s response.

Enforcement Activity

A. Please list and briefly describe disciplinary actions taken against licensees over the past 5 years, or actions against persons operating without a license.

Under the Pesticide Act, disciplinary actions can range from an advisory letter to license revocation and fines depending on the severity of the violation. In the last five years, no licenses have been revoked or suspended and thirteen have been placed on probation. When applicators are

² See FIFRA section 26

discovered to be operating without a license they are issued a certification violation and are then required to become licensed before they may continue to operate.

B. For any applications denied, please describe the reason(s) for denial.

Applicants must pass the appropriate certification exam to be qualified to receive a license. Applications can also be denied for a few reasons, most commonly if the individual is not legally able to work in the United States or the applicator has a suspended license in another state when applying for a reciprocal license.

License Activity:

Pesticide Applicator Licensure – 5 year Summary of Activity

Activity by Year					
	2022/23	2021/22	2020/21	2019/20	2018/19
License Activity					
Commercial/Noncommercial Applicator (NDA annual reporting numbers combine commercial and noncommercial licenses.)					
New	1021	881	796	1058	974
Renewal	2782	1493	2893	2734	2729
Applications Denied (These numbers include applicators who have failed certification exams but go on to pass and obtain a license.)	677	741	588	416	660
License Fee Revenue	0	0	0	0	0
Private Applicator					
New	557	463	724	670	600
Renewal	4964	3090	7807	5415	3273
Applications Denied	0	0	0	0	0
License Fee Revenue	0	0	0	0	0
Disciplinary/Enforcement Activity (All Applicator Categories)					
Complaints Received	62	91	63	102	85
Licenses Suspended, Revoked, Cancelled, Limited, or Probation	2	2	2	0	7
Number of Fines Assessed	13	16	17	13	21
Criminal Referrals	0	0	0	0	0

Cost of Regulation:

- A. Please list staff positions to support the Agency’s operations under the Nebraska Pesticide Act and whether dedicated or shared staff.

NDA employs five inspector positions and five office staff positions that are full time employees under the program. NDA also utilizes three shared staff positions to assist with clerical activities and numerous employees across the agency for administrative support.

- B. Please provide annual expenditures by the Agency to carry out the Nebraska Pesticide Act for each of the past 5 fiscal years.

Fiscal Year	FY 18/19	FY 19/20	FY 20/21	FY 21/22	FY 22/23
Pesticide Cash Fund	302,887.71	273,878.59	299,395.01	306,739.07	476,547.66
Pesticide Federal Fund	577,151.73	604,363.42	669,935.71	869,080.32	594,378.90
Total	880,039.44	878,242.01	969,330.72	1,175,819.39	1,070,926.56

- C. If possible to isolate costs, please provide annual expenditures by year for each of the past 5 years to receive and process applicator license applications and expenditures to support activities to enable applicants to meet credentialing requirements. What portion of this activity is supported by federal funds?

NDA does not track expenditures specifically for receiving, processing, or supporting activities specific to applicator licenses or credentialing requirements. NDA receives up to an 85% match from the EPA for pesticide enforcement work and up to a 50% match for certification training activities.

Comparison to Other States’ Regulation:

This report does not include a state-by-state comparison of pesticide applicator training and certification requirements. All states are presumed to apply licensure and training requirements consistent with federal standards discussed previously and that there would be a high degree of uniformity as a result. As part of the Committee’s inquiry, however, the Department was asked to identify any state licensure or certification requirements that exceed minimal federal requirements and any that significantly differ from surrounding states.

- A. Please list any variances of requirements for applicator licensure under the Nebraska Pesticide Act, the rules and regulations of the Department or policies of the Department that are more stringent than minimal requirements under applicable federal statutes or regulations.

Nebraska additionally requires applicators of general-use pesticides to be licensed when making commercial applications for lawn care and structural pests, as well as those making mosquito control applications on behalf of a political subdivision.

B. To the extent known, please describe any significant differences in requirements for applicator licensure under the Nebraska Pesticide Act, the rules and regulations of the Department or policies of the Department to those of surrounding states.

a. Nebraska does not require a business license for companies other than those making aerial applications;

Note – The requirement for an aerial pesticide business license was added by LB 254 enacted in 2010. The bill responded to increasing complaints of incidents associated with aerial spraying operations organized by pesticide distributors often utilizing out-of-state pilot applicators operating under reciprocal licensure where the only accountability for misapplication was through the applicator’s license. Aerial applicator licenses are not reviewed in this report since they are a business, and not an occupational, license.

b. In Nebraska training is completed all in one day versus providing a number of shorter training sessions as occurs in other states;

c. Nebraska does not allow for noncertified applicators to work under a supervisor unless they meet the requirements of the 60-day exemption from licensing;

Note - Nebraska law is currently more stringent than federal regs by only allowing nonlicensed/certified applicators to apply prior to licensure/certification for one 60-day period and if the noncertified applicator is in the process of seeking initial licensure. EPA regs only minimally require that uncertified applicators be supervised by a certified applicator and do not impose a requirement that supervised uncertified applicators be in the process of acquiring licensure. Legislation advanced by the Committee (LB 1159) in 2020 but not enacted would have increased the period uncertified applicators could apply restricted use pesticides while seeking initial licensure to 120 days.

d. Nebraska requires a commercial applicator license for persons applying general-use pesticides for commercial lawn care and structural pest purposes.

EPA only requires applicators to be certified when applying restricted use pesticides. The requirement that applicators who apply general use pesticides for hire for lawn care and structural pest control be licensed as a commercial applicator is more stringent than minimal federal standards but has been a statutory requirement since the Pesticide Act was first enacted.

Occupational Board Reform Act Analysis:

Assumptions underlying the creation of the occupational regulation:

Section 2-2623 of the Pesticide Act declares the intent of the Act is to “*regulate, in the public interest, the labeling, distribution, storage, transportation, use, application, and disposal of pesticides for the protection of human health and the environment.*” *The Legislature hereby finds that pesticides are valuable to our state’s agricultural production and to the protection of humans and the environment from insects, rodents, weeds, and other forms of life which may be pests but that it is essential the public health and welfare that pesticides be regulated to prevent adverse effects on humans and the environment. . . .*”

LB 588 enacted during the 1993 legislative session created the Nebraska Pesticide Act. From the hearing transcripts for LB 588, Nebraska was the last state to assume administration of FIFRA. The legislation was intended to endow the Department of Agriculture with the resources and statutory authorities to meet the requirements for delegation of FIFRA enforcement to the state. A significant motivation for taking this step was a concern that increasing detections of agricultural and other chemicals in ground and surface waters would lead to EPA imposing severe pesticide restrictions or outright bans on the use of products statewide due to limited response options available to EPA under FIFRA. Under state enforcement, the state would be able to more carefully craft pesticide regulations to tailor regulations to target more specific areas of concern and to take proactive steps to prevent pesticide contaminations of water and other natural resources from reaching critical levels.

Occupational board statement of efficacy:

- A. Please provide a brief description of the benefits of the occupational regulation-
Certification of pesticide applicators is intended to assure that persons who use certain pesticides or who make specific types of pesticide applications have a fundamental understanding of how to do so safely for themselves, the community, and the environment as required by the EPA.

- B. Please provide a brief description of potential harm should the occupational regulation be discontinued.
Federal regulations for pesticide applicators who apply restricted-use pesticides would be enforced by EPA and the state would lose primacy of enforcement under FIFRA.

Occupational regulation in relation to Occupational Board Reform Act policy:

§84-946 of the Occupational Board Reform Act (OBRA) declares a policy of the state of Nebraska to protect the fundamental right of an individual to pursue a lawful occupation. To assist committees in assessing current occupational regulations for purposes of OBRA, the current regulation is assessed by the following series of questions.

Do the policy justifications/need for regulation identified when the occupational regulation was enacted remain valid?

Training and certification of commercial applicators and others using restricted use pesticides, and limiting applications of certain pesticides to certified applicators, remain as key component of a strategy to mitigate risks associated with pesticide use. Additionally, Nebraska's pesticide applicator licensure program is consistent with continuing requirements under FIFRA for the state to exercise primary authority for pesticide regulation in the state. Absent a state certification program meeting minimal federal standards, the federal government could resume licensure of applicators in Nebraska under federal authority.

What potential costs or consequences to the consuming public or society at large might arise due to poor quality of services provided by, or unethical conduct of, persons subject to the occupational regulation?

It is reasonably anticipated that environmental harms and health risks from improper pesticide usage would increase absent limiting use of certain pesticides to persons knowledgeable in the safe and effective use of pesticide products. To the extent that incompetent and unethical actors could increase in the marketplace, increased presence and detection of pesticide chemicals in water and in foods could trigger pesticide use restrictions and prohibitions within FIFRA and other environmental protection laws that would limit the availability of pesticides as an economic responses to pest problems for agriculture and other industries.

Absent the availability of the services of certified applicators that the state certification program enables, any property owner applying restricted use pesticides on their property would be required to be certified under federal oversight to lawfully apply the products as required elsewhere in the Nebraska Pesticide Act and the federal FIFRA act.

Does the occupational regulation use the least restrictive regulation necessary to achieve the public welfare interests served by the regulation?

The certification and licensure of applicators under the Nebraska Pesticide Act does not necessarily correspond to any of the least restrictive options set forth in section 84-948 of the Occupational Board Reform Act. While licensure may incidentally confer some measure of consumer protections against incompetent or unethical actors providing services in the marketplace, the certification program is more accurately a component of a larger regulatory scheme to protect public health and the environment. Again, the requirements for licensure, and certification standards are intended to meet or exceed federal standards that apply to the application of restricted use pesticides. There is little room for modification that does not conflict with federal requirements.

Is there information to indicate harm to competition and/or availability of services provided by persons subject to the occupational regulation?

The committee has not received any information to suggest any shortage of individuals or businesses qualified to perform pesticide application services. The requirements for licensure of individual applicators in order to apply pesticides commercially are relatively inexpensive and convenient and are not perceived as a significant barrier to pesticide businesses having a sufficient certified labor pool or for individual entrepreneurs to enter the occupation. The act is not intended to regulate the number of service providers in the marketplace, but only serves to assure competency of persons entering the occupation. Nebraska law provides for reciprocal licensure which further expands the availability of pesticide service providers in the state. Additionally, Nebraska allows use of non-certified applicators provided they are acting under supervision of a certified applicator although our restrictions for noncertified applicators is more stringent than the federal standard. A recent change in federal regulations for minimal age of noncertified applicators when applying restricted use pesticides may marginally reduce the pool of younger workers available to perform spraying operations

Is the occupational regulation enforced only against individuals selling goods or performing services contemplated in the regulatory act?

The licensure/certification requirements apply to those persons who physically perform applications of restricted use pesticides and in some cases, commercial applications of general use pesticides. The Act expressly excludes persons who use pest control products, e.g. dewormers, whose use is regulated elsewhere. The act does not apply to associated activities such as crop consulting even though such service providers may make recommendations for pesticide applications.

Agriculture Committee Recommendations

The Committee does not see a need to eliminate or modify existing regulations due to inconsistency with the policy of the Occupational Board Reform Act at this time. The committee recognizes that pesticide certification according to federal standards is a prerequisite for the state to retain primary authority for FIFRA implementation in the state and that any elimination or relaxation of certification standards should be carefully considered to avoid conflict with federal law. The federal standards establish a floor and Nebraska has only exceeded the federal standards in a few ways but which have utility in protection of public health and the environment.