

MEMORANDUM

SUBJECT: Interpretive Statement on Application of Pesticides to Waters of the United States in Compliance with FIFRA

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TO: Regional Administrators, Regions I - X

The Environmental Protection Agency (EPA) is issuing this interpretation of the Clean Water Act (CWA) to address issues regarding coverage under the CWA of pesticides regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) that are applied to or over, including near, waters of the United States. This Memorandum is issued to address the question of whether National Pollutant Discharge Elimination System (NPDES) permits under section 402 of the CWA are required for the applications of pesticides described below that comply with relevant requirements of FIFRA. EPA provided public notice of and solicited public comment on its interpretation of the CWA with regard to this question. See 68 Fed. Reg. 48385 (Aug. 13, 2003). After considering the comments received in response to that notice, EPA is issuing this Interpretive Statement.

The application of a pesticide to or over, including near, waters of the United States consistent with all relevant requirements under FIFRA does not constitute the discharge of a pollutant that requires a NPDES permit under the Clean Water Act in the following two circumstances:

- 1) The application of pesticides directly to waters of the United States in order to control pests. Examples of such applications include applications to control

mosquito larvae, aquatic weeds or other pests that are present in the waters of the United States.

- 2) The application of pesticides to control pests that are present over waters of the United States, including near such waters, that results in a portion of the pesticides being deposited to waters of the United States; for example, when insecticides are aerially applied to a forest canopy where waters of the United States may be present below the canopy or when pesticides are applied over, including near, water for control of adult mosquitos or other pests.

It is the Agency's position that these types of applications do not require NPDES permits under the Clean Water Act if the pesticides are applied consistent with all relevant requirements under FIFRA (i.e., those relevant to protecting water quality).¹ Applications of pesticides in violation of the relevant requirements under FIFRA would be subject to enforcement under any and all appropriate statutes including, but not limited to FIFRA and the Clean Water Act.

EPA will continue to review the variety of other circumstances beyond the two described above in which questions have been raised about whether applications of pesticides that enter waters of the U.S. are regulated under the CWA, including other applications over land areas that may drift over and into waters of the U.S.

¹ As described in this Interpretive Statement, pesticides designed and registered for application to or over, including near, water are not considered to be pollutants requiring an NPDES permit under the CWA, regardless of whether the pesticides targets are in the water itself or over, including near, the water. If applied in accordance with all relevant requirements under FIFRA, EPA considers these pesticides to be products that are applied to perform their intended purpose of controlling target organisms and, therefore, are neither "chemical wastes" nor "biological materials" within the meaning of section 502(6) of the CWA. This includes any residual product that is an inherent, inextricable element of the pesticide application. For purposes of this Interpretive Statement, EPA considers the portion of a pesticide application that does not reach a target organism and any pesticide remaining in the water after the application is complete to be residual product, and not a pollutant requiring an NPDES permit, *only* if the product had been applied in accordance with all relevant requirements under FIFRA. However, the Agency continues to review whether and under what unique circumstances the material might later become a waste and, therefore, a pollutant. See also n.5, *infra*. If such residuals were to present a water quality problem, they could be addressed through nonregulatory planning and grant processes under the CWA.

The Agency's interpretation is not inconsistent with the result in the Ninth Circuit's decision in *Headwaters, Inc. v. Talent Irrigation District*, 243 F. 3d 526 (9th Cir. 2001), because in the factual situation described by the district court, in EPA's view, the application did not comply with relevant FIFRA requirements and, therefore, was not the type of activity addressed by this Interpretive Statement.

Through a proposed rule in the Federal Register, EPA will solicit comment on incorporating the substance of this Interpretive Statement in the NPDES permit program regulations in 40 CFR Part 122. Notwithstanding that action, however, the application of pesticides in compliance with relevant FIFRA requirements is not subject to NPDES permitting requirements, as described in this Interpretive Statement.

Background and Rationale

In this Interpretive Statement, the Agency construes the Clean Water Act in a manner consistent with how the statute has been administered for more than 30 years. EPA does not issue NPDES permits solely for the direct application of a pesticide to target a pest that is present in or over a water of the United States, nor has it ever stated in any general policy or guidance that an NPDES permit is required for such applications.

It has been and will continue to be the operating approach of the Agency that the application of agricultural and other pesticides in accordance with label directions is not subject to NPDES permitting requirements.

In *Headwaters, Inc. v. Talent Irrigation District*, the U.S. Court of Appeals for the Ninth Circuit held that an applicator of herbicides was required to obtain an NPDES permit under the circumstances before the court. 243 F.3rd 526 (9th Cir. 2001).² The *Talent* decision caused public health authorities, natural resource managers and others who rely on pesticides great concern and confusion about whether they have a legal obligation to obtain an NPDES permit when applying a pesticide consistent with FIFRA and, if so, the potential impact such a requirement could have on accomplishing their own mission of protecting human health and the environment. Since *Talent*, only a few states have issued NPDES permits for the application of pesticides. Most state NPDES permit authorities have opted not to require applicators of pesticides to obtain an NPDES permit. In addition, state officials have continued to apply pesticides for public health and resource management purposes without obtaining an NPDES permit. These varying practices reflect the substantial uncertainty among regulators, the regulated community and the public regarding how the Clean Water Act applies to the use of pesticides.

² In an *amicus* brief filed by the United States in the *Talent* case, the Agency did not address EPA's interpretation of the circumstances in which pesticides applied to or over water are "pollutants" under the CWA's definition of that term. Rather, the *Talent* brief accepted the District Court's factual findings that a "person" had discharged a "pollutant" from a "point source" into "navigable waters" but then disputed the District Court's legal determination that, even in these circumstances, the discharge did not require a CWA permit because the FIFRA label for the particular pesticide did not reference the NPDES permitting requirement. In contrast, this Interpretive Statement addresses the specific and distinct legal question of whether pesticides applied in the two specific circumstances discussed above are pollutants to begin with, and concludes they are not, provided the use of the pesticide complies with all relevant FIFRA requirements.

There has been continued litigation and uncertainty following the *Talent* decision. One such case is *Altman v. Town of Amherst* (Altman), which was brought against the Town of Amherst for not having obtained an NPDES permit for its application of pesticides to wetlands as part of a mosquito control program. EPA filed an amicus brief in that case setting forth the agency's views in the context of that particular case. In September 2002, the Second Circuit remanded the *Altman* case for further consideration and issued a Summary Order that stated, "Until the EPA articulates a clear interpretation of current law among other things, whether properly used pesticides released into or over waters of the United States can trigger the requirement for an NPDES permit [or a state-issued permit in the case before the court] the question of whether properly used pesticides can become pollutants that violate the Clean Water Act will remain open." 46 Fed. Appx. 62, 67 (2d Cir. 2002).

This Memorandum provides EPA's interpretation of how the CWA currently applies to the two specific circumstances listed above. Under those circumstances, EPA has concluded that the CWA does not require NPDES permits for a pesticide applied consistent with all relevant requirements under FIFRA.³

Many of the pesticide applications covered by this memorandum are applied either to address public health concerns such as controlling mosquitos or to address natural resource needs such as controlling non-native species or plant matter growth that upsets a sustainable ecosystem or blocks the flow of water in irrigation systems. Under FIFRA, EPA is charged to consider the effects of pesticides on the environment by determining, among other things, whether a pesticide "will perform its intended function without unreasonable adverse effects on the environment," and whether "when used in accordance with widespread and commonly recognized practice [the pesticide] will not generally cause unreasonable adverse effects on the environment." FIFRA section 3(c)(5).

³ EPA discusses the positions taken in *Talent* and *Altman* in greater detail in a Memorandum issued by EPA's General Counsel on January 24, 2005, titled "Analysis of Previous Federal Government Statements on Application of Pesticides to Waters of the United States in Compliance with FIFRA."

The application of a pesticide to waters of the U.S. would require an NPDES permit only if it constitutes the “discharge of a pollutant” within the meaning of the Clean Water Act.⁴ The term “pollutant” is defined in section 502(6) of the CWA as follows:

The term ‘pollutant’ means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

EPA has evaluated whether pesticides applied consistent with FIFRA fall within any of the terms in section 506(2), in particular whether they are “chemical wastes” or “biological materials.” EPA has concluded that they do not fall within either term. First, EPA does not believe that pesticides applied consistent with FIFRA are “chemical wastes.” The term “waste” ordinarily means that which is “eliminated or discarded as no longer useful or required after the completion of a process.” The New Oxford American Dictionary 1905 (Elizabeth J. Jewell & Frank Abate eds., 2001); see also The American Heritage Dictionary of the English Language 1942 (Joseph P. Pickett ed., 4th ed. 2000) (defining waste as “[a]n unusable or unwanted substance or material, such as a waste product”). Pesticides applied consistent with FIFRA are not such wastes; on the contrary, they are EPA-evaluated products designed, purchased and applied to perform their intended purpose of controlling target organisms in the environment.⁵ Therefore, EPA concludes that “chemical wastes” do not include pesticides applied consistent with FIFRA.

⁴ This Interpretive Statement addresses circumstances when a pesticide is not a “pollutant” that would be subject to NPDES permit requirements when discharged into a water of the United States. It does not address the threshold question of whether these or other types of pesticide applications constitute “point source” discharges to waters of the United States. On March 29, 2002, EPA issued a Memorandum titled “Interpretive Statement and Regional Guidance on the Clean Water Act’s Exemption for Return Flows from Irrigated Agriculture.” This statement clarified that the application of an aquatic herbicide consistent with the FIFRA label to ensure the passage of irrigation return flow is a nonpoint source activity not subject to NPDES permit requirements under the CWA. Additionally, on September 13, 2003, EPA’s General Counsel issued a Memorandum titled “Interpretive Statement and Guidance Addressing Effect of Ninth Circuit Decision in *League of Wilderness Defenders v. Forsgren* on Application of Pesticides and Fire Retardants.” That Memorandum reaffirmed EPA’s long-standing interpretation of its regulations that silvicultural activities such as pest and fire control are nonpoint source activities that do not require NPDES permits. Both these documents remain in effect and are available at www.epa.gov/npdes/agriculture.

⁵ Where, however, pesticides are a waste, for example when contained in stormwater regulated under section 402(p) of the CWA or other industrial or municipal discharges, they are pollutants and their discharge by a point source to a water of the U.S. may be controlled in an NPDES permit.

EPA also interprets the term “biological materials” not to include pesticides applied consistent with FIFRA. We think it unlikely that Congress intended EPA and the States to issue permits for the discharge into water of any and all material with biological content.⁶ With specific regard to biological pesticides, moreover, we think it far more likely that Congress intended not to include biological pesticides within the definition of “pollutant.” This interpretation is supported by multiple factors.

EPA’s interpretation of “biological materials” as not including biological pesticides avoids the nonsensical result of treating biological pesticides as pollutants even though chemical pesticides are not. Since all pesticides applied in a manner consistent with the relevant requirements under FIFRA are EPA-evaluated products that are intended to perform essentially similar functions, disparate treatment would, in EPA’s view, not be warranted, and an intention to incorporate such disparate treatment into the statute ought not to be imputed to Congress.⁷ Moreover, at the time the Act was adopted in 1972, chemical pesticides were the predominant type of pesticide in use. In light of this fact, it is not surprising that Congress failed to discuss whether biological pesticides were covered by the Act. The fact that more biological pesticides have been developed since passage of the 1972 Act does not, in EPA’s view, justify expanding the Act’s reach to include such pesticides when there is no evidence that Congress intended them to be covered by the statute in a manner different from chemical pesticides. Finally, many of the biological pesticides in use today are reduced-risk products that produce a more narrow range of potential adverse environmental effects than many chemical pesticides. As a matter of policy, it makes little sense and would be inconsistent with the environmental purposes of the CWA to discourage the use of these products by treating them as subject to CWA permitting requirements when chemical pesticides are not. Caselaw also supports this interpretation. Ass’n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Resources, 299 F.3d 1007, 1016 (9th Cir. 2002) (application of the *esjudem generis* canon of statutory interpretation supports the view that the CWA “supports an understanding of . . . ‘biological materials,’ as waste material of a human or industrial process”).⁸

⁶ Taken to its literal extreme, such an interpretation could arguably mean that activities such as fishing with bait would constitute the addition of a pollutant.

⁷ Further, some pesticide products may elude classification as strictly “chemical” or “biological.”

⁸ EPA’s interpretation of section 502(6) with regard to biological pesticides should not be taken to mean that EPA reads the CWA generally to regulate only wastes. EPA notes that other terms in section 502(6) may or may not be limited in whole or in part to wastes, depending on how the substances potentially addressed by those terms are created or used. For example, “sand” and “rock” can either be discharged as waste or as fill material to create structures in waters of the U.S., and Congress created in section 404 of the Act a specific regulatory program to address such discharges. See 67 Fed. Reg. 31129 (May 9, 2002) (subjecting to the section 404 program discharges that have the effect of filling waters of the U.S., including fills constructed for beneficial purposes). The question in any particular case is whether a discharge falls within

Under EPA's interpretation, whether a pesticide is a pollutant under the CWA turns on whether or not it is a chemical waste or biological material within the meaning of the statute, and this can only be determined by considering the manner in which the pesticide is used. Where a pesticide is used for its intended purpose and its use complies with all relevant requirements under FIFRA, EPA has determined that it is not a chemical waste or biological material and, therefore, is not a pollutant subject to NPDES permitting requirements. That coverage under the Act turns on the particular circumstances of its use is not remarkable. Indeed, when asked on the Senate floor whether a particular discharge would be regulated, the primary sponsor of the CWA, Senator Muskie (whose views regarding the interpretation of the CWA have been accorded substantial weight over the last four decades), stated:

I do not get into the business of defining or applying these definitions to particular kinds of pollutants. That is an administrative decision to be made by the Administrator. Sometimes a particular kind of matter is a pollutant in one circumstance, and not in another. Senate Debate on S. 2770, Nov. 2, 1971 (117 Cong. Rec. 38,838).

Here, to determine whether a pesticide is a pollutant under the CWA, EPA believes it is appropriate to consider the circumstances of how a pesticide is applied, specifically whether it is applied consistent with relevant requirements under FIFRA. Rather than interpret the statutes so as to impose overlapping and potentially confusing regulatory regimes on the use of pesticides, this interpretation seeks to harmonize the CWA and FIFRA.⁹ Under this interpretation, a pesticide applicator is assured that complying with relevant requirements under FIFRA will mean that the activity is not also subject to the distinct NPDES permitting requirements of the CWA. However, like an unpermitted discharge of a pollutant, application of a pesticide in

one of the terms in section 502(6), in light of the factors relevant to the interpretation of that particular term. As discussed above, the factors critical to EPA's interpretation concerning biological pesticides are consistency with section 502(6)'s treatment of chemical pesticides and chemical wastes, and how the general term "biological materials" fits within the constellation of other, more specific terms in section 502(6), which to a great extent focuses on wastes.

⁹ EPA's *Talent* brief suggested that compliance with FIFRA does not necessarily mean compliance with the CWA, and pointed out one difference between CWA and FIFRA regulation, i.e., individual NPDES permits could address local water quality concerns that might not be specifically addressed through FIFRA's national registration process. The position EPA is articulating in this memo would not preclude states from further limiting the use of a particular pesticide in accord with their authorities under 7 USC 136v(a) and Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 613-614 (1991), to the extent otherwise authorized by federal and state law. Furthermore, under Section 510 of the CWA, States and other governmental entities are not precluded from adopting more stringent requirements to address local water quality concerns.

violation of relevant FIFRA requirements would be subject to enforcement under any and all appropriate statutes including, but not limited to, FIFRA and the CWA.

Please feel free to call us to discuss this memorandum. Your staff may call Louis Eby in the Office of Wastewater Management at (202) 564-6599 or William Jordan in the Office of Pesticide Programs at (703) 305-1049.