



Application of Pesticides to Waters of the United States in Compliance with FIFRA: Final Rule

A new rule issued by the Environmental Protection Agency (EPA) clarifies that a Clean Water Act (CWA) permit will not be required when application of a particular pesticide to or over, including near, waters of the United States is consistent with requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The rule identifies two specific circumstances where CWA permits are not required: the application of pesticides directly to water in order to control pests; and the application of pesticides to control pests that are present over or near water, where a portion of the pesticides will unavoidably be deposited to the water in order to target the pests.

Background

In recent years, courts have been faced with the question of whether the Clean Water Act (CWA) requires a National Pollutant Discharge Elimination System (NPDES) permit for pesticide applications (e.g. *Headwaters, Inc. v. Talent Irrigation District*). As a result, public health authorities, natural resource managers, and others who rely on pesticides, have expressed to EPA their concern and confusion about whether they have a legal obligation to obtain an NPDES permit under the CWA when pesticides are applied to or over waters of the United States.

On August 13, 2003 EPA published an Interim Statement presenting the Agency's position on two circumstances in which pesticides applied to waters of the United States consistent with all relevant requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) are not "pollutants" under the CWA and thus do not require NPDES permits. On February 1, 2005 the Agency published a final Interpretive Statement and simultaneously published a proposed rule to incorporate the substance of the Interpretive Statement into EPA regulations. EPA received comments from more than 700 stakeholders on the Interim Statement and proposed rulemaking. This final rule is intended to clarify the applicability of the CWA to these pesticide applications.

What does the Final Rule say?

The application of a pesticide to waters of the United States consistent with all relevant requirements under FIFRA does not constitute the discharge of a pollutant that requires an NPDES permit 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 waters of the United States; and
2. The application of pesticides to control pests that are present over waters of the United States, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively; 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 or near water for control of adult mosquitoes or other pests.

Residuals of applications within the scope of the two circumstances described in the rule are pollutants. However, NPDES permits are not required for an application that may leave residuals. This is because the pesticide is not a pollutant at the time of discharge and becomes a residual only after it has served its intended purpose.

This rule does not address pesticide spray drift. A workgroup of the Pesticide Program Dialogue Committee (PPDC), established under the Federal Advisory Committee Act (FACA), is investigating this issue and intends to provide advice to EPA.

Regulatory Impacts

The Final Rule incorporates the substance of EPA's Interpretive Statement into regulation. It has no cost implications.

How to Get Additional Information

Copies of the Federal Register notice that contains the final rule are available on EPA's website at www.epa.gov/npdes/agriculture. You can also obtain copies of the Federal Register notice by contacting EPA's Water Resource Center, Mail Code RC-4100T, 1200 Pennsylvania Avenue NW, Washington, DC 20460, 202-566-1729, or via email at center.water-resource@epa.gov.