UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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MEMORANDUM

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

FROM: G. Tracy Mehan, III
Assistant Administrator for Water (4101)

Stephen L. Johnson
Assistant Administrator for
Prevention, Pesticides and Toxic Substances (7101)

TO: Regional Administrators, Regions I - X

The Environmental Protection Agency (EPA) is issuing this interpretation of the Clean Water Act (CWA) to address jurisdictional issues under the CWA pertaining to pesticides regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) that are applied to waters of the United States. This Memorandum is issued, in part, in response to a statement by the U.S. Court of Appeals for the Second Circuit in *Altman v. Town of Amherst* that highlighted the need for EPA to articulate a clear interpretation of whether National Pollutant Discharge Elimination System (NPDES) permits under section 402 of the CWA are required for applications of pesticides that comply with relevant requirements of FIFRA. EPA will solicit comment on this interim statement through the Federal Register prior to determining a final agency position. Until that position is made final, however, the application of pesticides in compliance with relevant FIFRA requirements is not subject to NPDES permitting requirements, as described in this statement.

EPA will continue to review the variety of circumstances in which questions have been raised about whether applications of pesticides to waters of the U.S. are regulated under the CWA. As EPA determines the appropriate response to these circumstances, we will develop additional guidance. This memorandum addresses two sets of circumstances for which EPA believes that the application of a pesticide to waters of the United States consistent with all relevant requirements of FIFRA does not constitute the discharge of a pollutant that requires an NPDES permit under the Clean Water Act:

) 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 or aquatic weeds 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 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 insecticides are applied over water for control of adult mosquitos.

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 of FIFRA. Applications of pesticides in violation of the relevant requirements of FIFRA would be subject to enforcement under any and all appropriate statutes including, but not limited to FIFRA and the Clean Water Act. This interpretation also does not preclude or nullify any existing authority vested with States or Tribes to impose additional requirements on the use of pesticides to address water quality issues to the extent authorized by federal, state or tribal law.

Background and Rationale

In this interim statement and guidance, 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.

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).[1] 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

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[1] In an *amicus* brief filed by the United States in the *Talent* case, EPA stated that compliance with FIFRA does not necessarily mean compliance with the Clean Water Act. However, the government's *Talent* brief did not address the question of how pesticide application is regulated under the Clean Water Act or the circumstances in which pesticides are "pollutants" under the CWA.

regulated community and the public regarding how the Clean Water Act applies to the use of pesticides.

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. 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 of FIFRA. This interpretation is consistent with the circumstances before the Ninth Circuit in *Talent* and with the brief filed by the United States in the *Altman* case.[2]

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. 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).

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.[3] The

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[2] While the court's analysis in *Talent* did not turn on whether the pesticide application at issue was consistent with the requirements of FIFRA, the factual situation described in the court's opinion constitutes a violation of the applicable FIFRA label because the pesticide applicator failed to contain the herbicide-laden water for the requisite number of days. In its *amicus* brief in the *Altman* case, EPA described factors relevant to the determination whether a pesticide may be subject to the CWA, and those factors are consistent with the analysis and interpretation of the Act described below.

[3] This Memorandum 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

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.[4] Therefore, EPA concludes that "chemical wastes" do not include pesticides applied consistent with FIFRA.

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.[5] 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 requirements of 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

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applications constitute "point source" discharges to waters of the United States.

[4] 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 require a permit when discharged to a water of the U.S.

[5] 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.

disparate treatment into the statute ought not to be imputed to Congress.[6] 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 for such products to be 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").[7]

Under EPA's interpretation, whether a pesticide is a pollutant under the CWA turns on the manner in which it used, i.e., whether its use complies with all relevant requirements of FIFRA. 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

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[6] Further, some pesticide products may elude classification as strictly "chemical" or "biological."

[7] 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 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.

> 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.[8] Under this interpretation, a pesticide applicator is assured that complying with environmental 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 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.

Solicitation of comment on this Interim Statement and Guidance

In the near future, the Agency will seek public comment on this interim statement and guidance in the Federal Register. The Agency will review all comments and determine whether changes or clarifications are necessary before issuing final interpretation and guidance.

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 Arty Williams in the Office of Pesticide Programs at (703) 305-5239.

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[8] 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 state or tribal authorities from further limiting the use of a particular pesticide to address any unique and geographically limited water quality issue to the extent authorized by federal, state, or tribal law.