ENVIRONMENTAL PROTECTION AGENCY

OW–2003–0063; FRL–7542–9

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice and request for comment.

SUMMARY: In a July 11, 2003, memorandum, the Environmental Protection Agency (EPA) issued, as an Interim Statement and Guidance, an interpretation of the Clean Water Act (CWA) to resolve jurisdictional issues pertaining to pesticides regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) that are applied to waters of the United States. The interpretation 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 a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act: the application of pesticides directly to waters of the United States in order to control pests (for example, mosquito larvae or aquatic weeds that are present in the water) and the application of pesticides to control pests that are present over waters of the United States that results in a portion of the pesticide 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 for control of adult mosquitoes). EPA issued this statement pursuant to its authority under Section 301 of the Clean Water Act. EPA is soliciting and will consider comments on this interim statement and guidance before determining a final Agency position.

DATES: Comments on this notice must be received or postmarked on or before midnight October 14, 2003.

ADDRESSES: Public comments regarding this notice may be submitted electronically, by mail, or through hand delivery/courier. Comments may be submitted by mail to: Water Docket, Environmental Protection Agency, Mail Code 4101T, 1200 Pennsylvania Avenue, NW, Washington, DC 20460, Attention Docket ID No. OW–2003–0063. For additional information on other ways to submit comments, see SUPPLEMENTARY INFORMATION, How May I Submit Comments?

FOR FURTHER INFORMATION CONTACT: For additional technical information contact Louis Eby, Office of Wastewater Management, at (202) 564–6599, or Arty Williams, Office of Pesticide Programs, at (703) 305–5239.

SUPPLEMENTARY INFORMATION:

I. General Information

A. How Can I Get Copies of This Document and Other Related Information?

1. Docket. EPA has established an official public docket for this action under Docket ID No. OW–2003–0063. The official public docket is the collection of materials that is available for public viewing at the Water Docket in the EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue, NW, Washington, DC. The EPA Docket Public Reading Room is open from 8:30 a.m. to 4:30 p.m. Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and
Once in the system, select access those documents in the public docket, and to access the index listing of the contents to submit or view public comments, Dockets at docket is available through EPA under the electronically through the EPA Internet

Electronic version of the public docket is available through EPA’s electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at http://www.epa.gov/edocket/ to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select “search,” then key in the appropriate docket identification number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA’s electronic public docket. EPA’s policy is that copyrighted material will not be placed in EPA’s electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in section I.A.1.

For public commenters, it is important to note that EPA’s policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA’s electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA’s electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA’s electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA’s electronic public docket. Where practical, objects will be photographed, and the photograph will be placed in EPA’s electronic public docket along with a brief description written by the docket staff.

B. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked “late.” EPA is not required to consider these late comments.

1. Electronically. If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA’s policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA’s electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. EPA Dockets. Your use of EPA’s electronic public docket to submit comments to EPA electronically is EPA’s preferred method for receiving comments. Go directly to EPA Dockets at http://www.epa.gov/edocket, and follow the online instructions for submitting comments. (To access EPA’s electronic public docket from the EPA Internet Home Page, select “Information Sources,” “Dockets,” and “EPA Dockets.”) Once in the system, select “search,” and then key in Docket ID No. OW–2003–0063. The system is an “anonymous access” system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. E-mail. Comments may be sent by electronic mail (e-mail) to ow-docket@epa.gov, Attention Docket ID No. OW–2003–0063. In contrast to EPA’s electronic public docket, EPA’s e-mail system is not an “anonymous access” system. If you send an e-mail comment directly to the Docket without going through EPA’s electronic public docket, EPA’s e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA’s e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA’s electronic public docket.

iii. Disk or CD ROM. You may submit comments on a disk or CD ROM that you mail to the mailing address identified in section I.B.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.


3. By Hand Delivery or Courier. Deliver your comments to: EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC, 20004, Attention Docket ID No. OW–2003–0063. Such deliveries are only accepted during the Docket’s normal hours of operation as identified in section I.A.1.

C. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at your estimate.
5. Provide specific examples to illustrate your concerns.
6. Offer alternatives.
7. Make sure to submit your comments by the comment period deadline identified.
8. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and Federal Register citation related to your comments.
II. Text of the Memorandum

The text of the Memorandum follows:

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 (signed and dated, July 11, 2003) Assistant Administrator for Water (4101) Stephen L. Johnson (signed and dated, July 11, 2003) 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 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:

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 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 pests that are present over waters of the United States that are aerially applied to a forest canopy where the application of pesticides to waters of the United States would require an NPDES permit only if it constitutes the “discharge of a pollutant” within the meaning of the Clean Water Act. 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 vessels, aircraft, 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

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.

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 “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.

Many of the pesticide applications covered by this memorandum are applied either to address public health concerns such as controlling mosquitoes 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. 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 vessels, aircraft, 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

3 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 applications constitute “point source” discharges to waters of the United States.

The application of herbicides was to obtain an NPDES permit under the circumstances before the court. 243 F.3d 526 (9th Cir. 2001). 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. 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 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. 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 vessels, aircraft, 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
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) (applying the general 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”).

Under EPA’s interpretation, whether a pesticide is a pollutant under the CWA turns on the manner in which it was 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 in the legislative record), 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. 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 chemical pollutant 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 Water Quality Management at (202) 564-6509 or Arty Williams in the Office of Pesticide Programs at (703) 305-5239.


G. Tracy Mehan, III,
Assistant Administrator, Office of Water.


Susan B. Hazen,
Principal Deputy Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.

[FR Doc. 03–20529 Filed 8–12–03; 8:45 am]
BILLING CODE 6560–50–P