

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 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:

(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 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 mosquitoes.

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.3d 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 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

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.

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 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

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