

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 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 *ejusdem 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 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,

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 FR 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.

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

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.

Dated: August 5, 2003.

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

Dated: August 5, 2003.

Susan B. Hazen,
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FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission

August 5, 2003.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104-13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a)

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.

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.

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