



*Defending the Planet One Beat at a Time*

**1536 Wynkoop Street  
Suite B200**

**Denver, CO 80202**

April 1, 2005

**VIA U.S. CERTIFIED MAIL & ELECTRONIC MAIL**

Water Docket  
Environmental Protection Agency  
Mailcode 4101T  
1200 Pennsylvania Ave., NW  
Washington, DC 20460  
ATTN: Docket ID No. OW-2003-0063

**Re: Docket ID No. OW-2003-0063; Proposed Rulemaking and Notice of Interpretive Statement on Application of Pesticides to Waters of the United States in Compliance with FIFRA.**

Dear Sir or Madam:

The members of Rock the Earth, a national nonprofit corporation, hereby submit comments to the Proposed Rulemaking and notice of Interpretive Statement concerning the application of pesticides to Waters of the United States in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§136, *et seq.* (“FIFRA”). The Proposed Rulemaking and Interpretive Statement, published in the Federal Register on February 1, 2005 (70 FR 5093), provides 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 requiring a National Pollutant Discharge Elimination System (“NPDES”) permit under the Federal Water Pollution Control Act, 33 USC §§1251 *et seq.* (“Clean Water Act” or “CWA”). This issue was formerly addressed in an Interim Statement and Guidance document published by EPA by EPA on August 13, 2003 (68 FR 48385) (“Interim Statement”). On October 13, 2003, Rock the Earth filed formal comments to the Interim Statement, objecting to the same, which comments are attached hereto and incorporated herein as if set forth in full in this comment letter.

It is our opinion, based on the current law and regulations, along with a wealth of technical information and data, that the Proposed Regulation and Interim Statement are illegal exercises of administrative authority, carve out exceptions to or repeal provisions of the CWA, while significantly placing both the environment and human health in jeopardy. For the reasons set forth in our October 13, 2003 letter as well as for the reasons contained herein, we ask that EPA withdraw the Proposed Rule and Interim Statement.

## **I. Rock the Earth**

Rock the Earth (“RtE”) is a Colorado 501(c)(3) nonprofit corporation with a national membership of concerned citizens who believe that protection of the waters of the United States is critical to maintaining a healthy and sustainable environment and ecosystem. RtE’s members will be directly affected by the Proposed Rule and Interpretive Statement as application of pesticides over and directly to waters of the United States, without the benefit of a permit review and site specific environmental assessment pursuant to the NPDES permit process, will lead to significant impact on the natural health and viability of the nation’s waterways, and could result in a degradation of water quality in streams that our members use recreationally<sup>1</sup> and as drinking water supply sources.<sup>2</sup> Municipal drinking water supplies are to be afforded the most stringent regulatory protections available. 33 USC §1312(a).

## **II. The Interpretive Statement Represents an Expansion of the Interim Statement, which was Patently Illegal.**

As set forth in our letter of October 13, 2003, the Interim Statement was an attempt by EPA to circumvent the regulatory process, carving out two exceptions to the Congressionally-mandated requirement that all discharges of pollutants to Waters of the U.S. require Clean Water Act permits. The Interim Statement was designed to address two sets of circumstances where the EPA believed that the application of a pesticide to waters of the United States, consistent with the relevant requirements of FIFRA, did not constitute a discharge of a pollutant requiring an NPDES permit under the CWA:

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<sup>1</sup> RtE members engage in recreational activities on and along such waters, which activities include, but are not limited to fishing, hunting, boating, water skiing, picnicking, camping, as well as the opportunity to observe, photograph, and appreciate a variety of bird and animal life.

<sup>2</sup> Several members of Rock the Earth are potentially affected by the Interim Statement in that the streams and watersheds from which their drinking water originates are regularly subjected to routine applications of various pesticides without NPDES permits. The water purveyors whose sources will potentially be adversely affected by the Interim Statement include, but are not limited to: West View Water Authority (serving the City of Pittsburgh) and Harrisburg Water Authority (serving the City of Harrisburg).

1. The application of pesticides directly to waters of the US in order to control pests; and
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.

70 FR 5095. It was the Agency's position that these types of applications do not require NPDES permits under the CWA if the pesticides are applied consistent with the requirements of FIFRA.

In the currently proposed Interpretive Statement, EPA expands these exceptions beyond the control of waterborne pests which may pose a human health risk, to now arguably include all applications of pesticides when *intended* for beneficial use, regardless of the locale or even whether the pesticides are not being directly applied to waterways (such as in the use of agricultural pesticides, which may be subject to drift and incidental application to waterways). 70 FR 5095-5096. It continues to be the operating approach of EPA that the application of agricultural and other pesticides in accordance with label directions is not subject to NPDES permitting requirements. 70 FR 5098.

EPA forms these conclusions based on the *intent* of the use:

Under EPA's interpretation, whether a pesticide is a pollutant under the CWA turns on whether or not it is a chemical waste or biological material within the meaning of the statute, and this can *only be determined by considering the manner in which the pesticide is used.*

Where a pesticide is used for its *intended purpose* and its use complies with all relevant requirements under FIFRA, EPA has determined that it is not a chemical waste or biological material and therefore, is not a pollutant subject to NPDES permitting requirements.

70 FR. 5099-5100 (emphasis added). This type of intellectual dishonesty puts the legal status of the material/pesticide into the hands of the user, creating a subjective standard as to whether one's activities are patently legal. The history of environmental jurisprudence does not allow for intent to play a part in whether or not permit requirements need to be met. One must either obtain a permit for certain activities or not. Activities involving pesticides, regardless of the propriety of their purpose, have enough potential to cause harm that they should be regulated. NPDES permits are often issued for chemicals used the way they are intended to be used. That they are used properly *does not* mean they are not a threat to the environment, that is, they are still a "pollutant" requiring permitting. The CWA is quite clear that a permit is required to discharge a pollutant to a navigable water from a point source. To have a subjective standard as to what constitutes a

“pollutant” which standard is based on intent makes no sense and reduces certainty in the law – both for the regulated and for the regulator. In addition, the original Interim Statement sought to address what was perceived as a matter of public health and safety: the need to apply pesticides to waterways to protect the general population from waterborne disease such as West Nile virus. While this concern would have been more properly addressed through a general permit, the standard agricultural use of pesticides addressed by the current Proposed Rule do not raise the same concerns regarding the need to facilitate rapid response. By expanding the Interpretive Statement to include agricultural operations, the agency is broadening an already overly broad policy without furthering the purpose of protecting public health. Finally, as in the Interim Statement, the agency restates that the 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. 70 FR 5100. Unfortunately, as noted in our October 13, 2003 letter, both EPA’s FIFRA and CWA programs lack sufficient resources to monitor proper pesticide use in accordance with labels issued under FIFRA. See RtE Letter of October 13, 2003, at 10, 13, 20.<sup>3</sup>

In summary, with the adoption of the Interpretive Statement, the agency is further broadening an already illegal and unnecessary policy.

### **III. The EPA’s Legal Analysis to Support the Proposed Rule is Deficient.**

As noted in our October 13, 2003 letter, EPA’s position that NPDES permits are not required for the application of pesticides to Waters of the U.S., if such applications are in compliance with FIFRA, is inconsistent with the position taken by EPA in prior cases, most notably, Headwaters v. Talent Irrigation District, 243 F.3d 526 (9<sup>th</sup> Cir. 2001). See also, RtE Letter of October 13, 2003, at 10-11. Further, EPA’s current position, allowing FIFRA approval to preempt the necessity for a CWA permit, also runs contrary to the position the agency took in its regulation of the wood preserving industry. See Altman v. Town of Amherst, 46 Fed. Appx. 62 (2<sup>nd</sup> Cir. 2002); 55 FR 50450, 50461 (1990) (cited in RtE Letter of October 13, 2003 at 11).

In support of the Proposed Rule and Interpretive Statement, EPA relies almost exclusively on a Memorandum from the EPA General Counsel that attempts to explain previous statements wherein the EPA clearly indicated that FIFRA approval and CWA permit requirements are mutually exclusive and that the fulfillment of FIFRA approval would not obviate the need for a CWA permit. See Memorandum of January 24, 2005 from Ann R. Klee, EPA General Counsel to Benjamin H. Grumbles, Assistant Administrator for Water entitled “Analysis of Previous Federal Government Statements

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<sup>3</sup> Additional support for this disparity between FIFRA and the CWA can be found in the 2<sup>nd</sup> Circuit’s decision in No Spray Coalition v. City of New York, 2003 WL 22888944 (2<sup>nd</sup> Cir. 2003), in which it was noted that FIFRA does not provide for citizen enforcement suits.

on Application of Pesticides to Waters of the United States in Compliance with FIFRA” (“the Memorandum”). EPA now maintains that the briefs it previously filed in both the Headwaters and Altman cases, which positions run contrary to the Proposed Rule, “were not a comprehensive statement of the Agency’s legal position on the precise questions at issue in the Interpretive Statement.” Concise or otherwise, they established a position that is now being reversed. While the Talent brief did not address the question of whether pesticides applied in accordance with FIFRA constitute “pollutants” necessitating a CWA permit, it did establish EPA’s position that the requirement for an NPDES permit is independent of the labeling requirements under FIFRA and that the pesticide labels are not intended to govern which environmental laws must be obeyed during the application of pesticides. As previously stated, the critical question is not whether the intended use of a pesticide is proper but rather whether the impact from the application of pesticides may cause an adverse impact on the environment, thus necessitating a water permit review process. Again, the agency relies on the fact that whether or not a pesticide is a “pollutant” requiring an NPDES permit is based on intent. See Memorandum, at 4 (“the Agency believes that a pesticide is neither a chemical waste nor biological material within the meaning of section 502(6) when it is being applied for its intended purpose in compliance with relevant FIFRA requirements.”) Memorandum, at 4-5. As in the case of a manufacturing operation applying herbicides to water intake and outfall streams to prevent vegetative growth, an NPDES permit should be required for pesticide applications to waterways to ensure that, among other things, aquatic and terrestrial life is not adversely impacted by the application and that drinking water supplies are not compromised. Further, in the absence of an NPDES permit, there a lack of regulatory sources to monitor such activities (as noted above in Section III). The fact is that it does not matter what the intended use is—this too would lead to varying conclusions having nothing to do with potential for environmental harm or threat to the public health. Pesticides, whether improperly disposed or dispersed into the waterways in full compliance with FIFRA have the potential to cause harm to human health and aquatic life. See RtE Letter of October 13, 2003, at 12-20.

While the General Counsel also acknowledges that federal, state and local law requirements are a factor determinative of whether a pesticide application is in compliance with relative FIFRA requirements (obviating the need for a CWA permit), the agency, in an attempt to preclude local and state laws from regulating such applications, blunts this provision by stating, “EPA does not believe that it best effectuates the goals of the CWA to have varying conclusions regarding when a practice is a pollutant based on state or local law.” Memorandum, at 5. Furthermore, not only does the United States Constitution allow for states to make more stringent regulations when it is in the best interest of the health and safety of its citizens (via the Tenth Amendment),<sup>4</sup> but literally, there are thousands of environmental laws nation-wide that

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<sup>4</sup> The Tenth Amendment to the U.S. Constitution states, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

do this very thing. In fact, the federal CWA expressly allows for states to adopt and enforce more stringent standards and limitations. See 33 U.S.C. §1370.

#### **IV. Conclusion**

As in the Interim Statement, EPA, once again goes beyond its statutory authority in promulgating the Proposed Rule and Interpretive Statement, providing that the application of pesticides to waters of the United States consistent with FIFRA does not constitute a discharge of a pollutant under the CWA. The Proposed Rule lacks legal foundation, is inconsistent with statutory intent and prior positions taken by EPA. but the Interpretive Statement extends this already improper policy to create exemptions for pesticide applications not contemplated by the 2003 Interim Rule and in so doing, violates Congressionally mandated statutory requirements of the Clean Water Act. Therefore, we respectfully request that EPA withdraw the Proposed Rule and Interpretive Statement.

Thank you for your consideration.

Sincerely,

Marc A. Ross  
Executive Director  
Rock the Earth