

April 4, 2005

Water Docket  
Environmental Protection Agency  
Mailcode 4101T  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

**RE: Pesticide Policy Coalition Comments on Proposed Rulemaking by Environmental Protection Agency: NPDES Permits Not Required for Certain Applications of Pesticides in Compliance with FIFRA**

**EPA Docket No. OW-2003-0063, 70 FR 5093 (February 1, 2005)**

American Farm Bureau Federation (AFBF) and the National Corn Growers Association (NCGA) submit the following comments on the Proposed Rulemaking by Environmental Protection Agency: Application of Pesticides to Waters of the United States in Compliance With FIFRA, 40 CFR Part 122, EPA Docket No. OW-2003-0063, 70 FR 5093, Feb. 1, 2005. AFBF and NCGA together represent hundreds of thousands of farm families and agricultural production members nationwide.

We are pleased about the agency's decision to address the question of whether the NPDES program applies to the use of pesticides registered under the FIFRA. We incorporate by reference and attachment the detailed comments submitted by the Pesticide Policy Coalition, of which both AFBF and NCGA are members. The proposed rulemaking document correctly makes the point that a pesticide being used in accordance with its FIFRA labeling is not a "chemical waste" being discarded and does not otherwise come within the definition of "pollutant" under the Clean Water Act; thus it does not require an NPDES permit because such a permit is only required where there is the "discharge of a pollutant." However, we are concerned that the proposed rule only specifically deals with two types of pesticide use patterns:

- (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, aquatic weeds or other pests 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, including near such waters, 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 pesticides are applied over, including near, water for control of adult mosquitoes or other pests. 70 FR at 5100 (middle column).

We strongly urge that the final rule approved by the agency make it unequivocally clear that an NPDES permit is not required for any label-appropriate application of pesticides for all uses and users. A comprehensive rule is absolutely vital to clarify the agency's long-standing policy that proper use does not require a permit, including use that may result in the transport of fractional amounts and/or residuals of a pesticide to off-site aquatic areas as a result of incidental drift, volatilization, windborne dust, evaporation and condensation, or other such incidental off-site transport that is analogous to runoff from treated fields. Such an interpretation is clearly consistent with congressional intent and longstanding agency policy.

AFBF and NCGA adamantly believe a broadened rule is vital to protecting the agricultural producers who rely on pesticides proven safe under the FIFRA process. Activist groups are seizing upon misapplication of the NPDES program as a vehicle to make agricultural use of pesticides impossible or impracticable. These groups have made known their intention to take advantage of the agency's failure to formalize its longstanding policy that the use of pesticides for their intended purposes does not require an NPDES permit. They have been successful in some courts – and hope to be successful in others – in forcing EPA to require NPDES permits for pesticide use, knowing full well that the NPDES program is not equipped to deal with these uses, and that obtaining and complying with the permits will be extremely burdensome and in some cases prohibitively expensive for farmers and other users. Rather than seeking legislation or rulemaking to establish to change EPA policy, activists are using citizen suits to target individual pesticide users and manipulate the courts.

EPA's concurrent final Interpretative Statement logically relays this policy and provides the legal basis for broadening the rule proposal. EPA declares in the statement that, "It has been and will continue to be the operating approach of the agency that the application of agricultural and other pesticides in accordance with label directions is not subject to NPDES permitting requirements." 70 FR at 5098 (left column). However, the scope of the proposed rule does not fully reflect this statement. EPA must be on notice that unless the final rule is broadened to cover all uses and user patterns, including those within agriculture, activists' litigation will continue targeting individual users and farmers who have had no reason to think they needed permits. In fact, the agency may inadvertently be fostering such a viewpoint by unnecessarily restricting the scope of the rule. By positing, on one hand, that compliance with FIFRA obviates the need for an NPDES permit and, on the other hand, explicitly restricting the activities covered by the rule, creative litigants might well point to the agency's bifurcated logic and seek sustenance from like-minded judges.

The Interpretative Statement states repeatedly that a pesticide being used in accordance with the product's EPA-approved label instructions is being used purposefully and beneficially in a government-approved manner, and thus is neither a chemical "waste"

nor the biological-material equivalent of a chemical waste. Accordingly, it is not a “pollutant,” its use is not the “discharge of a pollutant,” and thus the NPDES requirements are inapplicable. These statements include the following:

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.  
70 FR at 5099 (middle column).

“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 at 5099-5100.

Based on the agency’s own policy, we strongly urge EPA to finalize the proposed rule to broadly, consistently clarify pesticide application requirements for all users and use patterns. Accordingly, we suggest that in the final rule, the following comprehensive language be substituted for the language of the proposed rule:

(h) The introduction to waters of the United States of a pesticide (or residues of a pesticide) that has been registered or otherwise approved for use by the Administrator under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) resulting from use of the pesticide in a manner consistent with all relevant requirements under FIFRA (*i.e.*, those directly relevant to protecting water quality), is not a discharge of a pollutant subject to the NPDES provisions.

Or, in the alternative;

(h) The introduction to waters of the United States of a pesticide (or residues of a pesticide) that has been

registered or otherwise approved for use by the Administrator under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) resulting from use of the pesticide in a manner consistent with all relevant requirements under FIFRA (*i.e.*, those directly relevant to protecting water quality), in the following circumstances.

(1) Application of the pesticide directly to waters of the United States in order to control pests, for example, applications to control mosquito larvae, aquatic weeds, or other pests that are present in the waters of the United States;

(2) Application of the pesticide to control pests that are present over waters of the United States, or present over land that is near waters of the United States, that results or may result in a portion of the pesticide (or its residues) reaching 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 pesticides are applied over or near water for control of adult mosquitoes or other pests; or

(3) Application of the pesticide to control pests at other agricultural or nonagricultural outdoor site that results or may result in a portion of the pesticide (or its residues) reaching waters of the United States.

We support EPA's rulemaking on this critically important issue; however we stress our belief that the final rule must be expanded to protect all uses and users. We appreciate the agency's thoughtful consideration of our comments.

Sincerely,



Mark Maslyn, Executive Director of Public Policy  
American Farm Bureau Federation



Jon Doggett, Vice President of Public Policy  
National Corn Growers Association