

EPA APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title/subject	State approval/ submittal date	EPA approval date	Explanation
*	*	*	*	*
<b>Chapter 114 (Reg 4)—Control of Air Pollution From Motor Vehicles</b>				
*	*	*	*	*
<b>Subchapter H—Low Emission Fuels Division 1: Gasoline Volatility</b>				
*	*	*	*	*
Section 114.307 .....	Exemptions .....	10/04/01	11/27/06	[Insert <i>FR</i> page number where document begins].
Section 114.309 .....	Affected Counties .....	10/04/01	11/27/06	[Insert <i>FR</i> page number where document begins].

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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 122**

[OW-2003-0063; FRL-8248-1]

RIN 2040-AE79

**Application of Pesticides to Waters of the United States in Compliance With FIFRA**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** Today, EPA is issuing a regulation stating that the application of a pesticide in compliance with relevant requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) does not require a National Pollutant Discharge Elimination System (NPDES) permit in two specific circumstances. The first circumstance is when the application of the pesticide is made directly to waters of the United States to control pests that are present in the water. The second circumstance is when the application of the pesticide is made to control pests that are over, including near, waters of the United States. This rulemaking is based on the Agency's

interpretation of the definition of the term "pollutant" under the Clean Water Act (CWA) as not including such pesticides.

This final rulemaking replaces EPA's previously published Interim and Final Interpretive Statements on the Application of Pesticides to Waters of the United States in Compliance with FIFRA. EPA's Interpretive Statement, published February 1, 2005, described the Agency's interpretation of the CWA with regard to the application of pesticides regulated under FIFRA that are applied to or over, including near, waters of the United States. On August 13, 2003, EPA provided public notice of and solicited public comment on an Interim Statement and incorporated that input into the Interpretive Statement. On February 1, 2005, EPA published the Interpretive Statement and proposed to codify its substance in EPA's NPDES regulations and solicited comment on that proposed action. Today's final rule is the result of this process.

**DATES:** These final regulations are effective on January 26, 2006.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. OW-2003-0063. All documents in the docket are listed online at <http://www.regulations.gov>. Although listed in the online docket, some information is not publicly available, i.e., Confidential Business Information (CBI) or other

information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either online or in hard copy at the Water Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The 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 the telephone number for the Water Docket is (202) 566-2426.

**FOR FURTHER INFORMATION CONTACT:** For additional information, contact Jeremy Arling, Water Permits Division, Office of Wastewater Management (4203M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202-564-2218, e-mail address: [arling.jeremy@epa.gov](mailto:arling.jeremy@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. General Information**

*A. Does This Action Apply to Me?*

You may be affected by this action if you apply pesticides to or over, including near, water. Potentially affected entities may include, but are not limited to:

TABLE 1.—ENTITIES POTENTIALLY REGULATED BY THIS RULE

Category	NAICS	Examples of potentially affected entities
Agriculture parties—General agricultural interests, farmers/producers, forestry, and irrigation.	111 Crop Production .....	Producers of crops mainly for food and fiber including farms, orchards, groves, greenhouses, and nurseries.
	113110 Timber Tract Operations ..	The operation of timber tracts for the purpose of selling standing timber.

TABLE 1.—ENTITIES POTENTIALLY REGULATED BY THIS RULE—Continued

Category	NAICS	Examples of potentially affected entities
Pesticide parties (includes pesticide manufacturers, other pesticide users/interests, and consultants). Public health parties (includes mosquito or other vector control districts and commercial applicators that service these). Resource management parties (includes State departments of fish and wildlife, State departments of pesticide regulation, State environmental agencies, and universities).	113210 Forest Nurseries Gathering of Forest Products.	Growing trees for reforestation and/or gathering forest products, such as gums, barks, balsam needles, rhizomes, fibers, Spanish moss, ginseng, and truffles.
	221310 Water Supply for Irrigation 325320 Pesticide and Other Agricultural Chemical Manufacturing.	Operating irrigation systems. Formulation and preparation of agricultural pest control chemicals.
	923120 Administration of Public Health Programs.	Government establishments primarily engaged in the planning, administration, and coordination of public health programs and services, including environmental health activities.
	924110 Administration of Air and Water Resource and Solid Waste Management Programs.	Government establishments primarily engaged in the administration, regulation, and enforcement of air and water resource programs; the administration and regulation of water and air pollution control and prevention programs; the administration and regulation of flood control programs; the administration and regulation of drainage development and water resource consumption programs; and coordination of these activities at intergovernmental levels.
Utility parties (includes utilities) .....	924120 Administration of Conservation Programs.	Government establishments primarily engaged in the administration, regulation, supervision and control of land use, including recreational areas; conservation and preservation of natural resources; erosion control; geological survey program administration; weather forecasting program administration; and the administration and protection of publicly and privately owned forest lands. Government establishments responsible for planning, management, regulation and conservation of game, fish, and wildlife populations, including wildlife management areas and field stations; and other administrative matters relating to the protection of fish, game, and wildlife are included in this industry.
	221 Utilities .....	Provide electric power, natural gas, steam supply, water supply, and sewage removal through a permanent infrastructure of lines, mains, and pipes.
Other Parties .....	713910 Golf courses and country clubs.	Golf course operators who have ponds for irrigation.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility is affected by this action, you should carefully examine the applicability criteria in 40 CFR 122.23. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

**II. Background**

*A. Clean Water Act and the Federal Insecticide, Fungicide, and Rodenticide Act*

Congress passed the Federal Water Pollution Control Act (1972), also known as the Clean Water Act (CWA), to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters” 33 U.S.C. 1251(a). The CWA prohibits the discharge of any pollutant by any person from a point source into a water of the United States, except in compliance with certain other

provisions of the Act, including Section 402. 33 U.S.C. 1311(a). Section 402 in turn authorizes EPA to issue permits under the National Pollutant Discharge Elimination System (NPDES) permit program for such discharges. States may also issue NPDES permits if authorized to do so by EPA. 33 U.S.C. 1342(a) and (b).

NPDES permits under the CWA are required only for point source discharges of materials that are *pollutants* to waters of the United States. Section 502(6) of the CWA defines “pollutant” to mean:

\* \* \* 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.

33 U.S.C. 1362(6).<sup>1</sup> In the more than 30 years that EPA has administered the

<sup>1</sup> The remaining language of the definition of “pollutant” in Section 502(6) is as follows, and is not relevant to today’s action: “The term does not mean (A) “sewage from vessels” within the meaning of Section 312 of this Act; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production

CWA, the Agency has never issued an NPDES permit for the application of a pesticide to or over water to target a pest that is present in or over the water. Nor has the Agency ever stated in any general policy or guidance that an NPDES permit is required for such applications.

EPA regulates the sale, distribution and use of pesticides in the United States under the statutory framework of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to ensure that when used in conformance with FIFRA labeling directions, pesticides will not pose unreasonable risks to human health and the environment. All new pesticides must undergo a rigorous registration procedure under FIFRA during which EPA assesses a variety of potential human health and environmental effects associated with use of the product.

Under FIFRA, EPA is required to consider the effects of pesticides on the environment by determining, among

and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.”

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.” 7 U.S.C. 136a(c)(5). In performing this analysis, EPA examines the ingredients of a pesticide, the intended type of application site and directions for use, and supporting scientific studies for human health and environmental effects and exposures. The applicant for registration of the pesticide must provide data from tests done according to EPA guidelines. This process is discussed in more detail below.

Several courts have recently addressed the question of whether the CWA requires NPDES permits for pesticide applications. These cases have resulted in some confusion among the regulated community and other affected citizens about the applicability of the CWA to pesticides applied to waters of the United States. In 2001, the U.S. Court of Appeals for the Ninth Circuit held in *Headwaters, Inc. v. Talent Irrigation District (Talent)* that an applicator of herbicides was required to obtain an NPDES permit under the circumstances before the court (described in detail in Section V.C. below). 243 F.3d 526 (9th Cir. 2001). The *Talent* decision caused considerable concern and confusion among public health authorities, natural resource managers, and others who rely on pesticides regarding their potential obligation to obtain an NPDES permit when applying a pesticide consistent with FIFRA and particularly about the impact of such a requirement on accomplishing their mission of protecting human health and the environment.

In 2002, the Ninth Circuit in *League of Wilderness Defenders et al. v. Forsgren (Forsgren)* held that the application of pesticides to control gypsy moths in National Forest lands required an NPDES permit. 309 F.3d 1181 (9th Cir. 2002). The court in *Forsgren* did not analyze the question of whether the pesticides applied were pollutants, because it assumed that the parties agreed that they were. In fact, the United States expressly reserved its arguments on that issue in its brief to the District Court. *Id.* at 1184, n.2. The court instead analyzed the question of whether the aerial application of the pesticide constituted a point source discharge, and concluded that it did. *Id.* at 1185.

Since *Talent and Forsgren*, California, Nevada, Oregon, and Washington, all of which are within the Ninth Circuit, have issued permits for the application of certain types of pesticides (e.g., products to control aquatic weeds and algae and products to control mosquito larvae). Other States have continued their longstanding practice of not issuing permits to people who apply pesticides to waters of the United States. These varying practices reflect the substantial uncertainty among regulators, the regulated community, and the public regarding how the Clean Water Act applies to pesticides that have been properly applied and used for their intended purpose.

The Ninth Circuit recently addressed the Clean Water Act’s applicability to pesticide applications for a third time. In *Fairhurst v. Hagener*, the court held that pesticides applied directly to a lake in order to eliminate non-native fish species, where there are no residues or unintended effects, are not “pollutants” under the CWA because they are not chemical wastes. 422 F.3d 1146 (9th Cir. 2005).

Since *Talent and Forsgren*, other courts have addressed the applicability of the CWA’s NPDES permit requirements to pesticide applications. In *Altman v. Town of Amherst (Altman)*, the Second Circuit vacated and remanded for further development of the record a District Court decision holding that the Town of Amherst was not required to obtain an NPDES permit to spray mosquitocides over waters of the United States. 47 Fed. Appx. 62, 67 (2d Cir. 2002). The United States filed an amicus brief setting forth the Agency’s views in the context of that particular case. In its opinion, the Second Circuit stated that “[u]ntil the EPA articulates a clear interpretation of current law—among other things, whether properly used pesticides released into or over waters of the United States can trigger the requirement for NPDES permits \* \* \*—the question of whether properly used pesticides can become pollutants that violate the CWA will remain open.” *Id.* at 67.

#### B. Interim and Interpretive Statements

In August 2003, EPA first analyzed the applicability of the NPDES permit program to pesticide applications in an administrative context through an Interim Statement and Guidance. 68 FR 48385 (Aug. 13, 2003). The Interim Statement presented EPA’s position on the two circumstances in which pesticides applied to waters of the United States consistent with all relevant requirements of FIFRA are not

“pollutants” under the CWA and thus do not require an NPDES permit. Although the United States previously addressed issues related to the Interim Statement in several *amicus* briefs, including those filed in *Talent* and *Altman*, those briefs reflected the government’s evaluation of the law in the context of specific factual situations, and did not result from deliberative consideration through an administrative process. As such, the *amicus* briefs did not represent EPA’s legal position on the precise questions at issue in the Interim Statement or in today’s regulation.

EPA solicited public comments on its interpretation of the term “pollutant” in the Interim Statement as it relates to certain pesticide applications. After considering the public comments, EPA issued a final Interpretive Statement on January 25, 2005. EPA simultaneously published a notice of proposed rulemaking to incorporate the substance of the Interpretive Statement into EPA regulations and solicited public comment on the proposed rulemaking. 70 FR 5093 (Feb. 1, 2005). EPA has considered the comments received and is today taking final action on the proposed regulation. The final regulation is substantially similar to the proposed regulations, with certain modifications described below.<sup>2</sup>

### III. Summary of the Final Rule

EPA is revising the NPDES permit program regulations to add a paragraph to the list of discharges in 40 CFR 122.3 that are excluded from NPDES permit requirements. Specifically, today’s regulation excludes applications of pesticides to waters of the United States consistent with all relevant requirements under FIFRA in two specific circumstances as follows:

(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 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, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively; for example, when insecticides are aerially applied to a forest canopy where

<sup>2</sup> On March 29, 2002, EPA issued an Interpretive Statement and Regional Guidance on the Clean Water Act’s Exemption for Return Flows from Irrigated Agriculture, which clarified that the application of an aquatic herbicide consistent with the FIFRA labeling to ensure the passage of irrigation return flow is a nonpoint source activity not subject to NPDES permit requirements under the Clean Water Act. This regulation does not address the March 2002 guidance.

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.

Pesticides applied under these circumstances are not pollutants and therefore are not subject to NPDES permitting requirements.

EPA's final rule is substantially similar to the rule proposed in February 2005. EPA has modified the proposed regulatory text only to clarify the types of pesticide applications covered in the second circumstance (those to control pests present over, including near, waters of the United States).

Commenters raised concerns that the second circumstance, as written in the proposed rule, could be interpreted more broadly than the Agency intended (e.g. encompassing drift from terrestrial pesticide applications). The final rule clarifies that the applications in the second circumstance are those in which it is unavoidable that some of the pesticides will be deposited into water in order to effectively target the pests. In other words, EPA is clarifying in the final rule that the regulation encompasses only those applications to control pests over, including near, waters of the United States, where the pesticide necessarily must enter the water in order for the application to achieve its intended purpose. Thus, the applications must first be intended to control pests over (including near) a water of the United States. Second, it must be unavoidable that the pesticide enter the water in order to target such pests effectively. For example, EPA believes that wide-area forest canopy insecticide applications can result in deposition to streams and other waters of the U.S. which are either not visible to the aerial applicator or not possible to avoid given the location of aerial application, and that in such circumstances, it is unavoidable that the pesticide enter the water in order to effectively target pests living in the canopy. Likewise, mosquito adulticide applications can result in some pesticide product entering the water because adult mosquitoes generally live over and adjacent to waterbodies. Similarly, pesticide applications to control non-native plants which grow at the water's edge, such as purple loosestrife, are intended to be covered by this provision, because when targeting plants at the water's edge, it is unavoidable that some of the herbicide will enter the water. EPA notes that the clarifying language in § 122.3(h)(2) is not intended to impose any additional requirements on pesticide applications beyond relevant FIFRA requirements. In addition, it is not intended to address

applications of pesticides to terrestrial agricultural crops.

#### IV. Discussion

Today's rulemaking implements EPA's interpretation of the CWA's definition of "pollutant" with respect to certain applications of pesticides. Under the CWA, 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. 33 U.S.C. 1362(6).

The circumstances of pesticide applications covered under today's rule are limited to the two types of applications described above, when conducted in compliance with all relevant requirements of FIFRA. EPA considers "relevant requirements" of FIFRA to mean those FIFRA requirements that relate to water quality. For instance, violating a requirement that the person mixing the pesticide must wear protective clothing, while an unlawful act that can be enforced under FIFRA, is not related to the protection of water quality, and therefore not a relevant FIFRA requirement for purposes of today's regulation. However, a labeling provision that governs application rates, active ingredient concentrations and dilution requirements, buffer zones, application locations, intended targets, times of day, temperature or other application requirements, and thus concerns the amounts, concentrations, and viability of substances that may potentially end up in waters of the United States, is related to water quality. Relevant FIFRA requirements may appear in product labeling, FIFRA regulation, or other documents setting forth requirements applied pursuant to FIFRA.

The application of a pesticide from a point source to waters of the United States requires an NPDES permit only if it constitutes the discharge of a "pollutant" within the meaning of that term in the CWA. EPA has evaluated whether pesticides regulated under and applied consistent with relevant FIFRA requirements for the two circumstances previously described fall within the terms in the CWA's definition of "pollutant," and concludes that they do not. Pesticides are not dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt or industrial, municipal, and agricultural waste. See CWA section

502(6). In addition, as described below, the terms, "chemical waste" and "biological materials," also do not encompass the types of pesticide applications addressed in today's action.

First, such pesticides are not "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). Pesticides applied consistent with relevant FIFRA requirements are not "wastes" as that term is commonly defined—on the contrary, they are products that EPA has evaluated and registered for the purpose of controlling target organisms, and are designed, purchased, and applied to perform that purpose. See *Fairhurst v. Hagerer*, 422 F.3d at 1150.

EPA also interprets the term "biological materials" not to include biological pesticides applied consistent with relevant FIFRA requirements. This interpretation is both reasonable and consistent with Congressional intent, and is supported by relevant case law. It is unlikely that Congress intended to include biological pesticides applied in the circumstances described in today's rule within the Clean Water Act's definition of "pollutant." To do so would mean that biological pesticides are pollutants, while chemical pesticides used in the same circumstances are not. Since biologically and chemically based pesticides applied consistent with relevant requirements adopted by EPA under FIFRA are both EPA-evaluated products, treating them differently under the Clean Water Act is not warranted. Moreover, at the time the Act was adopted in 1972, chemical pesticides were predominant. It is therefore not surprising that Congress failed to discuss whether biological pesticides were to be covered by the Act. The fact that more biological pesticides have been developed since passage of the Act in 1972 does not justify expanding the reach of the NPDES permit requirement when there is no evidence that Congress intended the CWA to regulate biological pesticides in a manner different from chemical pesticides. Finally, biological pesticides in use today are generally reduced-risk products that have a narrower range of potential adverse environmental effects compared to many chemical pesticides. For this reason it would not make sense, and would be inconsistent with the goals of the Clean Water Act, to discourage the

use of biological pesticides by requiring applicators of these products to obtain an NPDES permit when chemical pesticides have no such requirement.

In cases in which courts have found specific biological materials to be "pollutants" under section 502(6) the substances at issue were waste materials discharged from a point source. See *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994) (liquid manure is solid waste, sewage, biological material, and agricultural waste and is therefore a pollutant); *USPIRG v. Atlantic Salmon*, 215 F.Supp. 2d 239, 247–49 (D. Maine 2002) (non-native fish escaped from net pens and salmon feces and urine exiting net pens are biological materials; pharmaceuticals in excess salmon feed exiting net pens are chemical wastes), *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 585 (6th Cir. 1988) (live fish, dead fish, and fish remains released from hydro-electric facility's turbine are biological materials), *U.S. v. Plaza Health Laboratories, Inc.*, 3 F.3d 643, 646 (2d Cir. 1993), *cert. denied* 114 S.Ct. 2764 (1994) (discarded vials of human blood are pollutants). In none of these cases, which were cited by commenters, did a court find that a product applied for its intended purpose consistent with applicable EPA requirements was a "biological material" and therefore a pollutant under the CWA.

The Ninth Circuit Court of Appeals in *Assn. to Protect Hammersley, Eld, and Totten Inlets (APHETI) v. Taylor Resources, Inc.*, 299 F.3d 1007, 1017 (9th Cir. 2002), cited to several of these cases as being in accord with its finding that "biological materials" means the waste product of a human or industrial process. The APHETI court based its decision that mussel shells, mussel feces, and other materials emitted from mussels grown on harvesting rafts are not pollutants on the doctrine of *ejusdem generis*. The court found that the more specific terms in the CWA's definition of "pollutant" support an understanding of the more general term "biological materials" as waste material of a human or industrial process. *Id.* at 1015. The court went on to analyze Congress' intent in enacting the CWA and found that the purpose of the statute further supported such an interpretation of biological materials in that case. *Id.* at 1016.

Furthermore, EPA's interpretation that biological and chemical pesticides are not pollutants is reasonable because both types of pesticides must comply with FIFRA registration requirements. EPA reviews and evaluates these pesticides and authorizes their use,

subject to the limitations and requirements of the EPA registration.

Today's action applies only to the specific categories of pesticide applications addressed in the text of the regulation. EPA notes that pesticides are waste materials, and therefore pollutants under the Act, when contained in a waste stream, including storm water regulated under section 402(p) or other industrial or municipal discharges. In those circumstances, an NPDES permit may be required if the pesticides are discharged into a water of the United States from a point source.

In addition, if there are residual materials resulting from pesticides that remain in the water after the application and its intended purpose (elimination of targeted pests) have been completed, these residual materials are also pollutants under CWA section 502(6) because they are wastes of the pesticide application. Such residuals include excess amounts of pesticide that do not reach a target organism and materials that remain after the application has completed its intended task. These materials are waste materials, as that term is commonly defined, because they are substances that are "no longer useful or required after the completion of a process." The New Oxford American Dictionary 1905, *supra*. See also *Fairhurst v. Hagerer*, 422 F.3d 1146.

However, pesticide applications under the circumstances described above and consistent with FIFRA do not require NPDES permits, even if the application leaves residual materials which are "pollutants" under the Act in waters of the United States. Section 301(a) of the CWA prohibits the "discharge of any pollutant" except in compliance with certain other provisions of the Act. The CWA defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." Thus, at the time of discharge to a water of the United States, the material in the discharge must be both a pollutant, and from a point source. In this case, while the discharge of the pesticide is from a point source (generally a hose or an airplane), it is not a pollutant at the time of the discharge. The material added by a pesticide applicator to or over, including near, water is not a pollutant for the reasons stated above. Even though the pesticide may become a "pollutant" at a later time (e.g., after the pesticide product has served its intended purpose), a permit is not required for its application because it did not meet both statutory prerequisites (pollutant and point source) at the time of its discharge into the water. Instead, the residual should

be treated as a nonpoint source pollutant, potentially subject to CWA programs other than the NPDES permit program (e.g., listing and TMDL development pursuant to CWA section 303(d)).

Today's action does not address drift over and into waters of the United States from pesticide applications to land. As discussed below, EPA has established a multi-stakeholder workgroup under one of its federal advisory committees to explore policy issues relating to the terrestrial application of pesticides that may drift into aquatic environments. EPA also notes that today's discussion of the terms "chemical waste" and "biological materials" applies only for CWA purposes and is not intended to address the use of those terms or similar terms under any other statutes the Agency administers.

## V. Public Comment

EPA first solicited comment on its interpretation of "pollutant" under the CWA with respect to certain pesticide applications on August 13, 2003. See 68 FR 48385 (Aug. 13, 2003). EPA provided a second opportunity for public comment on its interpretation when it proposed the regulation on which the Agency is today taking final action. See 70 FR 5093 (Feb. 1, 2005). EPA received many comments on its interpretation during both comment periods, from a wide range of interested parties including pesticide manufacturers and applicators, public health control agencies, State agricultural agencies, State environmental agencies, environmental groups, human health advocates, farming interests, and other members of the public. Many commenters supported EPA's interpretation, while others opposed it as inconsistent with the CWA.

The record for today's action contains EPA's detailed responses to comments received during both public comment periods. See Docket ID No. OW-2003-0063 at <http://www.regulations.gov>. EPA is providing a summary below of its responses to some of the significant comments received.

### A. Scope of Regulation

Many of the commenters who supported EPA's proposed rule also recommended that EPA broaden the scope of the final rule to cover all pesticide applications, including agricultural applications over land, that are conducted in accordance with the relevant requirements of FIFRA. This final rule addresses only the following two circumstances described in the proposed rule: The application of

aquatic pesticides directly to waters of the United States, and the application of pesticides to control pests over, including near, such waters.

In the meantime, EPA will continue to follow its long-standing practice of not requiring NPDES permits for agricultural pesticide applications that are conducted in compliance with relevant FIFRA requirements. EPA is continuing to consider the applicability of the CWA to situations other than those EPA is addressing in today's action where pesticides applied in accordance with relevant FIFRA requirements may reach and enter waters of the United States, including drift of pesticides applied aerially over land. Therefore, EPA does not believe it is appropriate to broaden the scope of the regulation to include additional types of pesticide applications at this time.

To assist the Agency's consideration of these issues, EPA has established a workgroup under the existing Pesticide Program Dialogue Committee (PPDC) (an advisory committee chartered under the Federal Advisory Committee Act (FACA)) to address issues involving pesticide spray drift from agricultural and other applications. The goals of the workgroup are the following: (1) Improving understanding of the perspectives of all stakeholders regarding pesticide spray drift; (2) finding common ground for further work toward minimizing both the occurrence and potential adverse effects of pesticide spray drift; (3) developing options for undertaking work where common ground exists; and (4) exploring the extent of drift, even with proper usage, and the range and effectiveness of potential responses to unacceptable levels of off-target drift. The spray drift workgroup will provide advice to EPA through the PPDC.

The PPDC is a FACA-authorized forum for a diverse group of stakeholders to provide feedback to the Agency's pesticide program on various pesticide regulatory, policy, and program implementation issues. Topics of discussion at past meetings have included the disclosure of inert ingredients, registration review, nonanimal testing, antimicrobial pesticides, endangered species, reduced risk pesticides, labeling, minor uses, ecological standards, fees for service, experimental use permits, environmental marketing claims, outreach to the public, and several implementation issues emanating from the Food Quality Protection Act of 1996.

Members of the PPDC include representatives of environmental and public interest groups, pesticide

manufacturers and trade associations, user and commodity groups, public health and academic institutions, federal and State agencies, and the general public. Participants in the Spray Drift workgroup reflect the range of stakeholder interests represented on the full PPDC, and also include members with backgrounds in water quality issues. By operating under the PPDC, the Spray Drift workgroup will comply with FACA procedural requirements including timely public notice of meetings, public access to meetings and opportunity for the public to comment; public availability of documents considered by the workgroup; and attendance of a federal officer or employee at each meeting.

#### *B. Sufficiency of FIFRA to Address Water Quality Impacts of Pesticide Applications*

Many commenters objected to the proposed rule on the basis that EPA's regulation of pesticides under FIFRA does not adequately protect water quality, and thus pesticide applications should require an NPDES permit. These commenters alleged both legal and policy shortcomings of FIFRA. They also asserted that EPA's interpretation is improper because FIFRA does not preempt CWA requirements and because EPA lacks authority to exempt categories of discharges from the CWA's prohibition against discharges without an NPDES permit.

These commenters may have misinterpreted the legal interpretation that provides the basis for today's action. First, EPA is not expressly or by implication repealing any provision of the CWA in today's action, nor is the Agency arguing that FIFRA registration preempts CWA section 301(a) or section 402(a). Moreover, EPA is not arguing that registration under FIFRA or compliance with FIFRA requirements replaces or satisfies an otherwise applicable requirement under the CWA to obtain an NPDES permit. Nor is EPA exempting from section 301(a) or section 402(a) any categories of pollutants, because the pesticide applications at issue here are not pollutants under the Act. The proscription in the CWA against discharging pollutants from point sources to waters of the United States except in compliance with section 402 continues to apply. Rather, EPA is exercising its authority to interpret a term in a statute it administers. EPA is clarifying that pesticides applied to or over, including near, water for their intended purpose consistent with all relevant requirements under FIFRA in the circumstances specified in the rule

are not, at the time of application, "pollutants" under the CWA, and therefore applications are not discharges required to obtain permits.

EPA's review, evaluation, and registration of pesticides used in these two circumstances further demonstrate that this is a reasonable interpretation, consistent with Congressional intent. EPA's regulatory programs under FIFRA provide support for the Agency's conclusion that the pesticides applied to or over, including near, water are not wastes (and therefore not pollutants) and serve as an indicator of when a pesticide is being applied as a product for its intended, beneficial purpose. Under FIFRA, EPA receives applications from people who wish to sell and distribute pesticides. The Agency may approve and issue a registration for a product if EPA determines that the product will not cause "unreasonable adverse effects on the environment," which is defined as "any unreasonable risk to man or the environment, taking into account the economic, social and environmental costs and benefits of the use of [a] pesticide \* \* \*." FIFRA Section 3(c)(5). In other words, the Agency may register a pesticide only if the product provides economic, social, and environmental benefits that outweigh risks from its use. As part of FIFRA registration, EPA may establish requirements, which are typically contained in the label for the pesticide, to ensure that when used, it will not cause unreasonable adverse effects on the environment, including the aquatic environment. Thus, registration and use of a pesticide in accordance with its approved labeling or other relevant FIFRA requirements indicates that a pesticide is a product intended to be used for a beneficial purpose that is authorized by EPA and is not a waste. For these reasons, comments regarding the adequacy of EPA's pesticide regulatory program do not pertain to the legal interpretation of whether a pesticide is a "chemical waste" or a "biological material" for purposes of the definition of "pollutant" under the CWA.

Nonetheless, it is important to note that EPA disagrees with commenters' concerns that EPA's registration process does not take into account local conditions, existing water quality standards and use designations, synergistic effects of multiple pesticides, inert ingredients, non-target aquatic organisms, and the effect of multiple applicators in the same area. The regulatory and non-regulatory tools under FIFRA provide means of addressing water quality problems arising from the use of pesticides. In

particular, the pesticide registration and re-registration processes consider impacts on both human health from the presence of pesticides in drinking water, and on aquatic resources (e.g., fish, invertebrates, plants, and other species in fresh water, estuarine, and marine environments). EPA requires a pesticide company to submit a substantial body of data in support of an application for registration. EPA then supplements this required database with information obtained through a systematic search of the open literature on the ecotoxicity of environmental substances. EPA compares the estimated environmental concentrations expected to result from use of a pesticide with toxicity values observed in required studies and studies from the open literature. This database provides sufficient information to conduct assessments of potential ecological and human health risks, including the identification of toxicologically significant degradation products and/or metabolites. For additional information on EPA's approach to ecological risk assessment in general, and endangered and threatened species in particular, see: <http://www.epa.gov/espp/consultation/ecorisk-overview.pdf>.

#### C. EPA's Interpretation of the Term "Pollutant" Under the CWA

Some commenters claimed that EPA's interpretation of the term "pollutant" is inconsistent with the Clean Water Act, with relevant case law, or with prior Agency statements. EPA disagrees with the commenters and believes its interpretation of the term "pollutant" is reasonable and consistent with the language and legislative intent of the Clean Water Act. As described above, pesticides applied in the circumstances addressed in today's regulation, in compliance with FIFRA, for their intended purpose, are not pollutants under the Act. EPA also disagrees with commenters that the term "biological materials" can only be read to include biological pesticides applied in the circumstances addressed by today's regulation—i.e., application to or over waters of the United States consistent with relevant requirements of FIFRA. EPA's analysis of the terms "chemical waste" and "biological materials" in the circumstances addressed by today's regulation is described in more detail above.

In addition, the Ninth Circuit Court of Appeals recently held that pesticides that do not generate a residue when applied directly to a lake to eliminate a non-native fish species are not "pollutants" under the CWA because they are not chemical wastes. *Fairhurst*

*v. Hager*, 422 F.3d 1146 (9th Cir. 2005). In so holding, the court considered the plain meaning of the term "chemical waste" and noted that its analysis was in accord with EPA's interpretation of the term in its July 2003 Interim Statement, and that EPA's interpretation is "reasonable and not in conflict with the expressed intent of Congress." *Id.* at 1149–50. Today's regulation is based on the same interpretation EPA first articulated in the Interim Statement, and is consistent with the *Fairhurst* court's holding.

Moreover, EPA's interpretation is not inconsistent with *Talent* and *Forsgren* as some commenters have asserted. As explained below, these cases do not interpret the term "pollutant" as including the pesticide applications addressed in today's rule.

In *Headwaters v. Talent*, the Ninth Circuit reversed the District Court's dismissal of a CWA citizen suit against an irrigation district alleging that application of the herbicide Magnacide H to irrigation canals to control aquatic weeds and vegetation required an NPDES permit. The District Court had concluded that the application of the pesticide was adequately regulated under FIFRA, and further regulation under the CWA was unnecessary. *Headwaters v. Talent*, No. 98–6004—AA slip op. at 12 (D. Ore. Feb. 1, 1999). The Ninth Circuit found that residual from the application of Magnacide H was a pollutant in this case and that registration of the herbicide under FIFRA did not preclude applicability of the CWA. *Headwaters v. Talent*, 243 F.3d at 532. This conclusion is consistent with EPA's interpretation. As described above, EPA agrees that residual materials from pesticide applications are "pollutants" under the Act. In addition, the irrigation district in *Talent* failed to comply with a FIFRA registration requirement to contain the herbicide-laden water in an irrigation canal for a specified number of days. EPA's interpretation codified in today's action is that pesticides applied in the circumstances described in the rule are not "pollutants" where they are applied consistent with relevant FIFRA requirements. Thus, EPA's interpretation is consistent with the result reached by the *Talent* court.

In *League of Wilderness Defenders v. Forsgren*, the Ninth Circuit held that the aerial application of insecticides over National Forest lands in Washington and Oregon to control a predicted outbreak of the Douglas fir tussock moth required an NPDES permit. However, the court in *Forsgren* stated incorrectly that the parties in the case did not dispute that the insecticides met the

CWA definition of "pollutant." *League of Wilderness Defenders v. Forsgren*, 309 F.3d at 1184, n.2. In fact, the Forest Service in its brief before the District Court reserved its arguments on that particular issue. Because the Ninth Circuit erroneously assumed that the question of whether the applications were pollutants was not in dispute, it did not analyze the issue but simply stated that they were. *Id.* at 1185. The issue that the *Forsgren* court did analyze in detail was whether the airplanes from which the insecticides were sprayed are point sources under the CWA—a different issue from that addressed in today's interpretation.<sup>3</sup>

Commenters also claimed that EPA's interpretation is inconsistent with the Clean Water Act because the purpose for which a pesticide is applied is not relevant to the question of whether it is a pollutant under the Act. The commenters pointed primarily to two cases—*Hudson River Fisherman's Assn. v. City of New York*, 751 F.Supp. 1088 (S.D.N.Y.), *affd.*, 940 F.2d 649 (2d Cir. 1991), and *Minnehaha Creek Watershed District v. Hoffman*, 597 F.2d 617 (8th Cir. 1979)—as supporting their assertion. However, both these cases are distinguishable from EPA's interpretation.

In *Minnehaha Creek*, the court was interpreting the terms "rock, sand, [and] cellar dirt" in the definition of "pollutant" in CWA Section 502(6). The federal appellants in that case appealed a District Court decision finding that the U.S. Army Corps of Engineers did not have jurisdiction under CWA Section 404 over the placement of riprap and the construction of dams in Minnehaha Creek and adjacent Lake Minnetonka. The District Court's decision was based on its conclusion that the creek and the lake were not navigable waters of the United States and that while the riprap and construction materials were "rock and sand," the activities at issue in the case were not within the purview of the Act because they did not significantly affect water quality. *Minnehaha Creek Watershed District v. Hoffman*, 449 F.Supp 876, 886 (D. Minnesota 1978). The Eighth Circuit disagreed and held

<sup>3</sup> EPA's General Counsel issued a memorandum on September 3, 2003, addressing the Agency's views on the effect of the *Forsgren* decision. Specifically, EPA stated that it did not acquiesce outside the Ninth Circuit with the court's decision regarding the application of EPA regulation defining "silvicultural point source" at 40 CFR 122.27(b)(1), and would continue to follow its longstanding interpretation of the statute and these regulations. Memorandum from Robert E. Fabricant to Regional Administrators, "Interpretive Statement and Guidance Addressing Effect of Ninth Circuit Decision in *League of Wilderness Defenders v. Forsgren* on Application of Pesticides and Fire Retardants," Sept. 3, 2003.

that a significant alteration in water quality need not be demonstrated for a substance to be a pollutant. *Minnehaha Creek Watershed District v. Hoffman*, 597 F.3d at 626–27.

The Eighth Circuit stated in *Minnehaha Creek* that it found “no justification in the District Court’s determination that whether the discharge of a particular substance listed in section 502(6) constitutes the discharge of a ‘pollutant’ under the Act depends upon the purpose for which the discharge is made.” *Id.* at 627, emphasis added. EPA notes that nowhere in its opinion does the District Court reach such a conclusion. In any case, EPA is not concluding that the question of whether a substance is a pollutant depends on the specific purpose for which it is discharged. Rather, EPA is interpreting what specific terms in section 502(6) mean in the context of certain pesticide applications.

The Second Circuit Court of Appeals decision in *Hudson River Fishermen’s Assn. v. City of New York* is also distinguishable from the circumstances addressed in today’s rule. In that case, the District Court held that discharges of chlorine and aluminum sulfate (alum floc) from an aqueduct into a reservoir were discharges of pollutants requiring an NPDES permit. First, this case involved the discharge of alum floc from a point source at a point when it was a “chemical waste” and, therefore, consistent with EPA’s interpretation, properly constituted a pollutant under the statute. *Hudson River Fishermen’s Assn. v. City of New York*, 751 F.Supp 1088, 1102. In contrast, today’s rule addresses certain pesticides which are being applied in compliance with relevant FIFRA requirements and, for the reasons described above, are not pollutants.

Moreover, the court’s holding that chlorine was a pollutant also referred to the chlorine in the aqueduct at the time it discharged into the reservoir, not at the time it was first added to the water. The court held that the chlorine was a pollutant, no matter how useful it may earlier have been, citing to the Eighth Circuit’s decision in *Minnehaha Creek*. *Id.* at 1101. Similarly, EPA is not concluding that the question of whether substances listed in section 502(6) are pollutants depends on the purpose for which they are discharged. Rather, EPA is interpreting what specific terms in section 502(6) (terms other than those addressed in *Minnehaha Creek*) mean in the context of these two types of pesticide applications.

Finally, while EPA’s interpretation is not inconsistent with either *Hudson*

*River* or *Minnehaha Creek*, it is further supported by the Ninth Circuit’s decision in *Fairhurst v. Hager*. In *Fairhurst*, the Ninth Circuit specifically considered the purpose for which the pesticide was applied—the same factor commenters claim is not relevant under *Hudson River* and *Minnehaha Creek*—and the fact that it was applied consistent with the product’s FIFRA label, in concluding that it was not a pollutant under the CWA. *Fairhurst v. Hager*, 422 F.3d 1146, 1150 (“Because intentionally applied and properly performing pesticides are not ‘pollutants,’ a potential discharger is not required to secure an NPDES permit for such pesticides before discharge.”)

Some commenters also claimed that EPA’s interpretation is inconsistent with positions taken by the government in several *amicus curiae* briefs related to the issues addressed by the interpretation. As mentioned above, these briefs reflected the government’s evaluation of the law in the context of the specific factual situations at issue and did not result from the deliberative consideration through an administrative process, as today’s rule does. As such, the briefs were not a comprehensive statement of EPA’s legal position on the precise questions addressed in today’s rule, nor did they reflect the exercise of EPA’s legal and policy judgment after consideration of public comments. See Memorandum from Ann R. Klee to Benjamin Grumbles and Susan Hazen, “Analysis of Previous Federal Government Statements on Application of Pesticides to Waters of the United States in Compliance with FIFRA,” Jan. 24, 2005.

## VI. Statutory and Executive Order Reviews

### A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a “significant regulatory action.” Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

### B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* This rule merely identifies two circumstances in which the application of a pesticide to waters of the United States consistent with all relevant requirements under

FIFRA does not constitute the discharge of a pollutant that requires an NPDES permit under the Clean Water Act.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA’s regulations in 40 CFR are listed in 40 CFR part 9.

### C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today’s rule on small entities, small entity is defined as: (1) A small business based on Small Business Administration (SBA) size standards at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today’s rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Because EPA is identifying two circumstances in which the application of a pesticide to waters of the United States consistent with all relevant requirements under FIFRA does not constitute the discharge of a pollutant



that requires a NPDES permit under the Clean Water Act, this action will not impose any requirement on any small entity.

#### *D. Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reason, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's rule is not

subject to the requirements of section 203 of UMRA.

#### *E. Executive Order 13132: Federalism*

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. EPA is merely identifying two circumstances in which the application of a pesticide to waters of the United States consistent with all relevant requirements under FIFRA does not constitute the discharge of a pollutant that requires a NPDES permit under the Clean Water Act. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicited comment on the proposed rule from State and local officials. EPA additionally consulted with state officials in the development of the final rule. Especially important were consultations regarding the manner in which States in the Ninth Circuit currently permit pesticides in response to the *Talent* decision and how states use TMDLs and other authorities to address pesticide residuals.

#### *F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on

one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

This final rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. EPA is merely identifying two circumstances in which the application of a pesticide to waters of the United States consistent with all relevant requirements under FIFRA does not constitute the discharge of a pollutant that requires a NPDES permit under the Clean Water Act. Thus, Executive Order 13175 does not apply to this rule. Moreover, in the spirit of Executive Order 13175, and consistent with EPA policy to promote communications between EPA and tribal governments, EPA specifically solicited comment on the proposed rule from tribal officials.

#### *G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks*

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This regulation is not subject to Executive Order 13045 because it is not economically significant as defined under Executive Order 12866 and because the Agency does not have reason to believe the environmental health and safety risks addressed by this action present a disproportionate risk to children. The regulation only interprets the legal scope of the NPDES permit requirement under the CWA and does not change how pesticide applications are addressed under FIFRA.

*H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)). The only effect of this rule is to identify two circumstances in which the application of a pesticide to waters of the United States consistent with all relevant requirements under FIFRA does not constitute the discharge of a pollutant that requires a NPDES permit under the Clean Water Act.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standard bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rulemaking does not involve technical standards.

*J. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective January 26, 2007.

**List of Subjects in 40 CFR Part 122**

Environmental protection, Administrative practice and procedure, Confidential business information,

Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

Dated: November 20, 2006.

**Stephen L. Johnson,**  
*Administrator.*

■ For the reasons set forth in the preamble, chapter I of title 40 of the Code of Federal Regulations is to be amended as follows:

**PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM**

■ 1. The authority citation for part 122 continues to read as follows:

**Authority:** The Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 2. Section 122.3 is amended by adding paragraph (h) to read as follows:

**§ 122.3 Exclusions.**

\* \* \* \* \*

(h) The application of pesticides consistent with all relevant requirements under FIFRA (i.e., those relevant to protecting water quality), in the following two circumstances:

(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 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, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively; 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.

[FR Doc. E6-20002 Filed 11-24-06; 8:45 am]

**BILLING CODE 6560-50-P**

**COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED**

**41 CFR Parts 51-1, 51-2, 51-3, 51-4, and 51-6**

**RIN 3037-AA07**

**AbilityOne Program**

**AGENCY:** Committee for Purchase From People Who Are Blind or Severely Disabled.

**ACTION:** Final rule; change to program name.

**SUMMARY:** The Committee for Purchase From People Who Are Blind or Severely Disabled (the Committee) has deliberated and voted to change the name of the JWOD Program to the AbilityOne Program. The name of the program is being changed to AbilityOne to give a stronger, more unified identity to the program and to show a connection between the program name and the abilities of those who are blind or have other severe disabilities.

**DATES:** *Effective Date:* November 27, 2006.

**ADDRESSES:** The Committee office is located at Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, VA 22202-3259.

**FOR MORE INFORMATION CONTACT:** Kimberly Zeich, Director, JWOD Business Development, by telephone (703) 603-7740, or by facsimile at (703) 603-0030, or by mail at the Committee for Purchase From People Who Are Blind or Severely Disabled, 1421 Jefferson Davis Hwy, Suite 10800, Arlington, VA 22202-3259.

**SUPPLEMENTARY INFORMATION:** The Committee's statutory authority includes making rules and regulations necessary to carry out the Javits-Wagner-O'Day (JWOD) Act (41 U.S.C. 46-48c). The program implementing the Act provides employment opportunities for people who are blind or have other severe disabilities in the manufacture and delivery of products and services to the Federal Government. The Committee has designated two Central Nonprofit Agencies (CNAs), National Industries for the Blind (NIB) and NISH (serving people with a wide range of disabilities) to provide technical and financial assistance to qualified nonprofit agencies nationwide. These qualified nonprofit agencies employ the blind or severely disabled in the fulfillment of product and service requirements deemed suitable by the Committee and placed on its Procurement List.

In the 1980s, the Committee informally adopted the "JWOD" acronym to serve as a program and umbrella name, and subsequently made changes to its regulations referencing the JWOD Program. However, the Committee has long recognized that confusion regarding the JWOD Program and the roles and identities of the governing and participating organizations continues to exist among Federal customers and other key audiences, including advocates for people with disabilities, the business