



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

MAR 28 2003

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Extension of Memorandum Regarding the Application of Pesticides to Waters of the United States, dated March 29, 2002

FROM: John Peter Suarez
Assistant Administrator

TO: Regional Administrators, Regions I - X

In *Headwaters v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001), the court held that a National Pollutant Discharge Elimination System (NPDES) permit was required for the direct application of an aquatic herbicide to water because the residual herbicide in the water following the application was found to be a pollutant. Since the issuance of that decision, EPA has been working on developing a national approach to appropriately regulate such pesticide application activities.

In the interim, on May 31, 2001, the Office of Enforcement and Compliance Assurance (OECA) issued a memorandum stating that civil enforcement under the Clean Water Act (CWA) for any direct application of pesticides to waters of the United States would be a low enforcement priority until EPA develops a national approach regarding how to best regulate those activities. By memorandum dated March 29, 2002, we extended this low enforcement priority through March 31, 2003. Today's memorandum continues this low enforcement priority beyond March 2003, until March 31, 2004.

OECA will continue to implement its enforcement activities as discussed in the original memorandum of May 31, 2001, for all direct pesticide applications to waters of the U.S. As stated in the May 2001 memorandum, civil administrative or judicial enforcement against discharges from the application of aquatic pesticides will be a low priority, provided that both of the following conditions are met:

- (1) The registered pesticide product is applied directly to waters of the U.S. in a manner consistent with its label; and
- (2) There are no egregious circumstances, such as those resulting in serious actual harm or which may present an imminent and substantial endangerment to public health or the environment.

It is necessary to continue this extension because since the issuance of the *Talent* decision and the subsequent May 31, 2001 enforcement memorandum, EPA's Office of Water, Office of Prevention, Pesticides and Toxic Substances, and the Office of General Counsel have been working together to formulate an approach for the effective implementation of the CWA and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) for direct pesticide applications to waters of the United States. Until this issue is resolved, OECA should continue its low enforcement priority approach to the matter. In this way, EPA can ensure that vital pesticide application activities such as disease vector and invasive species control are not disrupted.

As stated above, this low enforcement priority will remain in effect until March 31, 2004. The Office of Water intends to issue a policy memorandum to address these issues within this time period.

If you have any questions regarding this matter, please contact Walker Smith, Director of the Office of Regulatory Enforcement, Mark Pollins, Director of the Water Enforcement Division, or Susan Johnson of their staff at (202)564-8329.

cc: G. Tracy Mehan, III, Assistant Administrator, Office of Water
Stephen L. Johnson, Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances
Robert E. Fabricant, General Counsel, Office of General Counsel



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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MAR 29 2002

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Extension of Memorandum Regarding the Application of Pesticides to Waters of the United States, dated May 31, 2001

FROM: *SK* Sylvia K. Lowrance
Acting Assistant Administrator *Sylvia K. Lowrance*

TO: Regional Administrators, Regions I - X

On May 31, 2001, the Office of Enforcement and Compliance Assurance (OECA) issued a memorandum stating that civil enforcement under the Clean Water Act (CWA) for any direct application of pesticides to waters of the United States would be a low enforcement priority provided certain conditions intended to ensure appropriate protection of human health and the environment were met. We are continuing that low enforcement priority here.

Today, the Office of Water, the Office of Prevention, Pesticides, and Toxic Substances, and the Office of General Counsel jointly issued a memorandum titled *Interpretative Statement and Regional Guidance on the Clean Water Act's Exemption for Return Flow from Irrigated Agriculture* (Interpretive Statement) that addresses the application of aquatic herbicides in a manner consistent with a Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) label to ensure passage of irrigation return flows. The Environmental Protection Agency (EPA) continues to work on how to best address CWA and FIFRA requirements for other direct pesticide applications to waters of the United States.

OECA will continue to implement its enforcement activities as discussed in the original memorandum of May 31, 2001, for all direct pesticide applications to waters of the United States not addressed in today's Interpretive Statement. This will allow EPA additional time to determine how to best address CWA and FIFRA requirements for those other direct pesticide applications to waters of the United States and ensure that vital pesticide application activities such as disease vector and invasive species control are not disrupted.

This low enforcement priority will remain in effect until March 31, 2003. At that time, we will again review EPA's efforts to address direct pesticide applications to waters of the United States and determine whether to continue this priority.

If you have any questions regarding this matter, please contact Connie Musgrove, Acting Director of the Office of Regulatory Enforcement, Mark Pollins, Director of the Water Enforcement Division, or Tom Charlton of their staff at (202) 564-6960.

cc: G. Tracy Mehan, III, Assistant Administrator, Office of Water
Stephen L. Johnson, Assistant Administrator,
Office of Prevention, Pesticides, and Toxic Substances
Robert E. Fabricant, General Counsel, Office of General Counsel




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 31 2001

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Application of Pesticides to Waters of the United States

FROM: Sylvia K. Lowrance
Acting Assistant Administrator 

TO: Regional Administrators, Regions I - X

This memorandum is to inform you of a recent decision of the Ninth Circuit regarding the direct application of an aquatic herbicide to irrigation canals that were found to be waters of the United States and to alert you to the Environmental Protection Agency's ("EPA") current position on our civil enforcement response to that case. Under the conditions specified below, civil water enforcement priorities should not change and enforcement against any direct application of pesticides to waters of the United States in accordance with a Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") label, will be a low enforcement priority until EPA develops a concerted national approach on how to best regulate those activities.

In *Headwaters v. Talent Irrigation District*, 243 F.3d 536 (9th Cir., March 12, 2001), the Court held that a National Pollutant Discharge Elimination System ("NPDES") permit was required for the direct application of an aquatic herbicide to water because the residual herbicide in the water following the application was found to be a pollutant. In that case, a pesticide applicator had applied Magnacide H to irrigation canals that were waters of the United States without first obtaining an NPDES permit. The Court considered the boundary between the Clean Water Act ("CWA") and the FIFRA and concluded that the direct application of Magnacide H through a point source to waters of the United States in accordance with the pesticide's label requirements did not obviate the need for the applicator to obtain an NPDES permit.

The issue of how CWA requirements are met for the direct application of aquatic herbicides and other pesticides to water has important national implications for EPA, States, and the regulated community. For example, aquatic herbicides have long been considered to be essential tools for keeping irrigation canals free from aquatic vegetation which can impede flow by clogging irrigation channels and irrigation structures. EPA has not previously issued any national guidance of general applicability that would say that an NPDES permit would apply for these activities, nor have we established national policy specifying how the CWA might apply to the use of aquatic pesticides. Given the above, we understand that the decision in *Talent* could cause confusion among all interested parties.

EPA is initiating a process to determine how best to implement the CWA and FIFRA with respect to the direct application of pesticides to waters of the United States. However, it is unlikely to complete that action during the ongoing season for applying aquatic herbicides to irrigation canals, which may constitute waters of the United States. In addition, the application season for public health pesticides used to control disease vectors, such as insecticides for mosquitos bearing infectious diseases, has begun. These important activities require an interim Agency response.

The FIFRA regulatory system requires that the Agency look carefully at the risks and benefits, including aquatic toxicology, when registering pesticides for aquatic application. That review gives considerable assurance that a registered pesticide product lawfully used will not cause unreasonable adverse effects on the environment. Accordingly, rather than disrupt activities such as keeping irrigation canals free from aquatic vegetation or protecting human health from disease, EPA has decided to maintain its existing high priority areas for water enforcement. Therefore, civil administrative or judicial enforcement against discharges from the application of aquatic pesticides will be a low priority provided that both of the following conditions are met:

- (1) The registered pesticide product is applied directly to waters of the United States in a manner consistent with its labeling; and
- (2) There are no egregious circumstances, such as those resulting in serious actual harm or which may present an imminent and substantial endangerment to public health or the environment.

This low priority does not apply to situations where pesticides enter waters of the United States through other pathways, such as storm water run off, industrial wastewater (including discharges from pesticide manufacturers and formulators), or discharges resulting from the improper management or disposal of pesticides.

In order to provide EPA adequate time to address this issue and to determine how best to regulate these activities, this prioritization will remain in effect through December 2001. We will review the Agency's and States' responses at that time and determine whether to continue this prioritization.

If you have any questions about this matter, please contact Eric Schaeffer, Director of the Office of Regulatory Enforcement, Brian Maas, Director of the Water Enforcement Division or Pamela Mazakas of their staff at (202) 564-4028.

cc: Diane C. Regas, Acting Assistant Administrator, Office of Water
Stephen L. Johnson, Acting Assistant Administrator,
Office of Prevention, Pesticides, and Toxic Substances
Anna Wolgast, Acting General Counsel, Office of General Counsel