

MEMORANDUM

SUBJECT: Interpretive Statement and Regional Guidance on the Clean Water Act's Exemption for Return Flows from Irrigated Agriculture

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TO: Regional Administrators
Regions 1-10

In *Headwaters, Inc. v. Talent Irrigation District*, the U.S. Court of Appeals for the Ninth Circuit held that an applicator of aquatic herbicides was required to obtain a National Pollutant Discharge Elimination System ("NPDES") permit under the Clean Water Act ("CWA") under the circumstances before the court. 243 F.3d 526 (9th Cir. 2001). The Court concluded in that case that the applicator not only needed to comply with the herbicide's Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") label requirements, but also needed to obtain an NPDES permit. *Id.* The applicator used an herbicide with the active ingredient acrolein in an irrigation canal that was a water of the United States in a manner that was inconsistent with its label instructions. EPA is issuing this interpretive statement and regional guidance to clarify a jurisdictional issue that has arisen in the context of the *Talent* decision.

In the CWA, Congress specifically provided that the definition of "point source" does not include return flows from irrigated agriculture and provided that the Administrator shall not require a permit for such activity. EPA believes that the application of an aquatic herbicide consistent with the FIFRA label to ensure the passage of irrigation return flow falls within the exemption and is nonpoint source activity, consistent with Congressional intent. The court in *Talent* did not consider the irrigation return flow exemption.

With this statement, EPA clarifies that the application of an aquatic herbicide consistent with the FIFRA label to ensure the passage of irrigation return flow is a nonpoint source discharge not subject to

NPDES permit requirements under the CWA. EPA is not addressing at this time whether other types of direct applications of FIFRA-registered pesticides beyond the scope of this exemption are subject to regulation under the CWA. Nor does EPA intend for this statement to have any effect on point source discharges of pollutants subject to regulation under the CWA, including, but not limited to, discharges into an irrigation canal that is a water of the United States.

As explained more fully below, EPA believes that this interpretation is consistent with the intent of Congress in establishing this exemption in 1977. The Agency also believes that the use of aquatic herbicides for the purposes of ensuring irrigation return flow in accordance with FIFRA label requirements will serve to prevent unreasonable adverse effects on the environment. EPA will continue to use its full authority under FIFRA to ensure that pesticides are not used in ways beyond those intended and approved.

Under FIFRA, pesticide applicators must follow label instructions. These instructions include use restrictions and limitations that EPA deems necessary to ensure the product, when used according to the label, will not result in unreasonable adverse effects on the environment, taking into account both the risks and the benefits posed by use of the product. As part of the registration process, EPA evaluates potential label limitations based on the proposed use instructions for the product (application methods, rates, etc.), and the toxicity and environmental fate data submitted to the Agency in support of the pesticide's registration. After determining the validity of the submitted data, the Agency evaluates the amount of the particular pesticide that would result in unreasonable effects for plant and animal species other than the pest it is intended to control. If that amount is expected to result from the application, the Agency will determine what measures would reduce that amount, and therefore exposure, to an acceptable level. For acrolein products, the measure to reduce exposure is to keep the treated water on the field or otherwise contained for six days prior to release. The containment period allows the pesticide to degrade so that when the water is released, potential adverse impacts on aquatic species and the environment are minimized.

Statutory Background

In the 1977 amendments to the Clean Water Act, Congress expressly reversed a court decision which would have required an NPDES permit for return flows from irrigated agriculture. Congress accomplished this through two amendments to the CWA. (1) Congress exempted irrigation return flows from permitting: "The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture," § 402(1)(1); and (2) Congress excluded return flows from the definition of point source: "This term does not include return flows from irrigated agriculture," § 502(14).¹

¹ Congress enacted these amendments to the CWA in response to a court decision that vacated sections of EPA's 1973 NPDES regulations. *NRDC v. Train*, 396 F.Supp. 1393 (D.D.C. 1975), *aff'd*, *NRDC v. Costle* 568 F.2d 1369, 1382 (1977). The EPA regulations had exempted discharges from several classes of point sources from the NPDES permit requirement. Among the exempted sources were all irrigation return flows (such as tailwater, tile drainage, surfaced ground

The legislative history of these amendments shows that by amending the CWA, Congress intended to ensure a level playing field between irrigated and non-irrigated agriculture. Congress eliminated the disadvantage to irrigated agriculture by providing the irrigation return flow exemption, which primarily benefits irrigated agriculture. This effort was expressed during Senate debate on the amendment as intended to “correct[] what has been a discrimination against irrigated agriculture.” 3 Legislative History of the Clean Water Act, 1978 at 527.² Debate in the House of Representatives noted that “[t]his amendment promotes equity of treatment among farmers who depend on rainfall to irrigate their crops and those who depend on surface irrigation which is returned to a stream in discrete conveyances.” 4 Legislative History of the Clean Water Act, 1978 at 882. In the Senate report, the Senate adopted a broad definition of return flow to include “conveyances carrying surface irrigation return as a result of the controlled application of water by any person to land used primarily for crops.” S. Rep. No. 85-370, 95th Cong., 1st Sess. 35, *reprinted in*, 4 Leg. Hist. at 668. The Senate noted favorably the existence of the Section 208 program, which does not require an NPDES permit to address water quality concerns from irrigation return flow: “All such [irrigation return flow] sources, regardless of the manner in which the flow was applied to agricultural lands, and regardless of the discrete nature of the entry point, are more appropriately treated under the requirements of section 208(b)(2)(F).” *Id.*³ Section 208(b)(2)(F) establishes a non-NPDES program for addressing various nonpoint sources of pollution, “including return flows from irrigated agriculture, and their cumulative effects.” 33 U.S.C. § 1288(b)(2)(F). In addition, Section 303(d) of the CWA is a comprehensive program administered by EPA in conjunction with the States that identifies waters that are not meeting water quality standards.

water flow or bypass water) from areas of less than 3,000 contiguous acres or 3,000 noncontiguous acres that use the same drainage system. 40 CFR § 125.4(i) (1973). Following the court decision, which would have *required* NPDES permits for irrigation return flows, Congress acted to *not require* NPDES permits, establishing a statutory exemption for return flows.

² In 1987, Congress further amended the CWA’s definition of point source to exclude discharges of agricultural stormwater. The legislative history of the amendment demonstrates that Congress had assumed that such discharges would be nonpoint source discharges. That assumption explains why Congress was concerned in 1977 that there was discrimination against irrigated agriculture. In 1977, Congress thought that “Farmers in areas of the country which were blessed with adequate rainfall were not subject to permit requirements on their rainwater run-off, which in effect had been used for the same purpose and contained the same pollutants.” 3 Legislative History of the Clean Water Act, 1978 at 527.

³ Congress also recognized the significant burden on EPA and the States associated with issuing permits for all irrigation return flows. For instance, House debate on the legislation indicated that, “The problems of permitting every discrete source or conduit returning water to the streams from irrigated lands is simply too burdensome to place on the resources of EPA.” 3 Legislative History of the Clean Water Act, 1978 at 318.

Regulatory Background

Consistent with the 1977 CWA amendments and congressional intent, EPA adopted regulations, using language identical to the statutory exemption, that exempt return flows from irrigated agriculture from the NPDES permitting program. See 40 CFR §122.2 (“This term [point source] does not include return flows from irrigated agriculture. . . .”); § 122.3(f) (“The following discharges do not require NPDES permits: . . . (f) Return flows from irrigated agriculture.”). EPA believes that to fully implement congressional intent, the exemption must be broad enough to include the application of aquatic herbicides when necessary to maintain the conveyances and ensure that irrigation water can actually flow. This interpretation ensures that Congress’ primary purpose in enacting the exemption is met: irrigated agriculture is not subject to a greater regulatory burden than non-irrigated agriculture.

This is also consistent with the Agency’s longstanding interpretation of “point source” with respect to silviculture activities. EPA regulations exclude from the NPDES permit requirement “non-point source silvicultural activities such as . . . pest and fire control. . . .” 40 CFR 122.27. EPA’s interpretation has been upheld by courts considering various activities related to silviculture. In *League of Wildlife Defenders v. Forsgren*, pesticides were applied to forested areas through helicopter-mounted pesticide sprayers, which resulted in spray residue in adjacent streams. 163 F.Supp.2d 1222 (D.Ore. 2001)(appeal pending). The court affirmed EPA’s finding that pesticide application falls within the normal course of silvicultural operations and, as a nonpoint source activity, does not require an NPDES permit. Similarly, in *Sierra Club v. Martin*, the court concluded that logging roads for harvesting timber were not CWA “point source” discharges. 71 F.Supp.2d 1268 (N.D.Ga. 1996). The court noted that Congress and EPA intended to exempt the construction and maintenance of logging roads and most other activities related to silviculture from the NPDES permit program. *Id.* at 1301.

Statement Regarding Application of Herbicides to Facilitate Irrigation

Based on statutory language and Congressional intent, the Agency believes that the exemption for return flow from irrigated agriculture reasonably would include the maintenance through the use of aquatic herbicides of irrigation conveyances as integral to the function of an irrigation return flow system. Specifically, EPA believes that the application of aquatic herbicides consistent with the FIFRA label to ensure the passage of irrigation return flow falls within the scope of the exemption and, therefore, does not require an NPDES permit. Application of herbicides inconsistent with the requirements of FIFRA would not be for the purpose of maintaining irrigation and thus would not be treated as irrigation return flow exempt pursuant to the CWA.⁴

⁴ While neither the district court’s nor the appellate court’s analysis turned on whether the pesticide application in *Talent* was consistent with FIFRA label requirements, the Agency interprets the factual situation described in the district court’s opinion in *Talent* to constitute a violation of the FIFRA label for Magnacide H. Contrary to the FIFRA label, the pesticide applicator failed to contain the herbicide-laden water for the requisite number of days. Under these circumstances, EPA believes that the applicator would not be able to avail itself of the exemption.

While EPA believes that Congress intended the exemption to be broad enough to ensure the full functioning of irrigation return flow systems, the exemption is not unbounded. Discharges that are not return flows from irrigated agriculture into irrigation canals that are otherwise subject to permitting requirements would continue to require an NPDES permit. For example, storm water discharge from an industrial facility that “mixes” with irrigation return flows prior to addition to waters of the United States would require a permit. Preamble, NPDES Permit Application Requirements for Storm Water Discharges, 55 FR 47990, 47996 (Nov. 16, 1990). This interpretation finds support in the legislative history of the return flow exemption, based on the Senate’s discussion of the word “entirely” in Section 402(1)(1) which prohibits the Administrator from requiring a permit “for discharges composed entirely of return flows from irrigated agriculture.” The Senate stated that the word “entirely” was “intended to limit the exception to only those flows which do not contain additional discharges from activities unrelated to crop production.” 4 Legislative History of the Clean Water Act, 1978 at 668.

Summary of Interpretive Statement

This statement clarifies that the application of an aquatic herbicide consistent with the FIFRA label to ensure the passage of irrigation return flow is a nonpoint source discharge not subject to NPDES permit requirements under the CWA. EPA is not addressing at this time whether other types of direct applications of FIFRA-registered pesticides beyond the scope of this exemption are subject to regulation under the CWA. Nor does EPA intend for this statement to have any effect on point source discharges of pollutants subject to regulation under the CWA, including, but not limited to, discharges into an irrigation canal that is a water of the United States.

For further information about this statement, contact Jim Jones, Office of Prevention, Pesticides, and Toxic Substances, (703) 305-7565 or Mike Cook, Office of Water (202) 564-0748.