United States Environmental Protection Agency

Office of Water, 4204M
Office of Prevention, Pesticides, and Toxic Substances, 7502C

January 2005

FACT SHEET

Interpretive Statement and Proposed Rule on the Application of Pesticides to Waters of the U.S. in Compliance with FIFRA

EPA has published an interpretive statement outlining circumstances under which National Pollutant Discharge Elimination System (NPDES) permits are not required to apply pesticides to waters of the United States. EPA is also proposing to codify the interpretive statement in regulation. The public may comment on this proposed regulation for a period of 60 days after publication in the Federal Register.

Background

In recent years, courts have been faced with the question of weather the Clean Water Act requires an NPDES permit for pesticide applications (e.g. *Headwaters, Inc. v. Talent Irrigation District).* As a result, public health authorities, natural resource managers, and others who rely on pesticides, have expressed to EPA their concern and confusion about whether they have a legal obligation to obtain an NPDES permit (under the Clean Water Act) when pesticides are applied to or over waters of the United States. They were also concerned about the impact such a requirement would have on their ability to accomplish their missions. The interpretive statement and proposed rule are intended to address these concerns and clarify jurisdictional issues between the Clean Water Act and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) pertaining to the application of pesticides. EPA solicited public comment on an interim statement and guidance in a *Federal Register* Notice published on August 13, 2003 and received more than 400 comments expressing a wide range of views.

What do the interpretive statement and proposed rule say?

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 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 the waters of the United States.

2. The application of pesticides to control pests that are present over waters of the United States, including near such waters, that results in a portion of the pesticides being deposited to waters of the United States. Examples include aerial applications of insecticides to a forest canopy where waters of the United States may be present below the canopy or applications of pesticides over or near water for control of adult mosquitos or other pests.

Why is this action by EPA important?

Clarification of these issues is important because doubt over a requirement to obtain an NPDES permit could impede the ability of local officials to quickly control pests, such as mosquitos, that may carry communicable diseases like West Nile virus or invasive species that may damage natural resources. EPA believes that the existing regulatory requirements for pesticides under FIFRA adequately safeguard human health and the environment without imposing undue burden on local governments and others that rely on pesticides.

How to Get Additional Information

Copies of the Federal Register notice that contains the interpretive statement and proposed rule are available on EPA's website at www.epa.gov/npdes/agriculture. You can also get copies of the Federal Register notice by contacting EPA's Water Resource Center, Mail Code 4101T, 1200 Pennsylvania Avenue NW, Washington, DC 20460, 202-566-1729, or via email *center.water.resource@epa.gov* .

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

SUBJECT CATEGORY: Water programs: Federal Insecticide, Fungicide, and Rodenticide Act; implementation-- Pesticides applied to U.S. waters; statement and guidance

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PROPOSED RULE

Docket ID: [OW-2003-0063; FRL-7866-5]

CFR Citation: 40 CFR 122

Published: February 01, 2005 [FR Doc. 05-01868]

Comments Due: April 04, 2005

How to Comment: Submit a Comment on this Regulation
Submit your comments, identified by Docket ID No. OW-2003-0063, by one of the following methods: (1) Federal eRulemaking Portal: http://www.regulations.gov. Follow the on-line instructions for submitting comments. (2) Agency Web site: http://www.epa.gov/edocket. EDOCKET, EPA"s electronic public docket and comment system, is EPA"s preferred method for receiving comments. Follow the on-line instructions for submitting comments. (3) E-mail: ow-docket@epa.gov, Attention Docket ID No. OW-2003-0063. (4) Mail: Send the original and three copies of your comments to: Water Docket, Environmental Protection Agency, Mailcode 4101T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. OW-2003-0063. (5) Hand Delivery: Deliver your comments to: EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. OW-2003-0063. Such deliveries are only accepted during the Docket"s normal hours of operation. Instructions: Direct your comments to Docket ID No. OW-2003-0063. EPA"s policy is that all comments received will be included in the public docket without change and may be made available online at http://www.epa.gov/edocket, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the Federal regulations.gov Web sites are anonymous access systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA"s public docket visit EDOCKET on-line or see the Federal Register of May 31, 2002 (67 FR 38102). For additional instructions on submitting comments, go to section B.1. of the SUPPLEMENTARY INFORMATION section of this document. Docket: All documents in the docket are listed in the EDOCKET index at http://www.epa.gov/edocket. Although listed in the index, some information is not publicly available, i.e., 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 electronically in EDOCKET or in hard copy at the Water Docket in the EPA Docket Center, 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.

absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This proposed rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Particulate matter, and Reporting and recordkeeping requirements.

Dated: January 21, 2005.

Ronald A. Kreizenbeck,

Acting Regional Administrator, EPA Region 10.

[FR Doc. 05–1867 Filed 1–31–05; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 122

[OW–2003–0063; FRL–7866–5]

RIN 2040–AE72

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rulemaking and notice of interpretive statement.

SUMMARY: On August 13, 2003, the Environmental Protection Agency (EPA) published a notice in the **Federal Register** soliciting public comment on an Interim Statement and Guidance to address issues pertaining to coverage under the Clean Water Act (CWA) of pesticides regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) that are applied to or over waters of the United States. The interpretation addressed two sets of circumstances for which EPA has determined that the application of a pesticide to waters of the United States consistent with all relevant requirements of FIFRA does not constitute the discharge of a pollutant that requires a National Pollutant Discharge Elimination System (NPDES) permit under the CWA. EPA is announcing today the interpretive statement developed after consideration of public comments. In this notice, EPA is also proposing to revise the NPDES permit program regulations to incorporate the substance of the interpretive statement.

DATES: Comments on this action must be received or postmarked on or before midnight April 4, 2005.

ADDRESSES: Submit your comments, identified by Docket ID No. OW–2003–0063, by one of the following methods:

(1) Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

(2) Agency Web site: *http://www.epa.gov/edocket.* EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.

(3) E-mail: *ow-docket@epa.gov,* Attention Docket ID No. OW–2003–0063.

(4) Mail: Send the original and three copies of your comments to: Water Docket, Environmental Protection Agency, Mailcode 4101T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. OW–2003–0063.

(5) Hand Delivery: Deliver your comments to: EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. OW–2003–0063. Such deliveries are only accepted during the Docket's normal hours of operation.

Instructions: Direct your comments to Docket ID No. OW–2003–0063. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the Federal regulations.gov Web sites are "anonymous access" systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102). For additional instructions on submitting comments, go to section B.1. of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, *i.e.,* 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 electronically in EDOCKET or in hard copy at the Water Docket in the EPA Docket Center, 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 Louis Eby, Water Permits Division, Office of Wastewater Management (4203M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564–6599, e-mail address: *eby.louis@epa.gov;* or William Jordan, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 305–1049, e-mail address: *jordan.william@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

You may be potentially affected by this action if you apply pesticides to or

over, including near, water. Potentially affected entities may include, but are not limited to:

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.
	112511 Finfish Farming and Fisher Hatcheries.	Producers of farm raised finfish (*e.g.*, catfish, trout, goldfish, tropical fish, minnows) and/or hatching fish of any kind.
	112519 Other Animal Aquaculture.	Producers engaged in farm raising animal aquaculture (except finfish and shellfish). Alligator, frog, or turtle production is included in this industry.
	113110 Timber Tract Operations.	The operation of timber tracts for the purpose of selling standing timber.
	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.	Operating irrigation systems.
Pesticide parties (includes pesticide manufacturers, other pesticide users/interests, and consultants).	325320 Pesticide and Other Agricultural Chemical Manufacturing.	Formulation and preparation of agricultural pest control chemicals.
Public health parties (includes mosquito or other vector control districts and commercial applicators that service these).	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.
Resource management parties (includes state departments of fish and wildlife, state departments of pesticide regulation, state environmental agencies, and universities).	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.
	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.
Utility parties (includes utilities)	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 listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed could also be affected. Other stakeholders and members of the public concerned about the application of pesticides to and over, including near, waters of the U.S. may also have an interest in this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. 1. *Submitting CBI.* Do not submit this information to EPA through EDOCKET, regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

i. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns, and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background and Public Comments

EPA issued an Interim Statement and Guidance addressing two circumstances in which the Agency interprets the CWA as not requiring NPDES permits for the application of pesticides to and over waters of the United States, because such materials are not "pollutants" as that term is defined in the CWA. The first situation addressed in the Interim Statement and Guidance was the application of pesticides directly to waters of the United States in order to control pests (for example, mosquito larvae or aquatic weeds that are present in the water). The second situation was the application of pesticides to control pests that are present over waters of the United States that results in a portion of the pesticide being deposited to waters of the United States (for example, when pesticides are aerially applied to a forest canopy where waters of the United States may be present below the canopy or when insecticides are applied for control of adult mosquitos). Although the Interim Statement and Guidance was effective when issued, EPA provided public notice and solicited public comment. 68 FR 48385; August 13, 2003.

EPA received many comments on the Interim Statement and Guidance, including comments supporting EPA's interpretation as well as comments opposing it. In general, most commenters who supported EPA's interpretation agreed that it was the best interpretation of the CWA's definition of "pollutant," and that the issuance of the Interim Statement and Guidance would facilitate application of pesticides in a manner consistent with relevant FIFRA requirements to serve important public health purposes. The comments opposing EPA's interpretation disagreed with the Agency's interpretation of the Act and expressed concerns about the environmental effects of pesticides applied to and over waters of the United States. EPA has considered the comments received on the Interim Statement and will continue to do so in the context of today's proposed rulemaking. The Agency will formally respond to all public comments received on the Interim Statement and during the public comment period for today's proposed rule. Therefore, it is not necessary to resubmit comments that were previously submitted on the Interim Statement and Guidance.

While EPA will formally address all the comments when it promulgates a final regulation, the Agency addresses here two issues raised by public comments. Some commenters expressed concern that the Agency was not adopting this interpretation through a rulemaking proceeding; a subset of these comments argued that failure to go through rulemaking violated the Administrative Procedure Act (APA); other commenters urged EPA to undergo rulemaking in order to provide greater legal certainty to pesticide applicators. EPA disagrees with those commenters who contended that the APA rulemaking requirements apply to today's Interpretive Statement. The Interpretive Statement, like the Interim Statement and Guidance, is an "interpretative" rule under 5 U.S.C. 553(b) since it interprets the meaning of the term "pollutant" in section 502(6) of the CWA as applied to certain pesticide applications. Therefore, it is exempt from notice and comment rulemaking requirements under the APA. Consistent with its status, the document is entitled an "Interpretive Statement."

EPA agrees, however, with those commenters who emphasized the importance of providing clarity and greater legal certainty to parties who apply pesticides under the circumstances addressed by the Interim Statement and Guidance. Therefore, EPA is proposing to codify the substance of today's Interpretive Statement into EPA's NPDES regulations.

Second, several other commenters argued that EPA's interpretation in the Interim Statement and Guidance is a significant departure from previous statements in amicus briefs the Agency filed in *Headwaters, Inc.*, v. *Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001), and in *Altman* v. *Town of Amherst*, 47 Fed. Appx. 62 (2d Cir. 2002). EPA believes that, in some respects, these commenters have incorrectly characterized past government positions in these cases, consequently overstating the differences between the Interpretive Statement and the positions in those cases. Neither the CWA itself nor EPA's regulations address the question of whether pesticides are "chemical wastes" or "biological materials" under section 502(6) of the Act when used for their intended purpose and in conformity with relevant requirements of FIFRA. Moreover, EPA does not have a longstanding interpretation of the statute or its regulations that resolves this issue. Nonetheless, EPA's position on these issues has evolved since the briefs were filed in these cases. EPA believes that its revised thinking best accords with Congressional intent reflected in the language, structure and purposes of the CWA. A more detailed explanation is contained in a January 24, 2005, memorandum from EPA's General Counsel titled "Analysis of Previous Federal Government Statements on Application of Pesticides to Waters of the United States in Compliance with FIFRA," which is available in the docket for this rule at *http://www.epa.gov/edocket.*

III. Summary of Revisions to Interpretive Statement

EPA is issuing an Interpretive Statement that is substantially similar to the Interim Statement and Guidance. The Interpretive Statement contains the following changes from the Interim Statement and Guidance:

- EPA has modified the description of the first circumstance addressed in the statement to include other pests in addition to mosquito larvae and aquatic weeds, since pesticide applications directly to waters of the United States may target organisms other than the two identified in the Interim Statement and Guidance;
- EPA has modified the description of the second circumstance addressed in the statement to refer to pesticides (rather than insecticides) that are applied over water, and to refer to other pests in addition to mosquitos, since pesticide applications to control pests present over waters of the United States may target organisms other than mosquitos;
- EPA has modified the second circumstance to clarify that the reference to pests "over water" includes pests near water, since organisms targeted by pesticides covered by the Interpretive Statement are often found near as well as in, on or above waters;
- EPA has clarified that "relevant requirements" under FIFRA for purposes of this document refers to requirements relevant to protection of water quality; and
- Today's statement only specifically analyzes the applicability of NPDES permitting requirements to pesticide applications in the two circumstances identified therein. The Interpretive Statement now references, however, several other interpretive statements previously issued by the Agency and also notes that it has been and will continue to be the operating approach of the Agency that the application of agricultural and other pesticides in accordance with relevant FIFRA

requirements is not subject to NPDES permitting requirements.

The full text of the Interpretive Statement is included below in section VI.

IV. Summary of Proposed Rule

EPA is also proposing to revise the NPDES permit program regulations to incorporate the substance of the Interpretive Statement. The proposed revision would add a paragraph to 40 CFR 122.3's list of discharges that are excluded from NPDES permit requirements. The new paragraph would exclude applications of pesticides to waters of the United States consistent with all relevant requirements under FIFRA in the two circumstances described in the Interpretive Statement. As is explained in the Interpretive Statement, the pesticides are not pollutants under these circumstances and, therefore, are not discharges of pollutants subject to NPDES permitting requirements.

EPA is soliciting public comment today on the proposed regulatory language. The Agency will formally respond to all public comments received on the Interim Statement during the comment period on today's proposed rule. Therefore, it is not necessary to resubmit comments that were previously submitted on the Interim Statement and Guidance.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this proposed rule is not a "significant regulatory action" under the terms of Executive Order 12866 and, therefore, is not subject to OMB review.

B. Paperwork Reduction Act

This proposed action would not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* If promulgated, it would merely 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.

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 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 proposed rule on small entities, small entity is defined as: (1) A small business based on Small Business Administration (SBA) size standards; (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 proposed 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 proposes 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, this proposed action will not impose any burden on any small entity. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

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 the 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 proposed rule to change an NPDES deadline would 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. The proposed rule would not impose any additional costs to these entities. Thus, today's proposed 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 proposed 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 proposed rule does not have federalism implications. If promulgated, 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. 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 solicits comment on this proposed rule from State and local officials.

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 9, 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."

This proposed 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. Thus, Executive Order 13175 does not apply to this rule.

EPA specifically solicits additional comment on this proposed rule.

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 E.O. 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 E.O. 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 proposed rule only interprets the legal scope of NPDES permits 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 proposed rule would not be subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866. The only effect of this proposed rule would be 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"), Pub. L. 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 proposed rulemaking does not involve technical standards.

VI. Today's Interpretive Statement

The text of the final Interpretive Statement follows:

Memorandum

Subject: Interpretive Statement on Application of Pesticides to Waters of the United States in Compliance with FIFRA.

From: Benjamin H. Grumbles (signed and dated January 25, 2005). Assistant Administrator for Water (4101).

Susan Hazen (signed and dated January 25, 2005). Acting Assistant Administrator for Prevention, Pesticides and Toxic Substances (7101).

To: Regional Administrators, Regions I–X.

The Environmental Protection Agency (EPA) is issuing this interpretation of the Clean Water Act (CWA) to address issues regarding coverage under the CWA of pesticides regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) that are applied to or over, including near, waters of the United States. This Memorandum is issued to address the question of whether National Pollutant Discharge Elimination System (NPDES) permits under section 402 of the CWA are required for the applications of pesticides described below that comply with relevant requirements of FIFRA. EPA provided public notice of and solicited public comment on its interpretation of the CWA with regard to

this question. *See* 68 FR 48385 (Aug. 13, 2003). After considering the comments received in response to that notice, EPA is issuing this Interpretive Statement.

The application of a pesticide to or over, including near, 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 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 the waters of the United States.

(2) The application of pesticides to control pests that are present over waters of the United States, including near such waters, that results in a portion of the pesticides being deposited to waters of the United States; for example, when insecticides are aerially applied to a forest canopy where waters of the United States may be present below the canopy or when pesticides are applied over, including near, water for control of adult mosquitos or other pests.

It is the Agency's position that these types of applications do not require NPDES permits under the Clean Water Act if the pesticides are applied consistent with all relevant requirements under FIFRA (*i.e.*, those relevant to protecting water quality).[1] Applications of pesticides in violation of the relevant requirements under FIFRA would be subject to enforcement under any and all appropriate statutes including, but not limited to FIFRA and the Clean Water Act.

EPA will continue to review the variety of other circumstances beyond the two described above in which questions have been raised about whether applications of pesticides that enter waters of the U.S. are regulated under the CWA, including other applications over land areas that may drift over and into waters of the U.S.

Through a proposed rule in the **Federal Register**, EPA will solicit comment on incorporating the substance of this Interpretive Statement in the NPDES permit program regulations in 40 CFR part 122. Notwithstanding that action, however, the application of pesticides in compliance with relevant FIFRA requirements is not subject to NPDES permitting requirements, as described in this Interpretive Statement.

Background and Rationale

In this Interpretive Statement, the Agency construes the Clean Water Act in a manner consistent with how the statute has been administered for more than 30 years. EPA does not issue NPDES permits solely for the direct application of a pesticide to target a pest that is present in or over a water of the United States, nor has it ever stated in any general policy or guidance that an NPDES permit is required for such applications.

It has been and will continue to be the operating approach of the Agency that the application of agricultural and other pesticides in accordance with label directions is not subject to NPDES permitting requirements.

In *Headwaters, Inc.* v. *Talent Irrigation District,* the U.S. Court of Appeals for the Ninth Circuit held that an applicator of herbicides was required to obtain an NPDES permit under the circumstances before the court. 243 F.3rd 526 (9th Cir. 2001).[2] The *Talent* decision caused public health authorities, natural resource managers and others who rely on pesticides great concern and confusion about whether they have a legal obligation to obtain an NPDES permit when applying a pesticide consistent with FIFRA and, if so, the potential impact such a requirement could have on accomplishing their own mission of protecting human health and the environment. Since *Talent,* only a few states have issued NPDES permits for the application of pesticides. Most state NPDES permit authorities have opted not to require applicators of pesticides to obtain an NPDES permit. In addition, state officials have continued to apply pesticides for public health and resource management purposes without obtaining an NPDES permit. These varying practices reflect the substantial uncertainty among regulators, the regulated community and the public regarding how the Clean Water Act applies to the use of pesticides.

There has been continued litigation and uncertainty following the *Talent* decision. One such case is *Altman* v. *Town of Amherst* (Altman), which was brought against the Town of Amherst for not having obtained an NPDES permit for its application of pesticides to wetlands as part of a mosquito control program. EPA filed an *amicus* brief in that case setting forth the agency's views in the context of that particular case. In September 2002, the Second Circuit remanded the *Altman* case for further consideration and issued a Summary Order that stated, "Until 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 an NPDES permit [or a state-issued permit in the case before the court] the question of whether properly used pesticides can become pollutants that violate the Clean Water Act will remain open." 46 Fed. Appx. 62, 67 (2d Cir. 2002).

This Memorandum provides EPA's interpretation of how the CWA currently applies to the two specific circumstances listed above. Under those circumstances, EPA has concluded that the CWA does not require NPDES permits for a pesticide applied

[1] As described in this Interpretive Statement, pesticides designed and registered for application to or over, including near, water are not considered to be pollutants requiring an NPDES permit under the CWA, regardless of whether the pesticides targets are in the water itself or over, including near, the water. If applied in accordance with all relevant requirements under FIFRA, EPA considers these pesticides to be products that are applied to perform their intended purpose of controlling target organisms and, therefore, are neither "chemical wastes" nor "biological materials" within the meaning of section 502(6) of the CWA. This includes any residual product that is an inherent, inextricable element of the pesticide application. For purposes of this Interpretive Statement, EPA considers the portion of a pesticide application that does not reach a target organism and any pesticide remaining in the water after the application is complete to be residual product, and not a pollutant requiring an NPDES permit, only if the product had been applied in accordance with all relevant requirements under FIFRA. However, the Agency continues to review whether and under what unique circumstances the material might later become a waste and, therefore, a pollutant. See also n.5, infra. If such residuals were to present a water quality problem, they could be addressed through nonregulatory planning and grant processes under the CWA.

The Agency's interpretation is not inconsistent with the result in the Ninth Circuit's decision in *Headwaters, Inc.* v. *Talent Irrigation District,* 243 F. 3d 526 (9th Cir. 2001), because in the factual situation described by the district court, in EPA's view, the application did not comply with relevant FIFRA requirements and, therefore, was not the type of activity addressed by this Interpretive Statement.

[2] In an *amicus* brief filed by the United States in the *Talent* case, the Agency did not address EPA's interpretation of the circumstances in which pesticides applied to or over water are "pollutants" under the CWA's definition of that term. Rather, the *Talent* brief accepted the District Court's factual findings that a "person" had discharged a "pollutant" from a "point source" into "navigable waters" but then disputed the District" Court's legal determination that, even in these circumstances, the discharge did not require a CWA permit because the FIFRA label for the particular pesticide did not reference the NPDES permitting requirement. In contrast, this Interpretive Statement addresses the specific and distinct legal question of whether pesticides applied in the two specific circumstances discussed above are pollutants to begin with, and concludes they are not, provided the use of the pesticide complies with all relevant FIFRA requirements.

consistent with all relevant requirements under FIFRA.[3]

Many of the pesticide applications covered by this memorandum are applied either to address public health concerns such as controlling mosquitos or to address natural resource needs such as controlling non-native species or plant matter growth that upsets a sustainable ecosystem or blocks the flow of water in irrigation systems. Under FIFRA, EPA is charged to consider the effects of pesticides on the environment by determining, among 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." FIFRA section 3(c)(5).

The application of a pesticide to waters of the U.S. would require an NPDES permit only if it constitutes the "discharge of a pollutant" within the meaning of the Clean Water Act.[4] The term "pollutant" is defined in section 502(6) of the CWA as follows:

> The term "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.

EPA has evaluated whether pesticides applied consistent with FIFRA fall within any of the terms in section 506(2), in particular whether they are "chemical wastes" or "biological materials." EPA has concluded that they do not fall within either term. First, EPA does not believe that pesticides applied consistent with FIFRA are "chemical wastes." The term "waste" ordinarily means that which is "eliminated or discarded as no longer useful or required after the completion of a process." *The New Oxford American Dictionary* 1905 (Elizabeth J. Jewell & Frank Abate eds., 2001); *see also The American Heritage Dictionary of the English Language* 1942 (Joseph P. Pickett ed., 4th ed. 2000) (defining waste as "[a]n unusable or unwanted substance or material, such as a waste product"). Pesticides applied consistent with FIFRA are not such wastes; on the contrary, they are EPA-evaluated products designed, purchased and applied to perform their intended purpose of controlling target organisms in the environment.[5] Therefore, EPA concludes that "chemical wastes" do not include pesticides applied consistent with FIFRA.

EPA also interprets the term "biological materials" not to include pesticides applied consistent with FIFRA. We think it unlikely that Congress intended EPA and the States to issue permits for the discharge into water of any and all material with biological content.[6] With specific regard to biological pesticides, moreover, we think it far more likely that Congress intended not to include biological pesticides within the definition of "pollutant." This interpretation is supported by multiple factors.

EPA's interpretation of "biological materials" as not including biological pesticides avoids the nonsensical result of treating biological pesticides as pollutants even though chemical pesticides are not. Since all pesticides applied in a manner consistent with the relevant requirements under FIFRA are EPA-evaluated products that are intended to perform essentially similar functions, disparate treatment would, in EPA's view, not be warranted, and an intention to incorporate such disparate treatment into the statute ought not to be imputed to Congress.[7] Moreover, at the time the Act was adopted in 1972, chemical pesticides were the predominant type of pesticide in use. In light of this fact, it is not surprising that Congress failed to discuss whether biological pesticides were covered by the Act. The fact that more biological pesticides have been developed since passage of the 1972 Act does not, in EPA's view, justify expanding the Act's reach to include such pesticides when there is no evidence that Congress intended them to be covered by the statute in a manner different from chemical pesticides. Finally, many of the biological pesticides in use today are reduced-risk products that produce a more narrow range of potential adverse environmental effects than many chemical pesticides. As a matter of policy, it makes little sense and would be inconsistent with the environmental purposes of the CWA to discourage the use of these products by treating them as subject to CWA permitting requirements when chemical pesticides are not. Caselaw also supports this interpretation. *Ass'n to Protect Hammersley, Eld, and Totten Inlets* v. *Taylor Resources*, 299 F.3d 1007, 1016 (9th Cir. 2002) (application of the *esjudem generis* canon of statutory interpretation supports the view that the CWA "supports an understanding of * * * "biological materials," as waste material of a human or industrial process").[8]

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

[3] EPA discusses the positions taken in *Talent* and *Altman* in greater detail in a Memorandum issued by EPA's General Counsel on January 24, 2005, titled "Analysis of Previous Federal Government Statements on Application of Pesticides to Waters of the United States in Compliance with FIFRA."

[4] This Interpretive Statement addresses circumstances when a pesticide is not a "pollutant" that would be subject to NPDES permit requirements when discharged into a water of the United States. It does not address the threshold question of whether these or other types of pesticide applications constitute "point source" discharges to waters of the United States. On March 29, 2002, EPA issued a Memorandum titled "Interpretive Statement and Regional Guidance on the Clean Water Act's Exemption for Return Flows from Irrigated Agriculture." This statement clarified that the application of an aquatic herbicide consistent with the FIFRA label to ensure the passage of irrigation return flow is a nonpoint source activity not subject to NPDES permit requirements under the CWA. Additionally, on September 13, 2003, EPA's General Counsel issued a Memorandum titled "Interpretive Statement and Guidance Addressing Effect of Ninth Circuit Decision in *League of Wilderness Defenders* v. *Forsgren* on Application of Pesticides and Fire Retardants." That Memorandum reaffirmed EPA's long-standing interpretation of its regulations that silvicultural activities such as pest and fire control are nonpoint source activities that do not require NPDES permits. Both these documents remain in effect and are available at *http://www.epa.gov/npdes/agriculture*.

[5] Where, however, pesticides are a waste, for example when contained in stormwater regulated under section 402(p) of the CWA or other industrial or municipal discharges, they are pollutants and their discharge by a point source to a water of the U.S. may be controlled in an NPDES permit.

[6] Taken to its literal extreme, such an interpretation could arguably mean that activities such as fishing with bait would constitute the addition of a pollutant.

[7] Further, some pesticide products may elude classification as strictly "chemical" or "biological."

[8] EPA's interpretation of section 502(6) with regard to biological pesticides should not be taken to mean that EPA reads the CWA generally to regulate only wastes. EPA notes that other terms in section 502(6) may or may not be limited in whole or in part to wastes, depending on how the substances potentially addressed by those terms are created or used. For example, "sand" and "rock" can either be discharged as waste or as fill material to create structures in waters of the U.S., and Congress created in section 404 of the Act a specific regulatory program to address such discharges. See 67 FR 31129 (May 9, 2002) (subjecting to the section 404 program discharges that have the effect of filling waters of the U.S., including fills constructed for beneficial purposes). The question in any particular case is whether a discharge falls within one of the terms in section 502(6), in light of the factors relevant to the interpretation of that particular term. As discussed above, the factors critical to EPA's interpretation concerning biological pesticides are consistency with section 502(6)'s treatment of chemical pesticides and chemical wastes, and how the general term "biological materials" fits within the constellation of other, more specific terms in section 502(6), which to a great extent focuses on wastes.

with all relevant requirements under FIFRA, EPA has determined that it is not a chemical waste or biological material and, therefore, is not a pollutant subject to NPDES permitting requirements. That coverage under the Act turns on the particular circumstances of its use is not remarkable. Indeed, when asked on the Senate floor whether a particular discharge would be regulated, the primary sponsor of the CWA, Senator Muskie (whose views regarding the interpretation of the CWA have been accorded substantial weight over the last four decades), stated:

> I do not get into the business of defining or applying these definitions to particular kinds of pollutants. That is an administrative decision to be made by the Administrator. Sometimes a particular kind of matter is a pollutant in one circumstance, and not in another. Senate Debate on S. 2770, Nov. 2, 1971 (117 Cong. Rec. 38,838).

Here, to determine whether a pesticide is a pollutant under the CWA, EPA believes it is appropriate to consider the circumstances of how a pesticide is applied, specifically whether it is applied consistent with relevant requirements under FIFRA. Rather than interpret the statutes so as to impose overlapping and potentially confusing regulatory regimes on the use of pesticides, this interpretation seeks to harmonize the CWA and FIFRA.[9] Under this interpretation, a pesticide applicator is assured that complying with relevant requirements under FIFRA will mean that the activity is not also subject to the distinct NPDES permitting requirements of the CWA. However, like an unpermitted discharge of a pollutant, application of a pesticide in violation of relevant FIFRA requirements would be subject to enforcement under any and all appropriate statutes including, but not limited to, FIFRA and the CWA.

Please feel free to call us to discuss this memorandum. Your staff may call Louis Eby in the Office of Wastewater Management at (202) 564–6599 or William Jordan in the Office of Pesticide Programs at (703) 305–1049.

[9] EPA's *Talent* brief suggested that compliance with FIFRA does not necessarily mean compliance with the CWA, and pointed out one difference between CWA and FIFRA regulation, *i.e.*, individual NPDES permits could address local water quality concerns that might not be specifically addressed through FIFRA's national registration process. The position EPA is articulating in this memo would not preclude states from further limiting the use of a particular pesticide in accord with their authorities under 7 U.S.C. 136v(a) and *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597, 613–614 (1991), to the extent otherwise authorized by Federal and state law. Furthermore, under section 510 of the CWA, States and other governmental entities are not precluded from adopting more stringent requirements to address local water quality concerns.

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: January 26, 2005.

Stephen L. Johnson,

Deputy Administrator.

For the reasons set forth in the preamble, chapter I of title 40 of the Code of Federal Regulations is proposed 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.*

Subpart A—[Amended]

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

§ 122.3 Exclusions.

* * * * *

(h) The application of pesticides to waters of the United States 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 the waters of the United States.

(2) The application of pesticides to control pests that are present over waters of the United States, including near such waters, that results in a portion of the pesticides being deposited to waters of the United States; for example, when insecticides are aerially applied to a forest canopy where waters of the United States may be present below the canopy or when pesticides are applied over, including near, water for control of adult mosquitos or other pests.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 442

[OW–2004–11; FRL–7866–8]

RIN 2040–AE65

Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards for the Transportation Equipment Cleaning Point Source Category

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to amend the Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards for the Transportation Equipment Cleaning Point Source Category. This action proposes to correct a typographical error in the regulatory language of the Pretreatment Standards for New Sources in the existing regulation which refers to "any existing source" when it should say "any new source."

In the "Rules and Regulations" section of the **Federal Register**, we are amending the regulatory language of the Pretreatment Standards for New Sources in the existing regulation as a direct final rule without prior proposal because we view this as a noncontroversial revision and anticipate no adverse comment. We have explained our reasons for this revision in the preamble to the direct final rule. If we receive no adverse comment, we will not take further action on this proposed rule. If we receive adverse comment, we will withdraw the direct final rule and it will not take effect. We will address all public comments in a subsequent final rule based on this proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

The regulatory text for the proposal is identical to that for the direct final rule published in the Rules and Regulations section of this **Federal Register**. For further supplementary information, see the direct final rule.

DATES: Written comments must be received by April 4, 2005.

ADDRESSES: Submit your comments, identified by Docket ID No. OW–2004–11, by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- Agency Web site: *http://www.epa.gov/edocket.* EDOCKET, EPA's electronic public docket and comment