



MEMORANDUM

Via E-Mail

DATE: January 27, 2005

TO: Firm Clients and Friends

FROM: Bergeson & Campbell, P.C.

RE: EPA Issues Interpretive Statement and Proposed Rule on Pesticides in Water

Today, the U.S. Environmental Protection Agency (EPA) issued an interpretive statement and proposed rule in response to recent conflicting court decisions regarding Clean Water Act (CWA) permitting requirements for the application of pesticides to or over the nation's waters. According to EPA, "[t]he statement and proposed rule reflect EPA's long-standing policy that a CWA permit is not required where application of a particular pesticide to or over water is consistent with requirements under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)." EPA first solicited public comment on the interpretive statement in an August 13, 2003, *Federal Register* notice. Because EPA is proposing to codify the substance of the interpretive statement in regulation, it will solicit public comments for a period of 60 days from the date the proposed rule is published in the *Federal Register*. EPA intends to prepare a response to all comments received during both comment periods and make them available when the final rule is issued.

The interpretative statement states that 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 National Pollutant Discharge Elimination System (NPDES) permit under the CWA in the following two circumstances:

- The application of pesticides directly to waters of the United States 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; and



Memorandum to Firm Clients and Friends
January 27, 2005
Page 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 aerielly applied to a forest canopy where waters of the United States may be present below the canopy or when pesticides are applied over, including near, water for control of adult mosquitoes or other pests.

According to the interpretative statement, it is EPA's position that these types of applications do not require NPDES permits if the pesticides are applied consistent with all relevant requirements under FIFRA (*i.e.*, those relevant to protecting water quality). The interpretative statement continues: "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 states that it 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 are regulated under the CWA, including other applications over land areas that may drift over and into waters of the United States. EPA further states that, notwithstanding its rulemaking to revise the NPDES permit program regulations to incorporate the substance of its interpretative statement, "the application of pesticides in compliance with relevant FIFRA requirements is not subject to NPDES permitting requirements." The interpretative statement is available on the Internet at http://www.epa.gov/npdes/pubs/pesticides_memo_interpretive_statement.pdf, and the proposed rule, which has not yet been published in the *Federal Register*, is available at http://www.epa.gov/npdes/pubs/pesticides_interpretative_statement_fr.pdf.

* * * * *

We hope this information is helpful. As always, please call if you have any questions.