TESTIMONY OF
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BEFORE THE
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES

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Introduction

Good morning, Mr. Chairman and members of the Subcommittee. I am Ben Grumbles, Assistant Administrator for Water at the U.S. Environmental Protection Agency (EPA).

I am pleased to have the opportunity to discuss EPA's efforts to coordinate the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") and the Clean Water Act (CWA) and to clarify the responsibilities of pesticide applicators. Jim Jones, Director of the Office of Pesticide Programs, accompanies me today.

EPA appreciates this Subcommittee's leadership in reducing potential duplication and confusion that can lead to unnecessary litigation, while ensuring continued water quality protections. We also thank Representatives Otter and Cardoza for their hard work in crafting legislation to address the challenges that come with responsible pesticide use.

Federal Pesticide Regulatory Program

The Environmental Protection Agency is responsible for protecting human health and the environment from potential pesticide risks and ensuring that pesticides meet today's more stringent safety standards and offer benefits to society. Under the statutory framework of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), EPA regulates the sale, distribution, and use of pesticides in the United States to ensure that the pesticide, when used according to label directions, can be employed without posing unreasonable risks to human health and the environment. All new pesticides must undergo a rigorous registration procedure where EPA assesses a variety of potential human health and environmental effects associated with use of the product. EPA examines the ingredients of a pesticide, the intended application site and directions for use, and supporting scientific studies for human health and environmental effects and exposures. The applicant for registration or the registrant of the pesticide must provide data from tests done according to EPA guidelines.

The Agency is also continuing to review older pesticides – those initially registered prior to November 1984 – to ensure that they meet current scientific and regulatory standards under a process called "reregistration." EPA has a program for re-evaluating previously approved pesticides to determine if any changes in pesticide use or labeling are necessary. In reassessing these products, the Agency applies the most current scientific standards, and gives special consideration to potential exposure risks to children who may be more vulnerable to risks from pesticides.

We are taking steps to improve the label language on pesticide products. The new language will help public health and vector control officials, such as the mosquito control professionals on the front lines, “optimize application techniques” while ensuring that use of these products will not pose unreasonable risks to public health or the environment.

Furthermore, EPA is reassessing tolerances – pesticide residue limits in food – to ensure that they meet the safety standard established by the Federal Food Drug and Cosmetic Act as amended by the Food Quality Protection Act of 1996 (FQPA).

Pesticides and the National Pollutant Discharge Elimination System

In the past few years, questions have arisen regarding the appropriate role of the Clean Water Act in addressing application of pesticides to water. The CWA prohibits anyone from discharging pollutants through a point source into waters of the United States unless they have a National Pollutant Discharge Elimination System (NPDES) permit. The NPDES permit includes limits on what can be discharged, monitoring and reporting requirements, and other provisions to ensure that the discharge does not adversely affect water quality.

The application of a pesticide to waters of the United States requires an NPDES permit only if it constitutes the “discharge of a pollutant” within the meaning of the Clean Water Act. Pesticides are EPA-evaluated products designed, purchased, and applied to perform their intended purpose of controlling target organisms in the environment. Thus, certain pesticide

applications consistent with FIFRA are not "pollutants" and do not require NPDES permits. Recent citizen lawsuits have further focused attention on this matter. In addressing these concerns, the Agency, in August 2003, issued an interim guidance on circumstances under which NPDES permits are not required for applying pesticides to water.

Earlier this month, the Ninth Circuit Court of Appeals in the case of *Fairhurst v. Hagener* found that the State of Montana's use of a pesticide for the purpose of eliminating a non-native nuisance fish species did not require an NPDES permit. The court evaluated EPA's Interim Guidance as applied to the facts of the case and found that our guidance was reasonable and did not conflict with Congressional intent.

At the time we issued this guidance, the Agency solicited public comment. In response to the comments received, EPA modified the guidance. EPA issued a final Interpretive Statement and proposed a regulation to codify the substance of the Statement. The proposed rule, published on February 1, 2005, covers applications to control pests, including but not limited to mosquito larvae and aquatic weeds. The final Interpretive Statement and proposed rule state EPA's position that, for pesticides applied to waters of the United States in compliance with FIFRA, an NPDES permit is not required in 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 mosquitoes or other pests."

EPA is completing its review of comments received on the proposed rule. We plan to finalize the rule by early next year. In the meantime, the Agency continues its important efforts to integrate and coordinate FIFRA and CWA actions. We are evaluating information and case studies to help ensure continued achievement of public health protection and environmental goals while reducing potential duplication or confusion. For example, the Office of Water is working closely with the Office of Prevention, Pesticides and Toxic Substances when products are registered or are being reevaluated.

The Need for Clarification

EPA believes there is a need to clarify the relationship between FIFRA and CWA. Courts have taken differing approaches to this issue, and additional cases are still pending. These decisions have created uncertainty among pesticide applicators. Such uncertainty could impede the ability of local officials to quickly control pests, such as mosquitoes that may carry communicable diseases such as the West Nile virus, or invasive species that may damage natural resources. EPA's current rulemaking is an effort to reduce this uncertainty by clarifying pesticide users' legal responsibilities under two discrete circumstances where pesticides are properly applied to or over (including near) water. Our current rulemaking is focused on these two situations; but, it is

important to note, as reflected in our final Interpretive Statement, that the agency's operating approach has been and will continue to be that the proper application of agricultural and other pesticides in accordance with relevant FIFRA requirements is not subject to NPDES permitting requirements.

Comparison of H. R. 1749 with EPA's Current Rulemaking

H. R. 1749 would also clarify the interaction between FIFRA and the CWA. As mentioned previously, EPA's proposed rulemaking addresses pesticides applied under two specific circumstances. The legislation moves beyond the scope of EPA's current rulemaking. For example, the legislation would cover all pesticides used in accordance with relevant FIFRA label provisions including those agricultural land applications that result in pesticide spray drift into waterbodies. EPA's current proposal is not intended to address the broader issue of spray drift. However, the Agency recognizes the need for greater clarity on this issue and is evaluating options. The bill would also more broadly exempt activities for the prevention, control, or eradication of plant pests or noxious weeds than the EPA's proposed rule. In addition, the legislation would exempt the use of fire retardants applied in accordance with relevant federal guidelines by or in cooperation with the federal or State governments and silvicultural activities. Although our proposed rule does not address fire retardants, it continues to be our position that proper application of fire retardants for their intended purpose does not require an NPDES permits because the fire

retardants are not "chemical wastes" and therefore are not pollutants in those circumstances.

H. R. 1749 and EPA's current rulemaking are similar in that under both approaches, States could not require NPDES permits for the applications within the scope of coverage. However, neither EPA's interpretation nor the legislation would prohibit States from requiring and enforcing non-NPDES permits under State law.

Conclusion

Mr. Chairman, our work on the safe and healthy recovery of the Hurricane and flood-ravaged Gulf Coast region underscores the importance of improving regulatory efficiency and certainty. Local and State health officials need to act quickly and effectively to reduce risks from mosquitoes and other disease vectors. Our continued efforts on the integration of FIFRA and NPDES permitting will help.

In closing, Mr. Chairman, I would like to thank you and the Subcommittee for inviting EPA to participate in this hearing. I would be happy to answer any questions that you may have.

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