



April 20, 2009

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Washington, DC 20460

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Tom Vilsack, Secretary
U.S. Department of Agriculture
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Erik Holder, U.S. Attorney General
U.S. Department of Justice
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RE: Non-Permitted Pollutant Discharges in Violation of the Clean Water Act

Dear Administrator Jackson, Regional Administrator Rushin, Secretary Vilsack, Deputy Administrator Mendoza, Chief Glatt, Secretary Pirner, State Directors Mastrangelo and Gustad, and Attorney General Holder,

WildEarth Guardians hereby provides you with notice of its intent to file suit, pursuant to 33 U.S.C. § 1365(b)(1), against USDA-APHIS-Wildlife Services (“WS”) for its continued and ongoing violation of Section 301 of the Clean Water Act (“CWA”), 33 U.S.C. § 1311. These violations are the result of WS’s repeated, non-permitted discharge of herbicides and other

pollutants into waters of the United States originating in North Dakota and South Dakota. WS has discharged, and continues to discharge, these herbicides and other pollutants in order to effectuate the purported management of various blackbird species suspected of causing damage to the sunflower, corn, and other small grain crops in these two states. Ironically, some of the cattails targeted for poisoning are on wetlands that were restored using other funds, including those from the Conservation Reserve Program of the National Resources Conservation Service and the Farm Services Agency.

In 1972, Congress decided to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” by passing what is now known as the CWA, 33 U.S.C. §§ 1251 *et seq.* As amended, the CWA is designed not only to achieve acceptable water quality standards, but also to place restrictions on the discharge of pollutants from point sources into waters of the United States. *See* 33 U.S.C. §§ 1311(a) and 1362(7) and 12(A). These restrictions, called effluent limitations, are enforced by means of a National Pollution Discharge Elimination System (“NPDES”), under which it is unlawful to discharge a pollutant without obtaining a permit and complying with its terms. *See generally Environmental Protection Agency (“EPA”) v. California ex rel State Water Resources Control Board*, 426 U.S. 200 (1976).

“The discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). Within the context of the CWA, “pollutant” is defined broadly to include, *inter alia*, chemical wastes and biological materials. *Id.* § 1362(6). Herbicides and other toxicants constitute “pollutants” within the meaning of the CWA, and the aerial spraying of these pollutants clearly qualifies a “discharge” from a “point source.” *See, e.g., League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1185 (9th Cir.2002). The Supreme Court has interpreted “waters of the United States,” to include wetlands adjacent to tributaries of navigable waters, which, “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of [such] waters.” *Rapanos v. U.S.*, 547 U.S. 715, 780 (2006).

“Except as in compliance with [NPDES permits under Section 402 and other specified parts of the CWA], the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a). The statutory requirement that all point source discharges must be accompanied by a NPDES permit is unconditional and absolute; any discharge except pursuant to a permit is illegal. *See generally U.S. v. Tom-Kat Development, Inc.*, 614 F. Supp. 613 (D. Alaska 1985). *See also Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir.2001) (NPDES permit needed even for pollutants used as prescribed by the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136 *et seq.*). Indeed, 40 C.F.R. § 122.3(h) (EPA’s final rule exempting FIFRA-compliant applications of pesticides into waters of the United States) has been judicially invalidated as contrary to the CWA. *See National Cotton Council v. EPA*, 553 F.3d 927, 940 (6th Cir.2009).

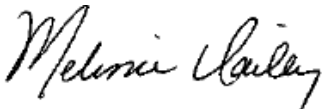
Based on recent responses from WS and the United States Fish and Wildlife Service (“FWS”) to requests submitted by WildEarth Guardians pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, WildEarth Guardians is aware that WS has been, and is currently, discharging herbicides and other pollutants into waters of the United States in conjunction with its North Dakota and South Dakota blackbird management program. These and other recent FOIA responses from WS and FWS show that such herbicides and other pollutants include, but

are not limited to, glyphosate, various dyes, DRC-1339, and tens of millions of adulterated bird carcasses, which are the product of a year-long WS poisoning campaign that ended in 2000.

These FOIA responses also show that WS's discharges have occurred, and continue to occur, in and around the Devil's Lake watershed, certain National Wildlife Refuges, numerous cattail marshes, and other jurisdictional waters located within the States of North Dakota and South Dakota. Recent responses from WS, EPA, the North Dakota Department of Health and Environment, and the South Dakota Department of Environment and Natural Resources make clear that WS has discharged, and continues to discharge, these pollutants into the aforementioned jurisdictional waters originating in North Dakota and South Dakota without the requisite NPDES permit(s).

WildEarth Guardians asserts that WS is liable for numerous past and ongoing violations of the CWA as a result of its North Dakota and South Dakota blackbird management program, and intends to seek declaratory and injunctive relief in federal district court unless WS voluntarily and immediately suspends this program in order to acquire the requisite NPDES permit(s). Please notify me at your earliest convenience regarding WS's willingness to take such steps to avoid litigation. Furthermore, if you believe any information in this letter is incorrect, or if you would simply like to discuss this matter further, please contact me as soon as possible.

Respectfully submitted,



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cc:

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Governor Mike Rounds
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Congresswoman Rosa DeLauro
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Congressman Peter DeFazio
Peter Orszag, Director, Office of Management and Budget
Adrian Erbach-Lucas, Office of Management and Budget
Noah Engelberg, APHIS Examiner, Office of Management and Budget
Nancy Sutley, Chair, Council on Environmental Quality