



# CALIFORNIA FARM BUREAU FEDERATION

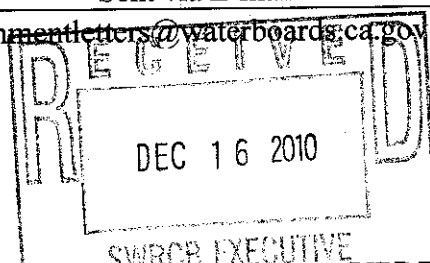
NATURAL RESOURCES AND ENVIRONMENTAL DIVISION

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December 16, 2010

Sent via E-mail

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Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24th Floor  
Sacramento, CA 95814

Re: ***Draft Statewide General National Pollutant Discharge ~~Elimination System (NPDES)~~  
Permit For Residual Pesticide Discharges To Waters Of The United States From Spray  
Applications (Spray Applications Permit)***

Dear Ms. Townsend:

The California Farm Bureau Federation ("Farm Bureau") is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing approximately 81,000 members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

Farm Bureau appreciates the opportunity to provide comments addressing the Draft Statewide General National Pollutant Discharge Elimination System ("NPDES") permit for pesticide discharges to waters of the United States from spray applications ("Spray Applications Permit"). As currently drafted, the Spray Applications Permit only applies coverage to two dischargers, the California Department of Food and Agriculture and the U.S. Forest Service. (See Draft Spray Applications Permit, p. 5.) However, because Farm Bureau is concerned with the potential precedent setting nature of this permit, Farm Bureau offers these comments as a prelude to potential comments that we feel are relevant to all pesticide permits, including the existing and current NPDES permits for pesticide discharges from spray applications, as well as any and all future permits developed by the State Water Resources Control Board, the Regional Water Quality Control Boards, and the U.S. Environmental Protection Agency ("U.S. EPA").

### Future Permits Should Not Utilize Improper Authority Over Discharges to Conveyances That Are Not Waters of the U.S.

Any future NPDES pesticide permits should not attempt to extend coverage and regulatory requirements to pesticide applications made to other water "conveyances with a hydrologic surface connection to waters of the U.S. at the time of pesticide application." Such statements

are inaccurate and improperly assert authority to regulate discharges to *conveyances* to waters of the U.S., rather than only discharges to waters of the U.S.

The Clean Water Act regulates only discharges to “navigable waters” – defined as “waters of the United States.” (33 U.S.C. § 1362(7), 33 C.F.R. § 328.1.) The determination of whether a particular feature is a “water of the United States” is essential and cannot be arbitrarily expanded to regulate discharges to “conveyances” that are not themselves waters of the U.S. If a particular ditch is not a water of the U.S. then discharges to the ditch are not regulated under the Clean Water Act.<sup>1</sup>

Any Subsequent State Permit Must Exclude Agricultural Pesticide Use Since it is Not Subject to Clean Water Act Regulation

The Clean Water Act makes plain Congress’s intent that the production of agricultural crops, including the use of pesticides, is not subject to federal NPDES permit requirements and cannot lawfully be subjected to such requirements. The CWA also explicitly exempts agricultural stormwater and irrigation return flow from NPDES permitting requirements. The Sixth Circuit’s ruling does not affect these exemptions.<sup>2</sup>

Any future permit should preclude the regulation of agricultural stormwater and irrigation return flow even if those discharges contain pesticide or pesticide residues since the Clean Water Act explicitly exempts such activities from regulation. (33 U.S.C. § 1362(14).) Thus, all such future iterations of the Spray Applications Permit and any future permit should continue to preclude the regulation of uses of pesticides in agricultural crop production.

Congress purposefully established non-regulatory mechanisms to develop the information and tools necessary to reduce the water quality impact of agricultural pesticide use without impairing the use of pesticides for the production of abundant food and fiber. The original 1972 Act established, for example, the Section 208 program for nonpoint sources, calling for area-wide waste treatment management plans by state or local entities for “all wastes generated within the area involved,” including control of “agriculturally and silviculturally related nonpoint sources.” (33 U.S.C. § 1288(b)(F).) Congress simultaneously enacted Clean Water Act Section 104(p), requiring “a comprehensive study and research program to determine new and improved methods ... of preventing, reducing, and eliminating pollution from agriculture.” (*Id.* § 1254(p).)

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<sup>1</sup> A ditch that is not a water of the U.S. may be a “point source” – in which case discharges *from the ditch* may be regulated (unless the discharge is classified as agricultural stormwater or another unregulated discharge). The discharge of pesticide *to* such a ditch, however, is not regulated under the Clean Water Act.

<sup>2</sup> The Sixth Circuit’s decision in *National Cotton Council* is not to the contrary. That decision vacated EPA’s interpretation that pesticide use (for any purpose) is not a discharge of “pollutant” in two specific circumstances: where pesticide is applied directly in water and where pesticide is applied to control pests located over water where pesticide will unavoidably be deposited in water. Neither EPA’s 2006 pesticide rule nor the Sixth Circuit’s decision addressed whether Congress intended in the Clean Water Act to require NPDES permit authorization for the use of pesticides for the production of agricultural crops that are located in or adjacent to “waters of the United States.”

Moreover, Congress specifically established these state- and local-based, non-regulatory programs in lieu of NPDES permitting requirements for agricultural pesticide use. Commenting on these provisions, Sen. Robert Dole (R-Kan.) explained that Congress would “place responsibility on the states for instituting and expanding the control of water pollution related to agriculture.” (S. Rep. No. 92-414, 90, *as reprinted in* 1972 U.S.C.C.A.N 3668, 3759.) Despite Congress’s explicit consideration of the potential water quality impact of agricultural pesticide use and of the over-riding public interest in facilitating such use for the production of food and fiber, nowhere in the *entire* history of the act can be found any discussion of an NPDES permit requirement for agricultural pesticide use.

When a subsequent Congress added provisions to the Clean Water Act in 1987 to establish specific NPDES requirements concerning *stormwater* discharges, it simultaneously enacted a statutory exemption for “agricultural stormwater discharges.” (*See* 33 U.S.C. § 1362(14).) Yet this explicit statutory exemption for agricultural stormwater discharges in no way alters the fact that Congress had *always* intended agricultural activities in general – including pesticide use – to be addressed through state and local programs and *not* through NPDES permitting. The Clean Water Act also *precludes NPDES regulation of the use of pesticides in agricultural production*. Any future assertion by the State Water Resources Control Board of a requirement for NPDES permit coverage for agricultural pesticide use would contravene clear congressional intent and would therefore be unlawful.

Additionally, all such future permits should not contradict or circumvent current pesticide regulation under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136 et seq. Pesticide products go through an extensive scientifically based registration process prior to use. FIFRA requires registration for all pesticides, which is only done after a period of data collection to determine the effectiveness for its intended use, appropriate dosage, manner of application, and hazards of the particular material. When registered, a label is created to instruct the final user on the proper usage of the material. Such pesticide labeling is regulated under Section 3 of FIFRA. In addition, as stated on EPA’s website:

Federal law requires that before selling or distributing a pesticide in the United States, a person or company must obtain registration, or license, from EPA. Before registering a new pesticide or new use for a registered pesticide, EPA must first ensure that the pesticide, when used according to label directions, can be used with a reasonable certainty of no harm to human health and without posing unreasonable risks to the environment. To make such determinations, EPA requires more than 100 different scientific studies and tests from applicants. Where pesticides may be used on food or feed crops, EPA also sets tolerances (maximum pesticide residue levels) for the amount of the pesticide that can legally remain in or on foods. (EPA, Pesticides: Regulating Pesticides, <http://www.epa.gov/pesticides/regulating/>> [as of December 16, 2010].)

Future State Permits Should Not Create Duplicative Regulation in California

Farm Bureau supports responsible farming and the proper use and application of pesticides, and respects the health and welfare of those throughout the state. Farm Bureau actively participates in state and federal legislative and regulatory advocacy relating to pesticide regulation, registration, labeling, and use on behalf of its members. The pesticide products and application practices used by Farm Bureau members have been reviewed and approved by both the United States Environmental Protection Agency and the California Department of Pesticide Regulations ("DPR").

California has regulated pesticides for over a century. The California Legislature has established a comprehensive body of law to control every aspect of pesticide sales and use. The California Department of Pesticide Regulation is mandated by law to protect the public health and environment by regulating pesticide sales and use and by fostering reduced-risk pest management. (Cal. Food & Agr. Code, §§ 11454, 1154.1 and 12981.) This strict oversight begins with product evaluation and registration and continues through statewide licensing of commercial applicators, dealers, and consultants, environmental monitoring, and residue testing of fresh produce. In 1990, California became the first state with expanded pesticide use reporting requirements to include all applications made to agricultural food crops. Farmers and pest control businesses now must complete site and time specific documentation of every pesticide application made to agricultural food crops, including post-harvest applications. (California Department of Pesticide Regulation, *A Guide to Pesticide Regulation*, p. 11 (emphasis added) <<http://www.cdpr.ca.gov/docs/pressrls/dprguide1.htm>> [as of December 16, 2010].)

Although EPA promulgates minimum pesticide requirements, California's regulations are *far more* comprehensive. They include site-specific local permitting by the County Agricultural Commissioners for use of restricted pesticides; periodic on-site observations by commissioners of application sites both before and during use; full documentation and reporting of agricultural pesticide use; post-use residue monitoring of treated commodities; and field worker safety inspections. (California Department of Pesticide Regulation, *A Guide to Pesticide Regulation*, p. 45 <<http://www.cdpr.ca.gov/docs/pressrls/dprguide1.htm>> [as of December 16, 2010].) County Agricultural Commissioners further regulate pesticide use to prevent misapplication or drift, and possible contamination of people or the environment. Prior to any application, site-specific permits must be obtained by farmers from the County Agricultural Commissioners to purchase and use many agricultural chemicals. The County Agricultural Commissioners must evaluate the proposed application to determine whether the desired place of use is near any sensitive areas, such as neighborhoods, schools, waterways, or organic fields. Based upon this evaluation, the County Agricultural Commissioners may deny the permit or require specific use practices to mitigate any hazards.

Given the state of California's current regulatory scheme for pesticide applications, any future permits must not be duplicative or contravene with existing and long-established state and federal law. Thank you for the opportunity to provide our comments and concerns. We look forward to further involvement and discussion with the State Water Resources Control Board on

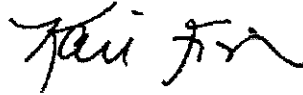
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the proposed Draft Statewide General National Pollutant Discharge Elimination System permit for pesticide discharges to waters of the United States from spray applications.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kari Fisher", written in a cursive style.

Kari E. Fisher  
Associate Counsel

KEF:pkh