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SUBJECT: NEW PESTICIDE REGULATION

ISSUE

How should the State Water Resources Control Board (State Water Board) respond to the United States Environmental Protection Agency's (U.S. EPA's) new regulation excluding the application of pesticides consistent with federal pesticide law from the need to obtain a Clean Water Act discharge permit in two circumstances?

CONCLUSION

The State Water Board currently has two general National Pollutant Discharge Elimination System (NPDES) permits that cover one of the circumstances exempted by U.S. EPA's regulation. If the regulation is upheld, an NPDES permit will no longer be appropriate to regulate the discharges. However, in light of legal challenges to the new regulation, I recommend that the State Water Board not rescind the two permits at this time, but clarify that persons whose discharges are exempt pursuant to the new regulation may file a Notice of Termination (NOT).

DISCUSSION

The purpose of this memorandum is to provide advice concerning a new regulation adopted by U.S. EPA that excludes certain pesticide applications from the requirement to obtain coverage under a NPDES permit. The State Water Board has adopted two permits that provided coverage to applicators subject to the regulation.

Background: Court Cases and U.S. EPA Guidance Documents

In 2001, the Ninth Circuit court of appeals issued an opinion regarding whether an irrigation district that applied the aquatic pesticide acrolein to an irrigation canal that was tributary to a natural creek needed an NPDES permit. (*Headwaters, Inc. v. Talent Irrigation District* (9th Cir.

2001) 243 F.3d 526.) The court held that registration and labeling of a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) does not preclude the need for an NPDES permit. The court then addressed whether application of the pesticide constituted the discharge of a pollutant from a point source to a water of the United States, thus requiring an NPDES permit. The court found that all of the components precedent to an NPDES permit were present—the discharge of a pollutant from a point source to waters of the United States—and specifically that acrolein directly poured into water is a pollutant because the residual acrolein left in the water after application is a chemical waste and thus a “pollutant.”

After the Ninth Circuit issued its *Headwaters* decision, U.S. EPA issued two guidance documents. On May 31, 2001, U.S. EPA stated that civil enforcement under the Clean Water Act for direct application of pesticides waters of the U.S. is a low enforcement priority, providing the pesticide is applied according to FIFRA label instructions and there are no egregious circumstances. On March 29, 2002, U.S. EPA stated that the application of an aquatic herbicide consistent with the FIFRA label, in order to ensure the passage of irrigation return flows, falls within the exemption for irrigation return flows from the definition of “point source” and is a nonpoint source activity.

In November 2002, the Ninth Circuit issued another opinion concerning the need for an NPDES permit for pesticide application. (*League of Wilderness Defenders v. Forsgren* (9th Cir. 2002) 309 F.3d 1181.) There, the court held that the U.S. Forest Service must obtain an NPDES permit before it sprays insecticides from an aircraft directly into rivers as part of silvicultural activities. In reaching its decision, the court found that the insecticides are pollutants under the Clean Water Act. The court also defined the exemption for silvicultural pest control from the definition of “point source” in U.S. EPA’s regulations to be limited to pest control activities from which there is natural runoff.

Also in 2002, the Second Circuit (comprised of New York, Vermont, and Connecticut) issued an unpublished decision regarding the need for an NPDES permit for application of pesticides for mosquito control in federal wetland areas. (*Altman v. Town of Amherst* (2d Cir. Sep. 26, 2002, No. 01-7468) 2002 WL 31132139.) The lower court had dismissed a citizens’ suit, holding that pesticides, when used for their intended purpose, do not constitute a “pollutant” for purposes of the Clean Water Act, and are more appropriately regulated under FIFRA. The appeals court vacated the trial court’s decision and remanded the matter. In its unpublished decision, the Second Circuit expressed concern that:

[u]ntil 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 requirements for NPDES permits []—the question of whether properly used pesticides can become pollutants that violate the [Clean Water Act] will remain open.

(*Altman v. Town of Amherst, supra*, 2002 WL 31132139, **5.)

In response to the request by the Second Circuit, U.S. EPA issued an Interim Statement and Guidance on July 11, 2003. The document states that application of pesticides in compliance with FIFRA requirements is not subject to NPDES permitting requirements in two

circumstances: (1) application of pesticides directly to waters of the United States to control pests (e.g., mosquito larvae or aquatic weeds) and (2) application of pesticides to control pests that are present over waters of the United States that results in a portion of the pesticides being deposited to waters of the United States (e.g., aerial application to forest canopy where waters of U.S. are below the canopy). U.S. EPA also requested public comment. On January 25, 2005, U.S. EPA issued a final Interpretive Statement and a notice of proposed rulemaking to incorporate the substance of the Interpretive Statement into regulations.

Also in 2005, the Ninth Circuit issued another relevant decision in *Fairhurst v. Hagener* (9th Cir. 2005) 422 F.3d 1146. In *Fairhurst*, the court reviewed U.S. EPA's guidance. The court agreed with U.S. EPA that a pesticide that is applied consistent with FIFRA is not a "chemical waste," but also stated that it would not change its holding in *Headwaters*. The court stated that the determinative issue in whether an NPDES permit was required was whether there is any "residue or unintended effect" from application of the pesticide. It is the "residue or unintended effect" that is the pollutant; in *Fairhurst* the parties stipulated there was none, and the court did not require an NPDES permit.

In response to the court cases and guidance, the State Water Board has adopted two general permits for discharges of aquatic pesticides. One permit regulates the use of aquatic weed killers and the other regulates aquatic pesticides used to control mosquitoes and other vectors. In adopting these permits, the State Water Board found that the Ninth Circuit decisions appeared to require these permits and that the U.S. EPA guidance documents might not be a legal basis for a lack of coverage under an NPDES permit. In its Preamble to the new regulation, U.S. EPA notes that four states in the Ninth Circuit adopted NPDES permits for certain pesticide applications: California, Nevada, Oregon, and Washington. California did not adopt a permit in response to the *Forsgren* decision (for aerial application directly above waters).

U.S. EPA's Regulation

On November 20, 2006, U.S. EPA adopted a regulation codifying, with slight revisions, its Interim Statement and Guidance. The regulation adds to the list of discharges that do not require NPDES permits:

The application of pesticides 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 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, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively; 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 or near water for control of adult mosquitoes or other pests.

(40 C.F.R. § 122.3(h) amended Nov. 27, 2006, 71 Fed.Reg. 68483.)

In the Preamble to the regulation, U.S. EPA stated that it believed that its regulation was consistent with court cases and the Clean Water Act. It stressed that the basis for the exemption was that a pesticide that is applied in compliance with FIFRA is not a “pollutant” *at the time of application*. It states that the exemption only applies to applications to control pests where the pesticides “necessarily must enter the water in order for the application to achieve its intended purpose.”

U.S. EPA arrives at this conclusion by determining that pesticides, when used to control pests, are not either “chemical wastes” or “biological materials.” Instead, they are “products.” Further, U.S. EPA states that other programs that regulate pesticides, such as municipal storm water NPDES permits and total maximum daily loads (TMDLs), will not be impacted by the regulation. U.S. EPA reaches this result because “pesticides are waste materials, and therefore pollutants . . . , when contained in a waste stream, including storm water regulated under section 402(p) or other industrial municipal discharges. In those circumstances, an NPDES permit may be required if the pesticides are discharged into a water of the United States from a point source.” (71 Fed.Reg. 68487 (Nov. 27, 2006).)

U.S. EPA also explains that, “if there are residual materials resulting from pesticides that remain in water after the application and its intended purpose (elimination of targeted pests) have been completed, these residual materials are also pollutants . . . because they are wastes of the pesticide application.” (71 Fed.Reg. 68487.) In making this point, U.S. EPA cites the *Fairhurst* decision. Recognizing that many pesticide applications to water will result in “pollutants” in the water, U.S. EPA explains that, even if there will be pesticide residue (i.e., pollutants) in the water following the application, an NPDES permit is not required because it is only required for the “*addition*” of any pollutant to navigable waters from “*a point source*.” U.S. EPA reasons that, at the time of discharge to waters of the United States, the pesticide is not a pollutant—it is a product. Even if it becomes a “pollutant” later, after it is already in the water, the applicator did not “add” a pollutant from a “point source.” U.S. EPA states: “the residual should be treated as a nonpoint source pollutant, potentially subject to [Clean Water Act] programs other than the NPDES permit program (e.g., listing and TMDL development pursuant to [Clean Water Act] section 303(d).)” (*Ibid.*)¹

Impact on State Water Board Programs

The State Water Board currently has two general NPDES permits that regulate discharges of aquatic pesticides into waters of the United States. (WQO 2004-0008-DWQ for vector control

¹ From a practical standpoint, U.S. EPA’s conclusion that the residue should be regulated as a nonpoint source pollutant is difficult to reconcile with the earlier statement that pesticides are pollutants when they are in waste streams for purposes of municipal storm water permitting. The State Water Board has previously noted that it is often difficult to determine what is the municipal storm system and what is the receiving water. (See, State Water Board No. WQO 2001-15, at p. 9.)

and WQO 2004-0009-DWQ for aquatic weed control.) These permits specifically apply to the use of aquatic pesticides for which the new regulations provide that a permit is not required. (40 C.F.R. § 122.3(h)(1).) The State Water Board has not adopted any permits for the situation described in paragraph (h)(2) (application above waters of the United States). U.S. EPA's regulation takes effect on January 26, 2007.

The State Water Board submitted comments to U.S. EPA that expressed concerns about impacts of a new rule on other programs that regulate pesticide residues, including storm water permits and TMDLs. U.S. EPA states in its Preamble that for purposes of these programs, the residues are still pollutants and subject to regulation. U.S. EPA's clarifications in the Preamble mean that the State Water Board does not need to take actions regarding these other programs.

Recommendation for the Aquatic Pesticide Permits

The State Water Board should maintain the permits pending any final judicial actions on the regulation. The State Water Board should forego taking any formal action to rescind the permits, but publicize the regulation and allow any dischargers who wish to, to file a notice of termination. This would immediately allow dischargers to terminate coverage, along with the obligation to conduct monitoring, pay fees, etc. Dischargers should also be informed that there is a legal challenge to the regulation.

In the event a court decision invalidates U.S. EPA's new regulation, persons who submitted notices of termination could reenroll under the existing permits. If the regulation is upheld by the courts, the State Water Board may subsequently rescind the permits or allow them to expire.