

Memorandum

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To : Harold J. Singer
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1-23-1995

Walt Pettit

From : Walt Pettit
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Subject: INTERPRETATION OF SWRCB'S MANAGEMENT AGENCY AGREEMENT WITH UNITED STATES FOREST SERVICE

In your memo of November 16, 1994, you requested a response to certain questions regarding the applicability of the above-referenced document. I have reviewed your request. Your questions generally relate to whether compliance by the Forest Service with Best Management Practices (BMPs) approved under the Management Agency Agreement (MAA) process preclude the Regional Water Quality Control Boards (RWQCB) from direct regulation of the activities in question. Under limited circumstances they do not, as explained more fully below.

Issue 1: Does the MAA between the State Water Resources Control Board (SWRCB) and the United States Forest Service (USFS) relieve the USFS of the requirement to submit a report of waste discharge for nonpoint source discharges when requested to do so by an RWQCB?

Conclusion 1: In limited circumstances, an RWQCB may require the USFS to submit a report of waste discharge notwithstanding the MAA.

Issue 2: Does the MAA relieve the USFS from complying with water quality control plan provisions, such as discharge prohibitions, if the USFS is implementing BMPs pursuant to the MAA?

Conclusion 2: No.

Issue 3: Does the MAA relieve the USFS from complying with the California Environmental Quality Act (CEQA)?

Conclusion 3: CEQA does not apply to federal agencies, but does apply to decisions of state agencies. Where CEQA compliance is required, the RWQCB could not approve the USFS action until the RWQCB complies with CEQA. Where the USFS is required to comply with the National Environmental Policy Act (NEPA), NEPA documents may be used to comply with CEQA.

BACKGROUND

The SWRCB executed an MAA with the USFS in 1981. The USFS was designated as the water quality management agency for National Forest Service lands in California. The MAA establishes that the USFS document entitled "Water Quality Management for National Forest System Lands in California", also known as the USFS 208 Report, sets forth the practices and procedures for controlling nonpoint sources of pollution on designated federal lands. Through those procedures, BMPs have been certified as adequate to protect water quality. The MAA "contemplates" that RWQCBs would waive the provisions requiring a report of waste discharge and issuance of waste discharge requirements for nonpoint source discharges under Water Code Section 13269, provided that the USFS reasonably implements the BMPs and the MAA. The MAA, however, also states that the MAA does not limit the authority of the SWRCB and the RWQCBs to carry out their legal responsibilities for management or regulation of water quality.

You indicate that your RWQCB has requested the USFS to submit a report of waste discharge for nonpoint source discharges in limited circumstances. These circumstances generally occur when it appears that compliance with the BMPs will not result in compliance with water quality control plan requirements. The USFS has refused to submit reports of waste discharge citing the MAA. The USFS has also stated its opinion that waste discharge requirements to control nonpoint source discharges should not apply to USFS projects. The USFS has refused to implement measures in addition to the BMPs where necessary to comply with Water Quality Control Plan requirements.

DISCUSSION

Issue 1: Does the Management Agency Agreement (MAA) between the SWRCB and the USFS relieve the USFS of the requirement to submit a report of waste discharge for nonpoint source discharges when requested to do so by an RWQCB?

The MAA clearly contemplates that the USFS will not be required to submit reports of waste discharges and that the RWQCBs will

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not issue waste discharge requirements for nonpoint source discharges if the USFS reasonably implements the BMPs and provisions of the MAA. Thus, in most circumstances, the RWQCBs would be acting contrary to the intent of the MAA if they require the USFS to submit a report of waste discharge and thereafter issue waste discharge requirements. Instead of a report of waste discharge, the MAA requires the USFS to provide the State with notification of and communications concerning projects that may impact water quality. However, if the USFS is not reasonably implementing the BMPs or provisions of the MAA, the RWQCBs may require the USFS to submit a report of waste discharge and fees and issue waste discharge requirements.

Where the USFS is proposing to take action that would violate the RWQCB Water Quality Control Plan or an SWRCB plan or policy, the USFS would not be in compliance with the MAA even if the USFS implements the BMPs. The MAA specifies that the SWRCB and RWQCBs are responsible for ensuring that land management activities do not adversely affect beneficial water uses. The MAA also specifies that the USFS shall assure that the BMPs meet water quality standards and protect beneficial water uses. Further, the Federal Water Pollution Control Act (FWPCA) Section 313, cited in the MAA, requires federal agency compliance with both the substantive and procedural requirements of state and local water pollution control laws. The MAA also specifies that the MAA shall not be construed to limit the authority of the SWRCB and RWQCBs in carrying out their legal responsibilities for management or regulation of water quality.

Although the MAA contemplates that the BMPs will protect water quality, that may not always be the case. The USFS is required to provide information concerning its proposed activities to the RWQCBs. If such information indicates that the action would result in violation of the Water Quality Control Plan or SWRCB plans and policies, even if it would implement BMPs, the RWQCB could require the submittal of a report of waste discharge. This conclusion is not inconsistent with the MAA. First, the RWQCBs did not sign the MAA. Secondly, the MAA only indicated a "contemplation" that compliance with BMPs would result in a waiver of waste discharge requirements. Finally, the MAA clearly states that the RWQCBs are not to be limited in carrying out their legal responsibilities.

Issue 2: Does the MAA relieve the USFS from complying with water quality control plan provisions, such as discharge prohibitions, if the USFS is implementing BMPs pursuant to the MAA?

The United States Ninth Circuit Court of Appeals in Northwest Indian Cemetery Protective Association v. Peterson, 795 F.2d 688 (9th Cir. 1986), directly addressed the issue of whether compliance with the USFS BMPs relieved the USFS from complying with Water Quality Control Plans. In that case, the North Coast RWQCB Water Quality Control Plan specified water quality standards concerning turbidity and suspended sediment. The USFS activity, although in compliance with the BMPs, would violate the Water Quality Control Plan requirements. The USFS argued that the Water Quality Control Plan was superseded by the BMPs. The court disagreed and stated:

"The BMPs, however, are merely a means to achieve the appropriate state Plan water quality standards. There is no indication in the Plan or in the agreements between the Forest Service and the Water Quality Control Board [MAA] that the BMPs were to be considered standards in and of themselves. Adherence to the BMPs does not automatically ensure that the applicable state standards are being met."

The USFS was required to comply with the Water Quality Control Plan.

Consistent with this court holding, an RWQCB may issue waste discharge requirements where necessary to ensure compliance with its water quality control plan requirements. Such action would also be consistent with the MAA language that it not be construed to limit the authority of the RWQCBs. If in fact BMPs are not adequate to protect water quality, the BMPs themselves should be modified. In the interim, waste discharge requirements are appropriate. Accordingly, RWQCBs may require the USFS to incorporate additional measures when standard BMPs will not be sufficient to achieve compliance with the Water Quality Control Plan, including prohibitions.

Issue 3: Does the MAA relieve the USFS from complying with the California Environmental Quality Act (CEQA)?

CEQA requires California state and local agencies, but not federal agencies, to comply with its provisions if the agency is making a discretionary decision, subject to certain exemptions. Activities in compliance with BMPs established pursuant to the MAA would not generally trigger CEQA review.

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However, if implementation of BMPs would result in violation of water quality control plan requirements, such as discharge prohibition, then CEQA would apply. In this connection, the CEQA Guidelines allow state agencies to use documents prepared to comply with NEPA for CEQA purposes along with any additional requirements of CEQA. (See attached memo for a short discussion of this issue.)

Attachment