



State Water Resources Control Board

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OCT 14 2003

Water Docket, ID No. OW-2003-0063
U.S. Environmental Protection Agency
Mail Code 4101T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

COMMENTS ON THE INTERIM STATEMENT AND GUIDANCE ON APPLICATION OF PESTICIDES TO WATERS OF THE UNITED STATES IN COMPLIANCE WITH FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT (FIFRA)

The California State Water Resources Control Board (SWRCB) believes that the Interim Guidance conflicts with the precedent established by the Ninth Circuit Court of Appeals (Ninth Circuit). Because California is in the Ninth Circuit, the interim guidance proposed by the U.S. Environmental Protection Agency (USEPA) creates a conflict for both the State [which issues national pollutant discharge elimination system (NPDES) permits] and the regulated community, who are subject to Ninth Circuit rulings. This comment letter explains the conflict and requests that USEPA revise its guidance so that it is consistent with the controlling law in the Ninth Circuit states. The State is also concerned that the guidance inadvertently creates negative implications for other programs by interpreting the definition of "pollutant" in a new manner, as explained below. Finally, California believes that if USEPA wishes to create an exemption for pesticide applications conducted in compliance with FIFRA, it should seek revisions to FIFRA and/or the Clean Water Act (CWA), clarifying that NPDES permits are not required, rather than attempting to obtain that result through strained interpretations of existing law.

Issue: Is a Pesticide a "Pollutant" When Applied Consistent with FIFRA?

USEPA's Interim Guidance states that pesticides applied consistent with FIFRA are not pollutants because they are neither "chemical wastes" nor biological materials. Therefore, the Interim Guidance concludes that NPDES permits are not required for pesticides applied consistent with FIFRA. A major issue in the *Headwaters, Inc. v. Talent Irrigation District* (9th Cir. 2001) 243 F.3d 526, was whether the application of pesticides constitutes discharge of a pollutant. The specific discharge that instigated the citizens' suit in that case was presumably not in compliance with FIFRA since the pesticide leaked into the creek at levels that killed 92,000 fish. The Interim Guidance points out these factual circumstances of the case. Normally, a holding in a case will be limited to its facts and broader statements in a decision, which are not required determinations of the facts in the case, are termed *dicta*, and need not be followed in future cases. Thus, USEPA, by referring to the "circumstances" of the *Headwaters* case, implies that to the extent the Ninth Circuit decision stated that all applications of aquatic pesticides—

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including those in compliance with FIFRA—constitute discharge of a “pollutant,” the statement is dicta for applications not in compliance with FIFRA, and therefore need not be followed. The weakness with this claim is that the conclusion by the Ninth Circuit—that all applications of aquatic pesticides, including applications consistent with FIFRA, constitute discharge of a pollutant—was necessary to the outcome of the case. In order to successfully bring a citizens’ suit for CWA violations, a plaintiff must prove that the violations are likely to continue (*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.* (1987) 484 U.S. 49, 64). The defendant irrigation district in the *Headwaters* case claimed that it had established new protocols and that no further releases into the creek were likely. The Ninth Circuit stated that an NPDES permit was necessary regardless of any impact from the pesticide applications, and therefore continuing violations of the CWA were likely if the district did not obtain a permit. Thus, while the “circumstances” of the *Headwaters* case were application of a pesticide not in compliance with FIFRA, the holding of the case was that any residual for pesticide application constitutes discharge of a pollutant and requires an NPDES permit whether or not the application was in compliance with FIFRA. Also, in the *League of Wilderness Defenders v. Forsgren* (9th Cir. 11/4/2002) 309 F.3d 1181, there is no indication that the pesticide application violated FIFRA. The Interim Guidance does not appear to try to distinguish the *Forsgren* case, and it is clearly in conflict with its holding. (USEPA issued a more recent guidance document on September 3, 2003, stating that the *Forsgren* case does apply in Ninth Circuit states.¹ It appears that the Interim Guidance and the more recent guidance documents are in conflict. In addition, as discussed above, there is no basis to distinguish the holdings in *Headwaters* and *Forsgren*.)

As discussed above, the USEPA Interim Guidance, which states that application of pesticides in conformance with FIFRA does not constitute discharge of a “pollutant,” appears to be inconsistent with the Ninth Circuit decisions in *Headwaters* and, more recently, in the *Forsgren* case. In weighing the decisions of the federal appeals court, who presides over states, including California, and whose decisions are entitled to “great weight” against an Interim Guidance document by USEPA, which has not been formally promulgated and which is entitled to some “deference,” following the Ninth Circuit decisions is a safer route. Federal guidance cannot justify actions in direct conflict with the controlling federal appellate court’s decisions. Therefore, it appears that the current status of the law in California is that when pesticides are directly applied to waters of the United States, or applied directly above waters of the United States, the discharger will violate the CWA if it has not obtained an NPDES permit. The existence of conflicting federal guidance would simply create confusion and a false sense of security for dischargers who rely upon it. (The September guidance document concedes that the *Forsgren* decision does apply within the Ninth Circuit and that NPDES permits are required for silvicultural pest control. This guidance document should be revised to make that clarification.)

¹ Interpretive Statement and Guidance Addressing Effect of Ninth Circuit Decision in *League of Wilderness Defenders v. Forsgren* on Application of Pesticides and Fire Retardants.

Implications for Other Programs

It should also be noted that were the USEPA guidance to be finalized, i.e., a pesticide applied consistent with FIFRA is not a "pollutant," it could have ramifications beyond the issue of whether an NPDES permit is necessary. The State is required to adopt total maximum daily loads (TMDLs) in some situations where "pollutants" cause exceedances of water quality standards and the impaired waters are placed on a list [CWA section 303(d)]. There are numerous situations in California where pesticides are causing waters to be placed on the CWA section 303(d) list and TMDLs are being prepared. Generally, there is no evidence that these pesticides in receiving waters were the result of application of pesticides in violation of FIFRA requirements. (In fact, in its amicus brief to the court in *Headwaters*, USEPA pointed out that the FIFRA nationwide requirements are not adequate to protect individual water bodies.) Exclusion of pesticide residuals from the definition of "pollutant" could hinder these TMDLs. The USEPA Interim Guidance appears to acknowledge this problem and indeed states in a footnote that where pesticides are a "waste," such as in discharges of storm water regulated under CWA section 402(p), they are pollutants and require an NPDES permit. The Interim Guidance does not explain this result since there is generally no way to tell whether or not the discharges in the storm water were the result of applications in compliance with FIFRA. In any event, the implication for other programs and delineation of when a pesticide becomes a "waste" are not clear in the guidance document.

Recommendation

USEPA should revise the Interim Guidance to be consistent with Ninth Circuit precedent. Revisions should consider the implications of narrowing the definition of "pollutant" and the adverse effects this may have on other CWA programs. If USEPA wishes to provide an exemption from NPDES permit requirements for pesticides applied consistent with FIFRA requirements, it should instead seek such clarification by amending the CWA and/or the FIFRA.

If you require further assistance, please telephone Adam Laputz, the staff person most knowledgeable on this subject, at (916) 341-5554. You may also call Philip Isorena, Chief of the Regulations Unit, at (916) 341-5544.

Sincerely,

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