



**Winston H. Hickox**  
Secretary for  
Environmental  
Protection

# State Water Resources Control Board

## Office of Chief Counsel

1001 I Street, 22<sup>nd</sup> Floor, Sacramento, California 95814  
P.O. Box 100, Sacramento, California 95812-0100  
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ www.swrcb.ca.gov



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**TO:**

1. Celeste Cantú  
Executive Director
2. SWRCB Members

**FROM:** Craig M. Wilson /s/  
Chief Counsel  
**OFFICE OF CHIEF COUNSEL**

**DATE:** April 8, 2002

**SUBJECT:** AQUATIC PESTICIDES

The purpose of this memorandum is to inform you of a recent interpretive statement by United States Environmental Protection Agency (U.S. EPA) concerning regulation of discharges of aquatic pesticides. I will also discuss how the memorandum may affect the ongoing regulation of such discharges by the State Water Resources Control Board (State Board).

### ISSUE

The Ninth Circuit Court of Appeals has ruled that registration and labeling of aquatic pesticides under the federal pesticide law (Federal Insecticide, Fungicide, and Rodenticide Act, or FIFRA<sup>1</sup>) does not preclude the requirement to obtain coverage under a national pollutant discharge elimination system (NPDES) permit prior to discharging such pesticides into waters of the United States. Moreover, the court ruled that the direct application of an aquatic pesticide into an irrigation canal qualifies as a discharge of a pollutant to waters of the United States, thus requiring coverage under an NPDES permit. In an interpretive statement, U.S. EPA has stated that the application of an aquatic herbicide consistent with FIFRA label instructions, which is applied "to ensure the passage of irrigation return flow," falls within the Clean Water Act exemption for return flows from irrigated agriculture and does not require coverage by an NPDES permit. The U.S. EPA states that the court never considered the irrigation return flow exception. This memorandum addresses what, if any, impact the U.S. EPA statement has on the State Board's regulatory program.

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<sup>1</sup> 7 U.S.C. §§ 136 et seq.

## CONCLUSION

The U.S. EPA interpretive statement is questionable in its legal effect, especially in states subject to the Ninth Circuit decision, including California. A discharger who relies upon it can choose not to be covered under the state's general NPDES permit for aquatic pesticide, but faces some risk of liability. In any event, many discharges of aquatic pesticides are not subject to the exemption described by U.S. EPA and will continue to require coverage under the permit. The State Board should not revise the permit, but should inform irrigation districts of U.S. EPA's interpretive statement.

## DISCUSSION

On March 12, 2001, the Ninth Circuit Court of Appeals issued its decision in *Headwaters, Inc. v. Talent Irrigation District* (9th Cir. 2001) 243 F.3d 526. The case arose from an incident involving the Talent Irrigation District (TID) in Oregon. TID provides irrigation waters to farmers. To control the growth of aquatic weeds and vegetation in its canals, TID uses Magnacide H, an aquatic herbicide, which it sprays with a hose from a tank mounted on a truck. While the irrigation canals are generally a "closed" system, the incident leading to the lawsuit involved an application to a canal that leaked through a waste gate and resulted in a fish kill in Bear Creek. A local environmental group sued TID, alleging an unlawful discharge under the Clean Water Act (CWA) because TID did not hold an NPDES permit. The irrigation canals were tributaries to the natural streams with which they exchange water. Apparently, the canals receive water from natural streams, provide the water to farmers for irrigation, and then divert the water to streams and canals. During application of the herbicide, TID closes off the canals with waste gates.

The court made several rulings in the case. First, it determined that the obligation to obtain an NPDES under the CWA is not preempted by FIFRA. Second, it addressed the requirement to obtain an NPDES permit. The CWA requires a permit for the discharge of a pollutant to navigable waters from a point source. The court determined that the direct application of the aquatic herbicide to irrigation canals constitutes a "discharge," that the residual pesticide that remains in the water after its application constitutes a "pollutant," and that the irrigation canals constitute "navigable waters," or waters of the United States because they are tributaries to the natural streams with which they exchange water. The court did not address whether the discharge was from a "point source" because TID did not dispute that the hose that delivered the herbicide was a point source.

Following issuance of the *Talent* decision, the State Board issued a general permit for discharges of aquatic pesticides. (WQ Order No. 2001-12-DWQ.) The Fact Sheet noted that the permit was adopted to allow dischargers to comply with the court order and that the State Board would rescind or revise the general permit if the law changes. The Fact Sheet also stated that the general permit does not cover non-point source discharges from agriculture, or other indirect

discharges of pesticides that may be conveyed in storm water or irrigation runoff. Entities that have signed up for coverage under the general permit include irrigation districts, municipal supply districts, and mosquito abatement districts.

U.S. EPA has stated in two memoranda<sup>2</sup> that enforcement of the requirements set forth in *Talent* is a low priority so long as the pesticide is applied according to label instructions and there are no egregious circumstances. On March 29, 2002, U.S. EPA issued a memorandum<sup>3</sup> that is intended to clarify a jurisdictional issue that the memorandum states has arisen in the context of the *Talent* decision. The memorandum concludes that the application of an aquatic herbicide consistent the FIFRA label “to ensure the passage of irrigation return flow” falls within the statutory exemption from “point source” for return flows from irrigated agriculture.

As is mentioned above, the parties in *Talent* stipulated that the discharge was from a point source. The Clean Water Act section defining “point source” excludes “return flows from irrigated agriculture.”<sup>4</sup> The factual situation in *Talent*, while not discussed in great detail, appears to be that TID diverts water from streams to its canals, applies herbicides to the water while in the canals, and then, water that is not used for irrigation is returned to natural streams. There may be times when all of the water in the canals is applied to fields for irrigation, but the court determined that because at least some of the time water returns to streams, there was a discharge to waters of the United States. There is no indication that any of the discharges at issue were return flows from fields that had been irrigated, in the plain meaning of that term. Presumably, water that is used for irrigating crops runs off to drainage ditches and would not likely be returned to the irrigation canal. U.S. EPA is apparently embracing a broader definition of “return flows from irrigated agriculture.” While the breadth of that definition is not discussed at length, the memorandum states that the term is interpreted to mean “the application of an aquatic herbicide consistent with the FIFRA label *to ensure the passage of irrigation return flow.*” In other words, it appears that water that is on its way to be used for irrigation is encompassed within the term of “return flows.” U.S. EPA provides as support for its interpretation the legislative history for the irrigation return flow exemption. The legislative history does include some broad references to irrigated agriculture.

In questioning the impact of U.S. EPA’s interpretation in California, there are several difficult questions. First, the memorandum never discusses the limitation in the exception to “*return*

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<sup>2</sup> Memorandum from Silvia K. Lowrance (Acting Assistant Administrator), “Application of Pesticides to Waters of the United States (May 31, 2001); Memorandum from Ms. Lowrance, “Extension of Memorandum Regarding the Application of Pesticides to Waters of the United States, dated May 31, 2001” (March 29, 2002).

<sup>3</sup> Memorandum from Robert E. Fabricant (General Counsel), G. Tracy Mehan, III (Assistant Administrator for Water) and Stephen L. Johnson (Assistant Administrator for Prevention, Pesticides, and Toxic Substances), “Interpretive Statement and Regional Guidance on the Clean Water Act’s Exemption for Return Flows from Irrigated Agriculture” (March 29, 2002).

<sup>4</sup> Clean Water Act § 502(14); 33 U.S.C. § 1362(14).

flows,” and appears to assume that any association of water with irrigation is subsumed in the definition, even though the application of pesticides may occur before the water is used for irrigation. Second, because California is within the Ninth Circuit and is governed by the *Talent* decision, irrigation districts that rely on the U.S. EPA interpretation and do not obtain coverage under the general permit may be at significant risk of liability for violation of the Clean Water Act. Third, the memorandum states that the exemption does not apply where discharges occur into an irrigation canal that is a water of the United States. In *Talent*, the court found that the irrigation canal was a water of the United States. Thus, the applicability of the interpreted exemption may be quite narrow. Finally, the memorandum makes clear that it does not apply to application of aquatic pesticides that are not related to irrigated agriculture. This would include use in flood control channels and drinking water reservoirs. Thus, there will continue to be dischargers that will seek coverage under the general permit. Therefore, I recommend that the general permit remain in place, but that the State Board inform irrigation districts of the interpretive statement.

If you have questions about this memorandum, please contact Elizabeth Miller Jennings, Senior Staff Counsel IV, in my office at (916) 341-5175.

Attachment