

Response to Comments

**Draft Statewide General National Pollutant Discharge
Elimination System (NPDES) Permit
for
Residual Pesticide Discharges
to
Waters of the United States from Pesticide Spray
Applications Permit**

**State Water Resources Control Board
February 25, 2016**

Draft Spray Applications Permit Reissuance
Response to Comments

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A. Comment Letters Received

| Letter No. | Affiliation | Representative |
|-------------------|-------------------------------|-----------------------------------|
| 1 | Public Comment – Bruce Fenton | Bruce Fenton |
| 2 | Heal the Bay | Katherine Pease Rita Kampalath |

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B. Responses to Comments

The State Water Resources Control Board (State Water Board) received two comment letters for the Draft Natural Pollutant Discharge Elimination System (NPDES) Permit for Residual Pesticide Discharges from Spray Applications (Spray Applications Permit) during the public comment period. The summarized comments and staff's responses are shown below.

1. Comment Letter 1 – General Public (Bruce Fenton)

Comment 1.01:

The proposal by the State Water Board does not comply with many provisions of the 1997 Management Agency Agreement (MAA) between the California Department of Pesticide Regulation (DPR) and the State Water Board. Actions taken must follow the requirements written in the MAA, yet they do not.

State Water Board Response:

The goals of the MAA between the DPR and the State Water Board are to: (1) identify roles and responsibilities of the two agencies regarding both water quality protection and pesticide regulation; and (2) describe how the agencies will work cooperatively to protect water quality in areas where pesticides are applied. State Water Board and DPR staff work cooperatively in drafting the Pesticide Permits to ensure all DPR-registered pesticides are used consistent with the pesticide label requirements and in a manner that protects water quality while providing effective pest management. Therefore, the proposed permit reissuance, and the analysis performed as part of permit development, are consistent with the MAA.

Comment 1.02:

The State Water Board attempts to add language that delegates the State Water Board's authority to the Executive Director or his/her designee. This is not authorized by law. No justification, reason, or necessity is explained for transferring authority. No legal code is cited allowing such delegation. No resolution has been adopted and no declaration of conflict is offered.

State Water Board Response:

The delegation language is supported by section 7 of the California Water Code which states: "Whenever a power is granted to, or a duty is imposed upon, a public officer, the power may be exercised or the duty may be performed by a deputy of the officer or by a person authorized, pursuant to law, by the officer, unless this code expressly provides otherwise."

Comment 1.03:

This permit limits the authority of DPR in carrying out its legal responsibilities for regulating the use of pesticides; the State Water Board is absorbing the duties and requirements of the DPR, yet has no expertise, program, or budget to do so.

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State Water Board Response:

As described in Response 1.01, the State Water Board collaborates with DPR to develop NPDES permit requirements pursuant to the Clean Water Act that are consistent with DPR requirements, and additional requirements to protect beneficial uses of the receiving waters.

Comment 1.04:

The MAA requires written consent of both parties and/or must be terminated by either party upon a 30-day advance written notice to the other party. No written notice to terminate the MAA is known to exist, therefore it must follow the MAA and the Associated Plan.

State Water Board Response:

Please see Response 1.01.

Comment 1.05:

The State Water Board does not possess a statement from the State Attorney General that it has adequate authority to carry out this program as proposed. In 40 C.F.R. section 123.23, the Attorney General's statement states: "Any State that seeks to administer a program under this part shall submit a statement from the State Attorney General (or the attorney for those state or interstate agencies which have independent legal counsel) that the laws of the state, or an interstate compact, provide adequate authority to carry out the program described under 40 C.F.R. section 123.22 and to meet the requirements of this part."

State Water Board Response:

The NPDES Program is a federal program which has been approved for implementation by the State of California through the State Water Board and the nine Regional Water Quality Control Boards, collectively Water Boards. Pursuant to this process, the Attorney General prepared a statement of legal authority in compliance with title 40 C.F.R. section 123.22. (See, Attorney General's Statement for the State National Pollutant Discharge Elimination System Program and State Pretreatment Program Administered by the California State Water Resources Control Board and the California Regional Water Quality Control Boards, State of California Office of the Attorney General, May 1987.) In addition, a 1989 Memorandum of Agreement between the U.S. Environmental Protection Agency and the State Water Resources Control Board reflects the State Water Board's authorization to implement the program and describes the agencies' roles. Chapter 5.5 of Division 7 of the Porter-Cologne Water Quality Control Act reflects state law authority to carry out the federal program at Section 13370 et. seq. Thus, the State Water Board NPDES program has been appropriately approved for implementation within the State.

Comment 1.06:

Serious conflicts of interest have not been disclosed in this matter. The commenter requests admission that the pesticide industry wrote the entire proposal and permit changes for the State Water Board to promote on its behalf.

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State Water Board Response:

Comment noted. The draft permit was prepared by State Water Board staff.

Comment 1.05:

The commenter requests none of the serious changes or actions be adopted, no justification, no scientific analysis, no risk assessment of the major changes are offered. The Health and Safety of the residents are threatened by all changes and proposals.

State Water Board Response:

The Fact Sheet of the Draft Spray Applications Permit contains justification for all permit requirements including the proposed major changes.

2. Comment Letter 2 – Heal the Bay

Comment 2.01:

Heal the Bay is concerned about the following: 1) toxicity monitoring has been previously removed from the Vector Control and Aquatic Animal Invasive Control Statewide Permits; 2) toxicity monitoring is currently proposed to be removed from the Draft Spray Applications Permit; 3) monitoring on a constituent-by-constituent basis ignores the potential synergistic and complex effects of pesticides on an ecosystem; 4) the reasoning for removing toxicity monitoring is not clear or transparent; 5) a State Water Board “toxicity study” is referenced in the Draft Pesticide Permits that was completed in December 2012. However, the Draft Pesticide Permits lack citations to the study which is only available through a scientific journal article which must be purchased, but is not available on the State Water Board’s website; and 6) Toxicity Study conclusions highlight the importance of toxicity monitoring which is contrary to removal of toxicity monitoring in the Draft Pesticide Permits. Heal the Bay recommends the following: 1) a more holistic approach to monitoring that would examine the health of the stream with a focus on possible biological impacts from pesticides; 2) update the Toxicity Study regularly to examine the toxicity of new pesticides and new mixtures of pesticides; and 3) include a numeric toxicity limit and toxicity monitoring in the Draft Pesticide Permits.

State Water Board Response:

The Draft Spray Applications Permit provides a balanced approach to protecting water quality while acknowledging the operational needs of the California Department of Food and Agriculture (CDFA) to protect California's agriculture from damage caused by invasive plant pests.

Due to the toxic nature of pesticides necessary to achieve pest management objectives, the State Water Board recognizes that there may be toxicity impacts to waters of the United States (U.S.) as a result of pesticide applications for effective pest management.

The State Water Board concludes that appropriately-managed spray application of pesticides for invasive plant pests are unlikely to contribute to long-term toxicity in waters of the United States (U.S.) due to the following factors:

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- 1) Pesticide spray applications are short duration.
- 2) CDFA uses only minimal amounts of pesticide effective pest management.
- 3) CDFA does not apply pesticides directly to waters of the U.S. Staff's review of annual reports from 2011 through 2014 found that CDFA collected six samples during this period. All constituent concentrations from post-event application samples were below receiving water limitations.

When the State Water Board adopted the Aquatic Animal Invasive Species, Spray, and Vector Control Permits in March 2011, the permits did not include toxicity monitoring requirements. In lieu of toxicity monitoring requirements, the Vector Control Permit required the State Water Board to conduct a toxicity study to determine whether toxicity testing requirements should be included in the permits. The December 2012 Toxicity Study results suggested that further monitoring would provide the same finding of toxicity in some samples due to the toxic nature of pesticides. The State Water Board amended the Vector Control Permit's Monitoring and Reporting Program in March 2014 based on the following: (1) the December 2012 Toxicity Study results; (2) the 2011-2012 monitoring data from Mosquito Vector Control Association of California showed no significant impact to beneficial uses of receiving waters due to application of vector control pesticides in accordance with approved application rates; and (3) the expectation that reporting of application rates and incidents of non-compliance provided similar information that chemical and toxicity testing would provide. Thus, the proposed permit reissuance does not add toxicity monitoring requirements. It will continue to require U.S. Environmental Protection Agency-approved application rates and appropriate best management practices to ensure effective pest management while concurrently minimizing toxicity.

The State Water Board found that although the December 2012 Toxicity Study showed some toxicity from pesticide applications, toxicity monitoring will not provide additional valuable information. Thus, the State Water Board did not finalize the report; however, the Toxicity Study report was recently posted and can be viewed at:
http://www.waterboards.ca.gov/water_issues/programs/npdes/pesticides/docs/vectorcontrol/vcp_tox_study_draft_final_july2013.pdf. Since the Toxicity Study report was not finalized, there is no need to update it because updating it will not provide new information.

The proposed permit reissuance is consistent with the State Water Board's resolution to reduce the cost of compliance with NPDES permits without compromising water quality protection.

Comment 2.02:

Heal the Bay is concerned that pesticides applications have become standard accepted practices and that critical cost-benefit analyses on pesticide applications are not routine. The Pesticide Application Plans for the Draft Pesticide Permits require "Identification of the Problem." Heal the Bay recommends the following: 1) the Pesticide Application Plans should require further justification of the need and efficacy of pesticide applications to protect

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public and ecological health; and 2) scientific studies documenting the impacts to public health or ecological health in addition to studies that show efficacy of pesticide application for the specific problem or pest should be required as part of the justification.

State Water Board Response:

CDFA developed the Programmatic Environmental Impact Report that evaluates the impacts from CDFA's Statewide Plant Pest Prevention and Management Program. The Programmatic Environmental Impact Report provides an environmental setting and impacts analysis, ecological risk assessment, and human health risk assessment. CDFA submitted the Programmatic Environmental Impact Report as part of its Pesticide Application Plan. Thus, additional scientific studies documenting the impacts to public health or ecological health do not need to be included in the Pesticide Application Plan.

Comment 2.03:

The Draft Pesticide Permits do not allow discharge of pesticides to waters that are impaired by the same pesticides, which Heal the Bay supports. However, protection should go further to include streams that are moderately contaminated by the same or similar pollutants. The addition of pollutants to a system that is already contaminated has the potential of pushing pollutants over a threshold to a toxic level. Again, monitoring for one constituent or suite of constituents is unlikely to adequately capture the impacts to the entire system of the pesticide discharge.

State Water Board Response:

CDFA's Statewide Plant Pest Prevention and Management Program is unlikely to contribute to pollution in waters of the U.S. because the program targets terrestrial plant pests and CDFA does not apply pesticides directly to waters of the U.S. CDFA is unlikely to discharge to waters of the U.S. and is covered under this permit for the rare instances where applications may discharge to waters of the U.S. Based on annual reports from 2011 through 2014, CDFA collected six samples during this period. All constituent concentrations from post-event application samples were below receiving water limitations. Therefore, assessing overall stream health would not provide valuable additional information beyond the information provided by existing monitoring requirements.