

EPA Proposed Rule Helps Farmers by Allowing Use of Pesticides that Enter Canals and Other Waterbodies

The U.S. Environmental Protection Agency (EPA) recently reissued its interpretive guidance regarding the Clean Water Act (CWA) and the need for permits for certain activities involving pesticides that are regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and are applied to or over waters of the United States. 70 Fed. Reg. 5093 (Feb. 1, 2005). This guidance addresses the question of whether National Pollutant Discharge Elimination System (NPDES) permits are required for the application of certain pesticides where the application is in compliance with relevant requirements under FIFRA. EPA has concluded that permits are not required for certain specified activities involving aquatic herbicides and pesticides used to control mosquitoes and other pests. Along with the guidance, the agency also released a proposed rule that would revise the NPDES permit program regulations to incorporate the substance of the interpretative statement.

Talent Irrigation District

This action addresses an issue that arose several years ago after the U.S. Court of Appeals for the Ninth Circuit issued its decision in *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001). The opinion held that the registration and labeling of the herbicide Magnacide H under FIFRA did not eliminate the need for Talent Irrigation District to obtain a CWA NPDES permit for the application of the aquatic herbicide in its irrigation canals. The *Talent* decision caused considerable concern among public health authorities, natural resource managers, and others who rely on pesticides and herbicides in their operations. These entities include not only mosquito abatement districts, but also irrigators who, similar to the Talent Irrigation District, use aquatic herbicides to control weeds and vegetation in irrigation canals. In response to the decision EPA issued guidance in 2002, and again in 2003, setting forth its interpretation of both FIFRA and the CWA with respect to the application of registered pesticides to waters. The guidance concluded that the CWA permitting requirements do not apply to certain specified activities.

EPA Interpretive Guidance

In this most recent guidance, EPA states that the application of a pesticide to or over, including near, waters of the United States consistent with all relevant requirements under FIFRA does not constitute the discharge of a pollutant that requires a NPDES permit under the Clean Water Act in the following two circumstances:

- 1) The application of pesticides directly to waters of the United States in order to control pests. This includes applications to control mosquito larvae, aquatic weeds or other pests that are present in the 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, that results in a portion of the pesticides being deposited to waters of the United States; 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, including near, water for control of adult mosquitoes or other pests.

EPA has determined that pesticides applied consistent with FIFRA do not fall within any of the terms used in the CWA definition of a “pollutant.” Specifically, EPA has determined that they are not “chemical wastes” or “biological materials.” EPA bases this conclusion in part on the manner in which pesticides are used. The agency notes that when a pesticide is used for its intended purposes and its use complies with all relevant requirements under FIFRA, the pesticide is not a chemical waste or biological material and therefore is not subject to the NPDES permitting requirements.

In the proposed rulemaking section of the notice, EPA has proposed to revise the NPDES permitting program regulations set forth in 40 C.F.R. Part 122 to incorporate its interpretation. The proposed revision would add a paragraph to the list of discharges that are excluded from the NPDES requirements. EPA is asking for comments on the proposal on or before April 4, 2005.

Particularly for agricultural interests, water suppliers and other interests in California, at this point, the immediate impact of the EPA action is unclear. It is likely that once EPA finalizes a rule on this subject, the rule may be challenged. The agency interpretation is open to question in light of the Talent decision, which stated that “it would seem absurd to conclude that a toxic chemical directly poured into water is not a pollutant.” 243 F.3d at 533. Despite this statement, the Talent court also declined to decide the issue regarding whether the direct application of Magnacide H constituted the discharge of a pollutant. The court did state, however, that it agreed with the lower court holding that the residual acrolein left in the water after the application of Magnacide H qualified as a chemical waste product and thus constituted a pollutant under the CWA.

The California State Water Resources Control Board has issued a statewide general permit for the discharge of aquatic pesticides for weed control in waters of the United States (Water Quality Order No. 2004-0009-DWQ) and a separate statewide general permit for discharges of aquatic pesticides to surface waters for vector control (Water Quality Order No. 2004-0008-DWQ). These permits authorize discharges in compliance with the permit terms. In the past, the state has also expressed concerns regarding EPA’s interpretation of its authorities in light of the Talent decision, and it can be expected that the general permits will remain in place at least until a final rule is promulgated.

For Further Information

If you have questions about the EPA’s new guidance on pesticides, including how it may affect your projects or activities, please contact **Tom Berliner** or **Karen Donovan** in San Francisco (415-371-2200) or any of the other members of Duane Morris’ Energy, Water and Natural Resources Group or Environmental Group (www.duanemorris.com) or the attorney in the firm with whom you are regularly in contact.