

## **Current & Future Status of Aquatic NPDES Permits & Agricultural Waivers**

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### AQUATIC NPDES PERMITS:

The State Water Resources Control Board (State Water Board) currently has two general National Pollution Discharge Elimination System (NPDES) permits that regulate discharges of aquatic pesticides into waters of the United States; one for vector control (mosquitoes), and another for aquatic weed control.

In November 2006 the United States Environmental Protection Agency (U.S. EPA) adopted a new regulation excluding vector and aquatic weed control pesticide applications from the requirement to obtain coverage under a NPDES permit.

In 2001, the Ninth Circuit court of appeals issued an opinion regarding whether the Talent Irrigation District that applied an aquatic herbicide to an irrigation canal that was tributary to a natural creek needed an NPDES permit. The court held that registration and labeling of a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) does not preclude the need for an NPDES permit. The court went on to find that such an application constituted the discharge of a pollutant from a point source to waters of the United States, thus requiring an NPDES permit.

After the Ninth Circuit court's decision U.S. EPA issued two guidance documents. One stated that civil enforcement under the Clean Water Act for direct application of pesticides to waters of the U.S. in accordance with FIFRA label instructions is a low enforcement priority. The second guidance document stated that the application of an aquatic herbicide consistent with the FIFRA label, to keep irrigation return flows clear, falls within the exemption for irrigation return flows from the definition of "point source" and therefore a nonpoint source activity.

In 2005 the Ninth Circuit issued another decision relevant to aquatic pesticides in *Fairhurst v. Hager*, and after reviewing U.S. EPA's guidance agreed that a pesticide that is applied consistent with FIFRA is not a "chemical waste." The court stated that their decision was based on whether there is any "residue or unintended effect" from the pesticide application. The Fairhurst parties stipulated there was no residue or unintended effect from the use of antimycin. The court did not reverse its opinion in the Talent decision. The State Water Board interpreted this ruling to mean that an NPDES permit is only required if the application leaves a residue or has an unintended effect.

The State Water Board adopted the two general permits for discharges of aquatic pesticides in response to these court cases and guidance. The State Water Board found that the Ninth Circuit decisions appeared to require these permits and that the U.S. EPA guidance documents might not be a legal basis for a lack of coverage under an NPDES permit.

Now that U.S. EPA has adopted regulation codifying its Interim Statement and Guidance, the State Water Board's Office of Chief Counsel has posted a five-page memorandum on our Website that explains how the State Water Board should respond to U.S. EPA's new regulation. This memorandum suggests the State Water Board should maintain the permits pending any final judicial actions on the regulation, but publicize the regulation and allow dischargers the option of filing a notice of termination (these documents and instructions are also available on the web). This would immediately allow dischargers to terminate coverage, along with the obligation to conduct monitoring, pay NPDES fees, etc.

In the event a court decision invalidates U.S. EPA's new regulation, those who chose to submit notices of termination could reenroll under the existing permits. If the courts uphold the regulation, the State Water Board may subsequently rescind the permits or allow them to expire. The State Water Board also has the authority to regulate these discharges under Porter-Cologne.

#### Aquatic NPDES Permit Reference Material and Contact Information:

- The five-page memorandum from the State Water Board Office of Chief Counsel to Acting Executive Officer Tom Howard is available at:  
<http://www.waterboards.ca.gov/npdes/aquatic.html>  
Scroll down the center of the page to News and click on Memorandum.
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#### AGRICULTURAL WAIVERS:

The federal Clean Water Act when adopted in 1972 exempted agricultural irrigation return flows from National Pollutant Discharge Elimination System permitting requirements.

The Regional Water Boards waived discharges from irrigated lands from waste discharge requirements in the early 1980's as authorized by Section 13269 of the California Water Code.

In 1987, Congress added Section 319 to the federal Clean Water Act, which required states to develop nonpoint source pollution control plans. To comply with this section, the State Water

Board adopted its first nonpoint source control plan in 1988. This plan established a three tier system, the first tier being voluntary controls, the second tier being conditional waivers, and the third tier being waste discharge requirements.

In the 1990's, environmental groups sued the U.S. Environmental Protection Agency for failing to establish total maximum daily loads (TMDLs) for various water bodies as required by the federal Clean Water Act.

Senate Bill 390 was signed into law October 6, 1999. The bill revised Section 13269 of the California Water Code. In general, the bill requires the regional boards to review the terms, conditions, and effectiveness of the waivers they have adopted; renew waiver policies and individual waivers by January 1, 2003 (failure to renew waivers automatically resulted in the termination); issue general or individual WDR's for ongoing discharges whose waivers have been terminated; enforce waiver conditions; and renew or terminate waivers every five years.

The number and type of waivers varied from region to region, but overall there were more than 40 between the nine regions, four of which have been the bulk of the focus in recent years; Dairy, Timber, Septic, and Irrigated Agriculture Runoff Waivers. With potentially millions of miles of agricultural drains and upwards of 80,000 growers with hundreds of commodities irrigated agriculture arguably poses the greatest challenges.

In February 1977, the State Water Board and the Department of Pesticide Regulation signed a Management Agency Agreement on their respective responsibilities for protecting water quality.

As stated earlier the State Legislature amended California Water Code Section 13269 in 1999. This amendment required the Regional Water Boards to review the conditions of their waivers of waste discharge requirements and to either renew the waivers or replace them with waste discharge requirements. The amendment also required enforcement of conditions in waivers and the re-adoption of waivers every five years. In addition, the State Water Board adopted the Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (NPS Policy). This policy more clearly defined the stated requirements of the Water Code. All current and proposed NPS discharges must be regulated under waste discharge requirements, waivers of waste discharge requirements, or a basin plan prohibition or some combination of these administrative tools.

In 2003, California Water Code Section 13269 was again amended. The second amendment provided authority to the State Water Board to establish fees for waivers. These legislative actions are applicable to all waivers but placed particular focus on agriculture statewide. The fiscal year 2004-2005 State budget included up to 22 positions at a cost of \$1.9 million for implementing agricultural waivers and specified that the funding for the positions would come from new fees to be established for waivers.

The Central Coast, Central Valley, Los Angeles and San Diego Regional Water Boards have adopted conditional waivers for wastewater discharges from Irrigated Agriculture. The other five Regional Water Boards have no immediate plans to adopt agricultural waivers but may do so eventually to implement TMDLs. Without a conditional waiver, growers are vulnerable to other regulatory actions such as waste discharge requirements (WDRs).

The Conditional Agricultural Waivers adopted by the Regional Water Boards use different regulatory models.

The **Central Coast Water Board** Conditional Agricultural Waiver requires each grower to:

1. Submit a notice of intent (NOI).
2. Take courses in water quality management (15 hours).
3. Prepare and implement a water quality management plan (*this is done during the 15 hour water quality management courses*).
4. Perform individual monitoring or participate in a group monitoring program.

The Central Coast Water Board has created a consensus building process with representatives from the agricultural and environmental communities.

The **Los Angeles Water Board** Conditional Agricultural Waiver is similar to the Central Coast Water Board's waiver but encourages the formation of discharger groups or coalition groups. The Conditional Agricultural Waiver requires each grower to:

1. Submit a notice of intent (NOI).
2. Provision to participate in a coalition group who would submit one NOI on behalf of it's membership.
3. Take courses in water quality management (8 hours).
4. Prepare and implement a water quality management plan.
5. Perform individual monitoring, or participate in a group monitoring program.

The **Central Valley Water Board** adopted two Conditional Agricultural Waivers at the request of agricultural interests and others: one conditional waiver for coalition groups and another for individual growers. The Central Valley Water Board renewed these two conditional waivers June 2006 for five years. The Coalition Conditional Waiver requires growers to:

1. Join coalition groups that assume the responsibility for conducting water quality monitoring.
2. Participate in grower education sponsored by their coalition.
3. Identify and implement necessary management practices to meet water quality objectives.

Growers in the Central Valley Region that do not choose to join coalition groups have the option of being covered under an individual grower conditional waiver or file a Report of Waste

Discharge for waste discharge requirements. Both coalition groups and individual growers who have not joined a coalition must file a NOI and various technical reports as conditions of the waiver.

The **San Diego Water Board** Conditional Agricultural Waiver does not require the submittal of a NOI, and does not require water quality monitoring, but does require the implementation of management measures in accordance with State Water Board Nonpoint Source Implementation and Enforcement Policy. The Region is currently holding public workshops in anticipation of renewing the waiver with additional conditions.

The **Colorado River Basin Water Board** has implemented a Conditional Prohibition to address their sediment TMDL.

As previously stated, the Legislature decided waivers are to be supported by fee revenues rather than the State's General Fund. As a result, the State Water Board adopted a Fee Schedule in June 2005 to fund the Conditional Agricultural Waiver Program at the State and Regional Water Boards. The 2006-2007 Governor's Budget includes a one time \$1.5 million general fund augmentation for the program.

Expectations for the Conditional Agricultural Waiver Program are:

1. A better characterization of the water quality in water bodies that receive agricultural discharges.
2. Identification of the sources of pollutants.
3. Development and implementation of management practices designed to control these sources.
4. Implementation of TMDLs through conditional waivers.

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