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MEMORANDUM

Confidential Attorney-Client Privileged Communication

TO: Mosquito and Vector Control Association of California

FROM: Richard P. Shanahan, General Counsel

RE: Clean Water Act, NPDES General Permit, and Extension of Stay in *National Cotton Council v. EPA*

DATE: April 5, 2011

I have been asked to summarize recent events concerning the vector control NPDES general permit and the extension of the stay in *National Cotton Council v. EPA*, confirm the related Association recommendations to the member districts, explain the status of the NPDES permit monitoring coalition, and review related liability and VCJPA concerns and issues.

SUMMARY OF RECENT EVENTS

Before reviewing the Association recommendations and plans for the future, it may be helpful to recap significant events and happenings over the past month:

- On March 1, 2011, the State Water Resources Control Board (“State Board”) adopted a new NPDES general permit¹ for vector control. The permit adopted by the State Board consisted of the draft permit (the version in the February 15, 2011 State Board agenda packet) plus staff-recommended changes that were distributed on February 28, 2011 plus changes approved by the State Board at the meeting. The permit was made effective immediately. The final permit was posted today on the State Board website. It is available at: http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2011/wqo2011_0002.pdf

¹ Recall that a general permit is optional and voluntary. It applies only to dischargers that voluntarily apply for coverage under the permit by filing a notice of intent and pesticide application plan and paying applicable fees.

- On March 3, lawyers for the U.S. Environmental Protection Agency filed a motion with the Sixth Circuit Court of Appeals requesting that the stay in *National Cotton Council v. EPA* be extended to October 31, 2011. Under federal court rules, the filing of the motion automatically extended the stay until action by the court.
- On March 18, the Association sent a letter to the State Board informing it that the Association has formed a monitoring coalition, that it will implement a statewide monitoring program under the general permit, that the Association will be revising its monitoring plan, and that, if the stay is granted, the Association would postpone implementation of the monitoring program until after expiration of the stay. The State Board has not objected to this plan.
- On March 28, the Sixth Circuit court ruled, extending the stay in a brief order: “Upon consideration of the government’s motion to stay mandate until October 31, 2011, It is ORDERED that the motion be and hereby is GRANTED.”

What’s the legal effect of the extension of the stay? The court’s action keeps in effect the 2007 EPA regulation that exempts aquatic pesticides from NPDES permit requirements. With the extension, NPDES permits are not required at this time. Rather, the EPA regulation will not be vacated until October 31, 2011. NPDES permits will be required for discharges to waters of the U.S. after that date.

- On or about March 31, the State Board added the following to its website, confirming that permits are not required: “On March 28, 2011, the Sixth Circuit Court granted USEPA’s request for an extension to allow more time for pesticide operators to obtain permits for pesticide discharges into U.S. waters. The attached court decision extends the deadline for when permits will be required from April 9, 2011 to October 31, 2011.”
- On March 31, the U.S. House of Representatives passed H.R. 872 by a vote of 292-130. The bill would amend the Clean Water Act to exempt aquatic pesticides from the NPDES permit requirement. The bill now moves to the U.S. Senate, where passage will be more difficult.
- On April 1, Association representatives met with State Board Chief Deputy Director Jonathon Bishop to discuss uncertainties and plans for moving forward in light of the foregoing events. Mr. Bishop confirmed that NPDES permits are not required for aquatic pesticides until October 31, 2011, that the State Board will allow new permittees to terminate coverage, that the final permit should be posted on the State Board website soon, that the State Board will proceed to meet on April 5 to discuss whether to authorize \$500,000 to begin work on the toxicity study related to the vector control permit, and that the State Board staff would be agreeable to coordinating with the Association on the toxicity study.
- Today (April 5), the State Board met to discuss the toxicity testing. At Mr. Bishop’s urging, Gary Goodman appeared to urge the State Board to coordinate with the Association. The Board voted unanimously to allocate \$500,000 from the Cleanup and Abatement Account to fund the Pesticide Permits Toxicity Impacts Project. These funds will be used by the State Board and the U.C. Davis Marine Pollution Studies Laboratory at Granite Canyon to

evaluate toxicity in California waterways from aquatic pesticide applications. The State Board and its staff agreed to work collaboratively with the Association on the design and implementation of the study. The State Board plans a “pilot study” to be done this year and the majority of the toxicity study to be done in 2012 when pesticide applications to waters of the U.S. will be covered under NPDES permits.

- Today (April 5), the State Board staff sent an informational e-mail on the status of the general permit. The following explains the State Board’s position regarding the extension of the stay:

“How does the Sixth Circuit Court's granting of USEPA's request to extend the stay of its mandate from April 9, 2011 to October 31, 2011 affect implementation of the Permits?”

“A discharger that has received a Notice of Applicability (NOA) from the State Water Board's Deputy Director is covered under the permit for which it has applied. Thus, the discharger is required to comply with the requirements of that permit. If the discharger wishes to discontinue permit coverage, it must submit a Notice of Termination (NOT).

“... [A] discharger that submits an NOT and wants to get coverage again under the same permit when the Sixth Circuit Court's stay extension of its order expires on October 31, 2011, must resubmit a timely application.

“Reapplying for coverage under the permit means submitting the application package which includes the application fee, Notice of Intent, pesticide application plan (PAP), and monitoring and reporting plan (MRP).² If there are no changes to a previously submitted PAP or MRP, there is no need to resubmit these documents. If there are major changes to the PAP or MRP, staff will post these documents for a 30-day comment period. Examples of major changes include using a different product other than what is specified in the PAP, changing an application method that may result in different amounts of pesticides being applied, or adding or deleting BMPs. Since the PAP will have been previously posted for a 30-day comment period, comments will be limited to the major changes.

“Although the Sixth Circuit Court's stay extension obviates the need for an NPDES permit from April 9 through October 30, 2011, I would like to encourage dischargers to work diligently on their PAPs and MRPs so that they can submit their application package to the State Water Board by June 1, 2011. Receiving the application package by this date would give us adequate time to ensure that we would post them on our website by July 1, fully respond to comments by October 1, and send final NOAs by October 30. Please keep in mind that the Pesticide Permits allow the Deputy Director to issue Provisional NOAs only in March and April 2011; thus, she will have to issue final NOAs when the stay expires in October.”

² For member districts in the Association monitoring coalition, the Association will be providing the coalition monitoring and reporting plan to the State Board and your district’s application should refer to the MRP to be provided by the Association. For other member districts not in the coalition, you will need to provide a district-specific monitoring and reporting plan.

MVCAC RECOMMENDATIONS

In light of this chain of events, and in particular the extension of the stay to October 31, 2011, the Association recommends the following to its member districts:

- If a member district has applied for coverage under the general permit, it should prepare and file a Notice of Termination with the State Board. The Notice of Termination form is Attachment H of the vector control general permit. See also page 6 of the permit. In the “Basis for Termination” section of the form, we recommend: “The Sixth Circuit Court of Appeals recently extended the stay of *National Cotton Council v. EPA*, and the deadline for NPDES permits for aquatic pesticides, to October 31, 2011. Our agency therefore does not need a permit at this time or for several months.”

A district should proceed quickly to terminate coverage. If a district already has a permit, it must comply with it. The district remains subject to the permit until it prepares and files a Notice of Termination and the State Board has issued a coverage termination letter.

- If a member district has not applied for coverage, it should postpone applying until August 2011 or spring 2012.
- Over this summer, each member district should reevaluate and, if appropriate, refine and improve its pesticide application plan.
- In mid-August 2011, each member district should apply or reapply for coverage under the general permit, in order for the permit coverage to be effective (i.e., Notice of Applicability received) by October 31, 2011.³ It should be approximately a 45-60 day process to obtain an NOA from the State Board. However, if by late October, a district’s pesticide applications will be concluded for the year, then the district may wish to apply or reapply in early 2012 prior to next year’s program.

STATUS OF COALITION

The Association continues to serve as the permit monitoring coalition. It is in the process of contracting with URS as program manager. Full monitoring implementation will be postponed until early 2012. The extension of the stay will enable the Association to more gradually develop and implement the coalition monitoring and reporting plan. This year, the Association (through a coalition working group) and URS will reevaluate, refine and improve the monitoring and reporting plan, develop a quality assurance project plan, develop protocols for communication between URS and the member district pesticide applicators, coordinate with the member districts on refinement of the pesticide application plans, and, coordinate with the State Board on the toxicity testing. After the State Board posts the final general permit, we also will carefully evaluate the permit and probably will request the State Board to make clarifications and minor revisions. Therefore, there

³ Note that in the April 5 e-mail, State Board staff is urging that applications be submitted by June 1, 2011. This strikes me as too early. Association staff will coordinate with the State Board staff on the most appropriate time to file applications for coverage by November and we will let you know if the time is other than mid- to late-August.

will be some general permit and monitoring related costs this year, but they will be very low compared to the full monitoring expected to begin next year.

Member districts that have joined the monitoring coalition will continue to participate in the coalition. Districts should not seek to withdraw from or terminate participation in the coalition.

LIABILITY AND VCJPA INSURANCE

Until October 31, 2011, member districts have a strong defense against a Clean Water Act enforcement action. The 2007 EPA regulation (which now remains good law until October 31, 2011) adds the following to the list of discharges that do not require NPDES permits: “The application of pesticides consistent with all relevant requirements under FIFRA (i.e., those relevant to protecting water quality), in the following two circumstances: (1) The application of pesticides directly to waters of the United States in order to control pests. Examples of such applications include applications to control mosquito larvae, aquatic weeds, or other pests that are present in 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, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively; for example, ... when pesticides are applied over or near water for control of adult mosquitoes or other pests.” (Code of Federal Regulations section 122.3(h).)

A key criterion in the regulation is the phrase, “application of pesticides consistent with all relevant requirements under FIFRA.” If an application is not consistent with FIFRA and/or the FIFRA-approved label instructions and limitations, then the NPDES permit exemption would not apply and the district could be subject to a challenge under the Clean Water Act for discharging a pesticide to water without an NPDES permit (in addition to an enforcement action for violating FIFRA).

If a member district applied for coverage under the March 1 general permit and thereafter terminates coverage under the permit, there can be no enforcement action based on that permit. The general permit is voluntary and optional. There is no legal basis for a lawsuit to compel the district to operate under a general permit. Likewise, the discharge limitations and prohibitions in the general permit do not apply to a district if the district is not subject to the permit.

However, if a member district obtained coverage under the general permit and chooses not to terminate coverage, then it would be subject to the permit and enforcement under the permit, regardless of the extended stay in *National Cotton Council*. We do not recommend this course of action. Nevertheless, if your district retains its general permit coverage, then you need to notify the Association to discuss monitoring and reporting requirements for 2011.

For Association member districts that also are members of the Vector Control Joint Powers Agency (VCJPA), you benefit from defense-only coverage in the event of a Clean Water Act lawsuit. Under the current memorandum of coverage, the Clean Water Act coverage applies only if, after April 11, 2011, the district is covered under an available NPDES general permit. We now have an unexpected situation where the permit is available but not required.

This matter was discussed at the VCJPA workshop last month. I was directed to prepare an amendment to the memorandum of coverage to address this circumstance. At its April 11, 2011 meeting, the VCJPA Board will consider an amendment that would revise the coverage condition as follows:

Effective with any Lawsuit filed after ~~April, 11, 2011~~ the date of the expiration of the court stay in *National Cotton Council v. EPA* (6th Cir., 2009) 553 F.3d 927 (the “Permit Coverage Deadline”), the defense-only coverage described in the preceding paragraph shall not be provided with respect to any Lawsuit where (1) the Lawsuit alleges a violation of the Clean Water Act and/or the Porter-Cologne Water Quality Control Act involving a pesticide discharge after the Permit Coverage Deadline for which an NPDES general permit was available in California at the time of the Lawsuit, and (2) the Covered Party prior to the pesticide discharge Lawsuit had not filed received a Notice of Applicability from the State Water Resources Control Board indicating that the Covered Party is a notice of intent and paid the applicable related fees with the appropriate regional water quality control board(s) to be covered under the NPDES general permit that was adopted by the State Water Resources Control Board on March 1, 2011, or (3) the Covered Party was not in substantial compliance with the terms and conditions of the NPDES general permit at the time of the pesticide discharge Lawsuit.

The Board meeting agenda packet is posted at www.vcjpa.org. This change (which I expect the VCJPA Board to approve) should ameliorate any concerns about the lack of an NPDES permit adversely affecting VCJPA coverage for a Clean Water Act lawsuit. However (assuming VCJPA approves the amendment), after October 31, 2011, VCJPA coverage will be available only for those VCJPA members that have obtained coverage under the general permit (i.e., have received a Notice of Applicability) and that are in substantial compliance with the permit.

Please contact me if you have any questions.