

December 10, 2012

VIA E-MAIL AND FIRST CLASS U.S. MAIL

Ms. Tessa Fojut
Central Valley Regional Water Quality Control Board Office
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670

Re: CEQA Scoping Comments: Central Valley Pyrethroid Pesticides TMDL and
Basin Plan Amendment

Dear Ms. Fojut:

These comments are submitted on behalf of the Pyrethroid Working Group (PWG), a coalition of manufacturers of pyrethroid pesticides, pursuant to the Central Valley Regional Water Quality Control Board's (Regional Board) Notice of California Environmental Quality Act (CEQA) Public Scoping Meeting (October 30, 2012) and Informational Document. According to the notice, the Regional Board is using the CEQA scoping process to develop a Basin Plan amendment for the control of discharges of pyrethroid pesticides. The proposed action has not yet been identified, but according to the notice "may include the establishment of water quality objectives for pyrethroids and an implementation program to achieve those objectives, and establishment of total maximum daily loads (TMDLs)."

Before amending the Basin Plan, the Regional Board must consult with the public and "perform an environmental analysis of the reasonably foreseeable methods of compliance and must prepare substitute environmental documentation (SED) that fulfills the same informational needs as traditional CEQA documents[.]" (Informational Document at pp. 2-3.) PWG has actively monitored and participated in the development of the pyrethroid pesticides Basin Plan amendment (BPA) and TMDL, and appreciates the opportunity to provide input early in the process of BPA development and CEQA compliance. We are submitting these comments because the development of water quality objectives (WQOs) and TMDLs for pyrethroid pesticides may have significant economic and environmental impacts throughout the region.

Project Description

As an initial matter, PWG notes that the project proposed for CEQA review is not clearly defined. Substantial questions regarding the scope and implementation of the project make it very difficult for the public to offer meaningful and specific comments on project impacts, alternatives, and mitigation measures. PWG thus believes the Regional Board should provide additional opportunity for public input regarding both the BPA and scope of CEQA review prior to developing the draft SED. Concerns with the project description are further explained here.

Project Objectives

The SED must clearly identify the specific objectives associated with the BPA as well as its underlying purpose. If one objective is to create or protect habitat for aquatic life, the SED should evaluate and provide information about the extent to which the project will accomplish that objective. If, for example, it is not feasible to attain the beneficial use of aquatic life in particular water bodies, the project is unlikely to attain its stated objectives and purpose.

Geographic Scope

The scoping documents suggest that pyrethroid pesticide WQOs will be implemented in all water bodies with an aquatic life beneficial use designation and thus the geographic scope of the project includes all water in the Sacramento and San Joaquin Basins with designated aquatic life beneficial use, regardless of whether such use has been or can reasonably be attained in all water bodies. The informational document further states that the “aquatic life beneficial uses that are assumed to be most sensitive to pyrethroid pesticides (WARM and COLD) are widely designated in the project area and there are no indications that attainment of these designations is infeasible.” (Informational Document at p. 4.)

Protection of water quality in California is governed by the Porter-Cologne Water Quality Control Act, Water Code section 13000 et seq. (Porter-Cologne). A fundamental premise of Porter-Cologne is that water quality regulation must be reasonable. (See, e.g., Wat. Code, § 13000.) The Regional Board is empowered to adopt Water Quality Control Plans (also known as Basin Plans) which must include: beneficial uses of the water bodies in the region; WQOs to reasonably protect the beneficial uses; and a program of implementation for the WQOs. (Wat. Code, §§ 13050(h), (j), 13240, 13241, 13242.) In formulating a water quality control plan, the Regional Board seeks “to attain the highest water quality which is *reasonable*, considering all demands being made and to be made on waters of the state and the values involved.” (Wat. Code, § 13000, emphasis added.)

WQOs are defined as, “the limits or levels of water quality constituents or characteristics which are established for the *reasonable protection of beneficial uses* of water or the prevention of nuisance within a specific area.”¹ (Wat. Code, § 13050(h), emphasis added.) Note the key word here is “reasonable” protection of designated uses, which implies that 100% protection of all species 100% of the time is not required when setting a WQO. Rather, when establishing WQOs, the state must consider a series of factors, including economics, attainability, and other public interest factors. (See Wat. Code, § 13241.) As the State Water Resources Control Board’s Chief Counsel has previously explained, Porter-Cologne requires that “*objectives must be reasonable*, and economic considerations are a necessary part of the determination of reasonableness.” (*Memorandum to Regional Water Board Executive Officers from William R. Attwater, Chief Counsel, State Water Resources Control Board* (Jan. 4, 1994) at p. 3, emphasis added.) In adopting WQOs, the state must ensure that the WQOs provide for the reasonable protection of beneficial uses after considering the factors required by Water Code section 13241, including economics and attainability. (See *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 109-110 [state “is required to ‘establish such water quality objectives . . . as in its judgment will ensure the reasonable protection of beneficial uses’ ” (citing Wat. Code, § 13241); *id.* at p. 118 [state shall consider “all competing demands for water in determining what is a reasonable level of water quality protection.”].)

Applying the proposed pyrethroid pesticide WQOs basin-wide without consideration of the actual beneficial uses to be protected violate the reasonableness requirement governing the water quality regulatory process. Moreover, applying WQOs to direct or indirect discharges of a product into a water body that does not support aquatic life beneficial use may expose individuals to enforcement action even though the discharge has caused no impact on aquatic life beneficial uses. At most, application of the objectives should apply only to those water bodies for which substantial evidence supports the existing or attainable aquatic life beneficial use. Further, appropriate application of WQOs needs to be included as part of the project description.

Implementation Program

CEQA defines “project” as “the whole of an action, which has a potential for resulting in a physical change in the environment” (CEQA Guidelines, § 15378(a).) Water Code section 13242 provides that the Regional Board shall develop a program of implementation for achieving WQOs that includes a description of the nature of actions that are necessary to achieve the objectives, a time schedule for the actions to be taken, and a description of surveillance to determine compliance with objectives. (See Wat. Code, §§ 13242(a)-(c).) The SED must evaluate the environmental impacts associated

¹ Beneficial uses may include, but are not limited to, “domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves.” (Wat. Code, § 13050(f).)

with all actions identified in the implementation program. (*City of Sacramento v. State Water Resources Control Bd.* (1992) 2 Cal.App.4th 960, 969 [water board's consideration of rice pesticide plan must address environmental effects of steps required to implement plan]; *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1395-1396 [rejecting water board's functional equivalent document for water quality regulatory plan for failure to consider reasonably foreseeable environmental effects of actions required to implement plan].) The project description needs to clearly identify the implementation program so that the environmental impacts of the implementation program can also be adequately assessed as part of the CEQA process.

Significant Impacts

One outcome of the establishment of WQOs and one or more TMDLs for pyrethroids may be improved water quality and habitat for aquatic species. However, if the BPA results in the adoption of WQOs that substantially limit the use of pyrethroid pesticides, the project will have widespread secondary impacts that must be assessed in the SED. The SED must clearly describe the range of actions that would be anticipated to be required to implement the WQOs and the environmental tradeoffs associated with regulation and BPA implementation. For example, if the establishment of WQOs and TMDLs leads to restricted or reduced use of pyrethroid pesticides, the SED must describe the extent of the anticipated limitations and the consequences of such reductions.

The primary uses for pyrethroid pesticides in urban areas include structural pest control, landscape maintenance, rights-of-way, and public health pest control. (Daniel R. Oro, et al., *Pyrethroid Insecticides: An Analysis of Use Patterns, Distributions, Potential Toxicity and Fate in the Sacramento-San Joaquin Delta and Central Valley* (Oct. 7, 2005) at p. 43.) If pyrethroid pesticides are not available for these purposes, what alternatives are expected to be used, and what are the impacts associated with those alternative control methods, including potential impacts to human health if alternatives are less effective? Pyrethroid pesticides are also widely used in agriculture to protect crop viability and yield. In addition to use on row crops and orchards, pyrethroid insecticides are generally applied to rice fields prior to field flooding or within the initial stages of stand establishment. The Sacramento Valley contains more than 95% of the state's rice acreage, with the leading rice producing counties being Colusa, Sutter, Butte, Glenn, and Yolo. (*Id.* at p. 48.) If the BPA is expected to lead to reduced pyrethroid use, what would be the expected effect on crop yield and economic viability of existing agricultural practices? If restrictions on pyrethroid pesticides cause substantial economic impacts that lead to crop shifting or crop idling, these economic impacts could cause significant environmental impacts by contributing to the conversion of agricultural land, or even loss of wildlife habitat if cropping patterns change and lead to crop shifting away from crops like rice that provide important habitat for migratory birds.

One of CEQA's basic purposes is to inform government decision-makers and the public about the potential significant environmental effects of proposed projects. (CEQA Guidelines, § 15002(A)(1); *Citizens of Goleta Valley v. Board of Supervisors* (1990) 532 Cal.3d 553; *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 396.) "[A] paramount consideration is the right of the public to be informed in such a way that it can intelligently weigh the environmental consequences of any contemplated action and have an appropriate voice in the formulation of any decision." (*Environmental Planning and Information Center v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354.) To fulfill this mandate, the SED needs to provide sufficient information about the environmental tradeoffs and related economic effects associated with the BPA and TMDLs.

Alternatives

The informational document states that the Regional Board may consider changing beneficial use designations if it is infeasible to attain a designated use and identifies a number of alternatives related to beneficial uses. (Informational Document at p. 4.) The SED should evaluate an alternative focused on limiting any new pyrethroid pesticide WQOs to water bodies that have attained the beneficial use of aquatic life, or for which there is substantial evidence that such use is reasonably attainable.

The SED also should include information about the anticipated economic impact of the BPA and all alternatives, as this information is critical to an evaluation of their feasibility and also to the assessment of significant impacts. As noted previously, significant economic impacts to agriculture could have unintended significant environmental impacts if it causes crops to be taken out of production or cropping patterns to change.

Conclusion

PWG appreciates the opportunity to provide these initial comments on the BPA concept outlined in the scoping presentation. The lack of specificity in the project description makes it difficult to provide comments on potential impacts, possible alternatives, and mitigation. PWG recommends that the Regional Board conduct additional CEQA scoping after a specific BPA has been defined.

Very truly yours,



Theresa A. Dunham