



Brian R. Leahy
Director

Edmund G. Brown Jr.
Governor

November 16, 2017

Ms. Hope A. Smythe
Executive Officer
Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, California 92501-3348

Dear Ms. Smythe:

Thank you for your letter dated November 8, 2017 requesting the California Department of Pesticide Regulation (DPR) to provide input on addressing comments you have received from stakeholders regarding the interplay between DPR's regulation of copper-based antifouling paints (AFP) and the Santa Ana Regional Water Quality Control Board's (Board) ability to set a Total Maximum Daily Load (TMDL) for copper. I will address and answer each of your questions below:

1. *Is there any legal conflict between CDPR's regulation of the copper AFPs and the adoption by the Regional Board of Copper TMDLs addressing exceedances of water quality standards for dissolved copper in Newport Bay?*

No. There is no legal conflict between DPR's regulation of the sale and use of copper-based AFP and the authority of the Regional Board to regulate the discharge of copper and adopt and implement a revised copper TMDL. Although DPR's preemption statute, contained in Food and Agricultural Code section 11501.1, prohibits *local government* from passing ordinances or regulations regarding the registration, sale, transportation or use of pesticides, it specifically does not limit the authority of another *state agency or department* to enforce or administer any law that the agency or department is authorized or required to enforce or administer. (Food & Ag. Code § 11501.1, subd. (a) and (c) (emphases added).) In this case, the Regional Board clearly has the legal authority to set TMDLs and is not dictating a total ban on the use of copper or prescribing the specific method or manner of compliance with the TMDL. As a result, DPR does not view the Regional Board's proposed actions to be preempted under Food and Agricultural Code section 11501.1. In fact, throughout this process, the State Water Resources Control Board (SWRCB) and Regional Boards have worked closely with DPR to coordinate efforts towards meeting our respective obligations.



- 2. Is it CDPR's position that the use of copper AFPs alone (with leach rates at or below the maximum allowable leach rate of 9.5 ug/cm²/d) will lead to the attainment of the water quality standards for dissolved copper, based on the California Toxics Rule (CTR) chronic criterion, in salt water marinas where those water quality standards are already exceeded?*

No. Although establishment of the copper leach rate cap (i.e., 9.5 ug/cm²/day), which could include the reformulation of some existing antifouling boat paints, is expected to reduce loading of copper to all saltwater marinas in California, DPR has determined that these actions alone will not always achieve continuous compliance with the California Toxics Rule (CTR) for the few largest salt water marinas (i.e. approximately greater than 1300 boats) where water quality standards are already exceeded. As a result, DPR issued a number of recommended mitigation measures to aid in compliance that include best management practices (BMPs), reduced frequency for in-hull water cleaning, outreach, consideration of site-specific objectives, and fostering of new and existing incentive programs to convert copper-painted boat hulls to those painted with alternatives. (See Attachment [February 14, 2014 Letter to Assembly Member Atkins].)

- 3. Would Copper TMDLs, which include as part of the implementation plan, the use of mitigation measures such as Best Management Practices for in-water hull cleaners, incentives for the conversion of boats using copper AFPs to alternative paints, and/or the dry docking of boats, be consistent with CDPR's position as to what will be necessary to protect aquatic organisms from the effects of exposure to copper discharges from copper AFPs in those areas where water quality standards for copper are being exceeded?*

As stated above, the use of BMPs for in-water hull cleaners, reduced hull-cleaning frequency, and incentives for conversion of copper-based paints to alternatives are consistent with DPR's mitigation recommendations. Whether these actions, when paired with DPR's leach rate cap, will cumulatively result in the continuous compliance with the chronic CTR standard also depends on the size of the marina (i.e., number of boats), and on the specific implementation and effectiveness of the BMPs, hull cleaning frequency management, and conversion to alternatives.

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DPR has appreciated working with the California State and Regional Water Quality Board staff members and will continue to evaluate the effectiveness of its regulation of copper-based AFPs. If you have any additional questions or comments, please do not hesitate to contact DPR Senior Environmental Scientist, Nan Singhasemanon at 916-324-4122 or <Nan.Singhasemanon@cdpr.ca.gov>.

Sincerely,



George Farnsworth
Assistant Director
Pesticide Programs Division

Attachment: February 14, 2014 Letter to Assembly Member Atkins

cc: Mr. Brian Leahy, Director
Ms. Teresa Marks, Chief Deputy Director
Ms. Polly Frenkel, Chief Counsel
Mr. Nan Singhasemanon, Senior Environmental Scientist