UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Interpretive Statement and Guidance Addressing Effect of Ninth Circuit Decision in League of Wilderness Defenders v. Forsgren on Application of Pesticides and Fire Retardants

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TO: Regional Administrators, Regions I-X

The Environmental Protection Agency is issuing this interpretation and providing guidance regarding whether certain applications of pesticides and fire retardants are subject to regulation under the Clean Water Act ("CWA" or "the Act"). Specifically, this memorandum explains (1) the Agency's views regarding the effect of the recent decision in League of Wilderness Defenders v. Forsgren, 309 F.3d 1181 (9th Cir. 2002), and (2) whether these activities constitute the discharge of "pollutants" from a "point source" within the meaning of the Act.[1]

I. Effect of the Forsgren Decision

A. Background

In this case, the League of Wilderness Defenders and other environmental groups ("Plaintiffs") alleged that the Forest Service violated the CWA by engaging in unpermitted discharges. The contested Forest Service activity was the aerial spraying of a bacterial pesticide, *Bacillus thuringiensis* var. *kurstaki*, to control an outbreak of the Douglas Fir Tussock Moth

[1] On July 11, 2003, EPA issued an Interim Statement and Guidance (July 11 Interim Statement or July 11 memorandum) that addressed a different question than today's memorandum, i.e., the Clean Water Act's definition of "pollutant" with respect to certain pesticide applications.

within approximately 628,000 acres of National Forest lands in Washington and Oregon. The record shows that the Forest Service sprayed not only over trees, but also directly over and into waters of the United States.

The Forest Service argued that National Pollutant Discharge Elimination System (NPDES) permits were not required for the aerial pest control program according to a NPDES regulation promulgated in 1976 at 40 C.F.R. 122.27. That regulation provides:

> (a) *Permit requirement.* Silvicultural point sources, as defined in this section, as [sic] point sources subject to the NPDES permit program.
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> (b) *Definitions.* (1) *Silvicultural point source* means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities, which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include nonpoint source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff.

40 C.F.R. 122.27 (underlining added). Based on the administrative history of the regulations, the Forest Service argued that the specific enumeration of pest control as a nonpoint source activity meant that NPDES permits are not required for such activity. The District Court agreed.

On November 4, 2002, the Ninth Circuit Court of Appeals in League of Wilderness Defenders v. Forsgren held that the U.S. Forest Service ("Forest Service") must obtain a NPDES permit for the aerial spraying of silvicultural pesticides directly over and into navigable waters of the United States. The court found that the Forest Service applied the insecticide to threatened trees using "an aircraft equipped with tanks spraying pesticide from mechanical sprayers . . ." 309 F.3d at 1185. The court said that an airplane so fitted was a "discrete conveyance" and, therefore, a point source. Id. In addition, the court found that the Forest Service airplanes sprayed the insecticide "directly over" and "directly into" waters covered by the Clean Water Act. Id. The court concluded that such spraying was not "natural runoff" and was, therefore, not a nonpoint source activity. Id. at 1186. Although EPA was not a party to the case, the court's decision directly affects EPA's interpretations of the Clean Water Act and its implementing regulations.

B. Effect of the Forsgren Decision

EPA believes the court misinterpreted EPA's regulations at 40 C.F.R. 122.27(b)(1), which require NPDES permits for an exclusive list of four point source activities associated with silvicultural operations. The pest control activity at issue in Forsgren is not on that list. EPA disagrees with the court's holding. Therefore, outside the Ninth Circuit, EPA is not acquiescing in this decision and intends to continue to follow its longstanding interpretation of the statute and its regulations as not requiring a NPDES permit for silvicultural pest and fire control

activities. Below is an explanation of EPA's interpretation of this regulation, which EPA will continue to follow outside the Ninth Circuit. Within the Ninth Ciruit, EPA is bound by the court's holding that aerial spraying of pesticides directly over and into navigable waters is a point source discharge.[2] Because the case involved only the application of a pesticide directly over and into a water of the U.S., its holding does not extend either to other materials (e.g., materials used for fire control) or to circumstances where pesticides are not applied directly over and into waters of the U.S.

EPA first promulgated the NPDES silviculture regulation in 1973. 38 Fed. Reg. 18000 (July 5, 1973). EPA promulgated the regulation to exclude discharges from silvicultural activity except those identified by the NPDES agency as a significant contributor of pollution. Id. at 18003. Environmental groups successfully challenged that early regulation. In subsequent rulemaking, EPA identified four categories of "silvicultural point sources," specifically rock crushing, gravel washing, log sorting, and log storage. 41 Fed. Reg. 24709 (June 18, 1976). The regulation explained that "the term does not include nonpoint source activities inherent to silviculture such as ... pest and fire control. ... and road construction and maintenance from which runoff results from precipitation events." Id. at 24711. The preamble explained that "*only discharges from four activities related to silviculture enterprises*, rock crushing, gravel washing, log sorting and log storage facilities, *are considered point sources and thus subject to the NPDES permit program.*" Id. at 24710 (emphasis added).

Two decades later in a NPDES rulemaking associated with the "total maximum daily load" program, EPA proposed a case-by-case permit designation authority for silviculture activities. 64 Fed. Reg. 46058 (Aug. 23, 1999). EPA characterized the existing regulation by explaining that the listed nonpoint source silvicultural activities were "categorically" excluded from the NPDES permit requirement. Id. at 46077. Comments from affected entities expressed very strong opposition to changing this categorical exclusion. 65 Fed. Reg. 43586, 43652 (July 13, 2000). EPA did not take final action on the proposal and announced that it had no plans to re-propose changes to the silviculture exemption. Id.

Rationale for EPA's Nonacquiescence in the Court's Decision.

In Forsgren the Ninth Circuit misinterpreted the NPDES regulation when it found that the listing of the four identified silvicultural point source activities is not exhaustive. The regulation, however, is clear on its face. It states that "silvicultural point source" *means* any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, and log storage facilities which are operated in connection with silvicultural activities. 40 C.F.R. 122.27(b)(1). It is well settled that where a definition declares what it "means," it excludes any meaning not stated. Colautti v. Franklin, 439 U.S. 379, 393 n.10 (1979). In addition, a different NPDES regulation makes it clear that discharges from forest lands do not require NPDES permits except "silvicultural point sources" as defined by 40 C.F.R. 122.27. 40 C.F.R. 122.3(e).

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[2] The States within the Ninth Circuit are Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

Under accepted principles of statutory construction, the Court should have recognized that the expression of the four specified "silvicultural point source" activities excludes other silvicultural activities from the definition of "point source."

Moreover, the contemporaneous administrative history of the regulation (from 1976 through 1979) clearly demonstrates that only the identified silvicultural point source categories are point sources requiring NPDES permits. Subsequent administrative history demonstrates the long standing nature of this regulatory interpretation. As recently as 2002, EPA issued a guidance document again explaining this interpretation of the regulation. ("Return Flows from Irrigated Agriculture," March 29, 2002).

Courts other than the Ninth Circuit have properly interpreted EPA's regulations. See Newton County Wildlife Ass'n v. Rogers, 141 F.3d 803, 810 (8th Cir. 1996)(finding list of silvicultural point sources to be "a narrow" list) and Sierra Club v. Martin, 71 F.Supp.2d 1268, 1304-07 (N.D.Ga. 1996)(silvicultural pest control not a point source requiring NPDES permit). Additionally, the Ninth Circuit in a different case properly deferred to EPA's regulations distinguishing between point and nonpoint sources. See Ass'n to Protect the Hammersly, Eld, and Totten Inlets ("APHETI") v. Taylor Resources, 299 F.3d 1007 (9th Cir. 2002).

EPA's interpretation of the Clean Water Act in 40 C.F.R. 122.27 is both reasonable and permissible. It is, therefore, entitled to deference under Chevron, Inc. v. NRDC, 467 U.S. 837, 842-843 (1984). Although the CWA defines "point source," there is no evidence that Congress spoke to the precise question of what silvicultural activities constitute point sources. Moreover, the CWA does not define the term "nonpoint" source. Oregon Natural Resources Council v. U.S. Forest Service, 834 F.2d 842, 849 n.9 (9th Cir. 1987). EPA has discretion under the Clean Water Act to define silvicultural point sources. NRDC v. Costle, 568 F.2d 1369, 1382 (D.C. Cir. 1977)(holding that EPA has the power to define point sources and nonpoint sources). Indeed, Congress expressly delegated to EPA the power to define "nonpoint source" in the context of silviculture in order to address the appropriate pollutant controls for silvicultural activities. See 33 U.S.C. 208(b)(2)(F) and 304(f)(A). Because Congress has not directly addressed the precise question of which silvicultural activities are point and nonpoint sources, and because EPA reasonably specified the four categories of "silvicultural point sources" in its regulation, under Chevron the Court should have deferred to EPA's statutory interpretation. In States outside the Ninth Circuit, EPA intends to continue to follow its long-standing interpretation of 40 CFR 122.27 as excluding silvicultural pest and fire control activities from the definition of point source under the Act. Therefore, such activities will not require a NPDES permit.

2. Effect of Court's Decision Within the Ninth Circuit.

Within the Ninth Circuit, EPA will follow the holding of the Forsgren decision that application of a pesticide directly over and into waters of the U.S. is a point source discharge. In accordance with this decision, it will be necessary for the NPDES permitting authority to make a decision on a case-by-case basis, in light of the particular facts, whether a particular application is a discharge from a point source requiring a NPDES permit. Because the case involved only the application of a pesticide directly over and into a water of the U.S., its holding does not

extend to circumstances where pesticides or other materials (e.g., materials used for fire control) are not applied directly over and into waters of the U.S.. This issue is addressed in more detail below.

II. Application of Pesticides and Fire Retardants

EPA has evaluated the application of pesticides and fire retardants to determine whether such applications constitute the discharge of "pollutants" from a "point source" under the CWA's definitions of these terms. The Agency's analysis and conclusions are described in detail below.

A. Pesticides.

On July 11, 2003, EPA's Office of Water and Office of Prevention, Pesticides, and Toxic Substances issued an Interim Statement and Guidance memorandum on the application of pesticides to waters of the United States. The Interim Statement addressed two specific circumstances: (1) the application of pesticides directly to waters of the United States in order to control pests, such as mosquito larvae or aquatic weeds and (2) the application of pesticides to control pests that are present over waters of the United States that results in a portion of the pesticides being deposited to waters of the United States. As described in that memorandum, EPA interprets the Clean Water Act as not requiring NPDES permits for these applications if the applications are in compliance with all relevant requirements of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) because pesticides applied in such a manner are not "pollutants" under Section 502(6) of the Clean Water Act.

EPA is soliciting public comment on the July 11 memorandum and will issue a final interpretation after considering comments received. However, until the final interpretation is issued, the application of pesticides under the specific circumstances identified in the July 11 memorandum in compliance with relevant FIFRA requirements is not subject to NPDES permitting requirements, regardless of whether the application is a point or nonpoint source, because such pesticides are not pollutants. The Forsgren decision focused on an issue not addressed in the July 11 memorandum, i.e., whether aerial spraying constitutes a point source subject to NPDES permitting requirements under the Clean Water Act. As described above, the court held that the aerial spraying at issue in the case constituted a point source as defined by the CWA and that EPA did not exclude it from NPDES permit requirements by regulation. Because the issue of whether the pesticides in Forsgren are pollutants was not contested in that case, the "pollutant" issue was not fully litigated and was only peripherally addressed by the Forsgren court. Therefore, the July 11 Interim Statement and Guidance contains EPA's interpretation of the Act within as well as outside the Ninth Circuit.[3] Thus, permitting authorities, including those

[3] The Forsgren court did say the insecticides at issue meet the definition of "pollutant" 309 F.3d at 1185. However, the court also noted that the parties did not dispute the pesticide at issue was a pollutant under the Clean Water Act. Therefore, the question of whether the pesticide met the Act's definition of pollutant was not an issue in the case on appeal. EPA notes that the Forest Service in its brief in the lower court expressly reserved arguments on that issue.

within the Ninth Circuit, should first consider the facts of the particular situation before them to determine whether an application of pesticides directly over waters of the United States is in compliance with relevant FIFRA requirements. If it is, no NPDES permit is required.

B. Fire Retardants.

Forest fires occur in the United States every year, often having significant, widespread environmental impacts. The application of fire retardants is an important, effective part of controlling fires and preventing loss of human and animal life as well as significant property and ecosystem damage. The Forest Service conducts the majority of fire retardant applications in the U.S., and in doing so its applicators follow guidelines intended to prevent adverse impacts on waterbodies. EPA is issuing today's interpretive statement to assist responsible state and federal agencies in promptly addressing dangerous and often unpredictable fires, and to clarify that when fire retardants are properly applied for their intended purpose, the applicator need not apply for and obtain a NPDES permit prior to application. EPA's July 11 Interpretive Statement focused on application of pesticides. While it did not address application of fire retardants, a similar analysis of the Clean Water Act's definition of "pollutant" can be applied to fire retardants.[4] EPA has evaluated whether fire retardants, which are chemical substances, are "chemical wastes" under the Act's definition of pollutant in section 502(6), and concludes that they are not when properly used for the purpose of controlling fires.

Proper use would include following guidelines intended to minimize any adverse environmental impacts of fire retardants on waters of the United States. For example, the U.S. Forest Service's guidelines provide for a buffer zone within 300 feet of waterways. See U.S. Forest Service Guidelines for Aerial Delivery of Retardant or Foam Near Waterways, April 2000. In addition, before approving any fire retardant for use, the Forest Service conducts an intensive, two-year testing procedure which includes testing the product for aquatic toxicity. Thus, proper application of fire retardants by the Forest Service and other agencies that have agreed to follow the Forest Service guidelines and use only Forest Service-approved products should avoid or minimize any adverse effects on aquatic environments. Information from the Forest Service's record-keeping and reporting system provides support for the effectiveness of the guidelines in protecting aquatic environments.

As described in the July 11 Interim Statement, the term "waste" ordinarily means that which is "eliminated or discarded as no longer useful or required after the completion of a process." The New Oxford American Dictionary 1905 (Elizabeth J. Jewell & Frank Abate eds.,

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Defendant's Summary Judgment Motion before the District Court, March 19, 2001, at 14 n.8.

[4] The term "pollutant" is defined in section 502(6) of the Clean Water Act as follows: "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."

2001). Fire retardants are not unwanted byproducts of a process that are discarded into the environment as waste material. Rather, they are products designed to control fires. When used for their intended purpose, fire retardants are not "chemical wastes," and thus are not pollutants under the CWA.[5] Therefore, application of fire retardants for the purpose of eradicating fires does not require a NPDES permit.[6] Because the Forsgren decision did not directly address this issue, EPA intends to apply this interpretation within as well as outside the Ninth Circuit.[7]

III. Conclusion

In summary, within the Ninth Circuit, EPA will follow the holding in Forsgren that application of pesticides directly over and into waters of the U.S. is a point source discharge. In circumstances not addressed in the July 11, 2003, memorandum, permitting authorities will need to make a case-by-case determination whether a particular pesticide application is a discharge from a point source directly over and into waters of the United States. Outside the Ninth Circuit, EPA will continue to apply its long-standing interpretation of 40 CFR 122.27 as excluding silvicultural pest and fire control activities from the NPDES permitting requirement.

Under EPA's July 11, 2003, Interim Statement and Guidance, certain pesticide applications are not pollutants under the Clean Water Act when applied in compliance with relevant FIFRA requirements, and therefore those applications do not require NPDES permits regardless of whether they are applied from a point source. In addition, for the reasons described above, fire retardants properly applied for the purpose of controlling fires are not pollutants under the Clean Water Act and therefore do not require NPDES permits. EPA intends to apply this interpretation within as well as outside the Ninth Circuit, since the Forsgren decision did not directly address the interpretation of "pollutant" as defined by the Act.

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[5] The interpretation of the term " waste" in this memorandum is limited to the specific circumstance addressed above, i.e., whether fire retardant applications are pollutants under the CWA. It is not intended to apply to other factual circumstances under the CWA or to other statutes EPA administers.

[6] In contrast, EPA considers fire retardants that are discarded or otherwise not properly used for their designed purpose, to be waste materials.

[7] To the extent aerial application of fire retardants is a silvicultural fire control activity, such activities are in any case excluded from the NPDES permitting requirement under EPA's long-standing interpretation of 40 CFR 122.27, which the Agency will continue to apply outside the Ninth Circuit.