



California Regional Water Quality Control Board

Lahontan Region



Winston H. Hickox
Secretary for
Environmental
Protection

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Ex D1

June 18, 2001

Certified Mail
Return Receipt requested

Jack A. Blackwell, Regional Forester
Attn: Appeals Deciding Officer
USDA Forest Service, Intermountain Region
324 - 25th Street
Ogden, UT 84401

APPEAL OF DECISION NOTICE AND FINDING OF NO SIGNIFICANT IMPACT FOR THE NOXIOUS WEED CONTROL PROGRAM FOR THE HUMBOLDT- TOIYABE NATIONAL FOREST, BRIDGEPORT AND CARSON RANGER DISTRICTS—ALPINE, LASSEN, MONO, NEVADA, PLUMAS AND SIERRA COUNTIES

Enclosed is a Notice of Appeal in response to the 5/9/01 decision by the Humboldt-Toiyabe National Forest (HTNF) to use herbicides for weed control. I am filing this appeal because the HTNF has decided to move forward without adequately addressing issues related to water quality.

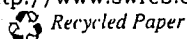
While I acknowledge the importance of controlling the spread of exotic weeds, the U.S. Forest Service (USFS) must also prescribe and implement measures adequate to fully comply with State water quality standards. I believe that the relief requested in the Notice of Appeal is reasonable, and would allow both of our agencies to meet our mutual objectives of controlling weeds while clearly demonstrating that water quality standards are being achieved.

I strongly prefer the cooperative "management agency approach" to water quality protection over formal regulation of USFS projects, and I am therefore disappointed that my staff's comments on this project have not been adequately addressed by the USFS. While I am confident that the USFS can implement the changes to its decision as requested in the enclosed appeal, I am prepared to consider regulatory options to ensure compliance with water quality standards in effect for the Lahontan Region of California. Regulatory actions may include, but are not limited to, requiring the HTNF monitor its projects, to submit formal reports of waste discharge (and filing fees) for its individual projects, as well as enforcement actions for non-compliance.

Please be advised that, due to a recent court decision, applications of pesticides to waters of the United States (including some ephemeral waters and wetlands) now require a National Pollutant Discharge Elimination System (NPDES) permit pursuant to the federal Clean Water Act (see *Headwaters Inc. v Talent Irrigation Dist.*, 9th Cir., Case No. 99-35373). I recommend that the

California Environmental Protection Agency

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HTNF coordinate closely with my staff well in advance of applying herbicides in or near any such areas, to determine the need for an NPDES permit.

I believe that a continued dialogue may assist us in resolving the outstanding issues in a cooperative manner. Please call me at (530) 542-5412, or Tom Suk of my staff at (530) 542-5419, if you have any questions regarding this letter or appeal.

Sincerely,



HAROLD J. SINGER
EXECUTIVE OFFICER

Enclosure: Notice of Appeal

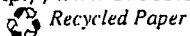
cc: Regional Board members
Robert L. Vaught, Humboldt-Toiyabe National Forest,
Certified Mail 7099-3220-0005-2375-0617
Stan Martinson, SWRCB-DWQ
Syed Ali, SWRCB-DWQ

TS/arT:Toiyabe Weed Cover.Doc
[General: USFS-Toiyabe National Forest]

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11

12)
13)
14)
15 California Regional Water Quality Control Board,)
16 Lahontan Region,)
17)
18 Appellant,)
19)
20)
21 Before the Regional Forester, USDA Forest Service,)
22 Intermountain Region)
23)
24 _____)

NOTICE OF APPEAL

25
26
27 The California Regional Water Quality Control Board, Lahontan Region (RWQCB),
28 hereby appeals, pursuant to 36 CFR Part 215, the Decision Notice and Finding of No Significant
29 Impact (DN/FONSI) for the Noxious Weed Management and Control Program for the
30 Humboldt-Toiyabe National Forest, Bridgeport and Carson Ranger Districts, signed by Forest
31 Supervisor Robert L. Vaught, on May 9, 2001. This Notice of Appeal incorporates by reference
32 the administrative record on file at offices of the Toiyabe National Forest.
33

34 State law assigns responsibility for protection of water quality within the Lahontan
35 watershed basin to the RWQCB. The RWQCB implements and enforces the Porter-Cologne
36 Water Quality Control Act ("Porter-Cologne Act," California Water Code §13000 et seq.) and
37 the *Water Quality Control Plan for the Lahontan Region* ("Basin Plan"). All projects conducted
38 on National Forest System lands within the Lahontan watershed basin must comply with all
39 applicable requirements of the Porter-Cologne Act and the Basin Plan, including narrative and
40 numerical water quality objectives and waste discharge prohibitions.

1 In 1981, the USDA Forest Service (USFS) and the California State Water Resources
2 Control Board (SWRCB) signed a Management Agency Agreement (MAA) that recognizes the
3 role of the USFS as a water quality management agency for National Forest System lands within
4 California. The MAA notes that the federal Clean Water Act mandates federal agency
5 compliance with the substantive and procedural requirements of state and local water pollution
6 control law, and the MAA requires the USFS to design, select, and implement nonpoint source
7 control measures for all USFS projects in order to meet all applicable state water quality
8 standards. In signing the MAA, the SWRCB "contemplated" that the RWQCBs would forego
9 formal regulation of USFS activities with the potential to result in nonpoint discharges, provided
10 that the USFS implements certified Best Management Practices (BMPs) sufficient to meet all
11 State water quality standards. Where proposed BMPs are insufficient to remove the threat of
12 violating State water quality standards, additional BMPs and/or mitigation measures must be
13 prescribed and implemented as necessary to remove the threat of a violation.

14

15 **Reasons for Appeal [36 CFR § 215.14(b)(5)]**

16

17 The RWQCB is appealing this decision because the DN/FONSI and accompanying
18 Environmental Assessment (EA) do not include adequate mitigation and monitoring
19 requirements (i.e., BMPs) to ensure compliance with State water quality standards. Because the
20 DN/FONSI and EA do not include adequate BMPs, the DN/FONSI does not comply with the
21 MAA cited above. Furthermore, the DN/FONSI and EA fail to incorporate mandatory standards
22 for BMP implementation that are contained in the Humboldt-Toiyabe Land and Resource
23 Management Plan (LRMP). The RWQCB is also appealing this decision because the DN/FONSI
24 and EA fail to take a hard look at, and provide reasoned responses to, issues and concerns raised
25 by RWQCB staff during the planning process.

26

27 **Applicable Basin Plan excerpts:**

28

29 The Basin Plan states (in part):

30

1 “On October 28, 1968, the State Water Resources Control Board adopted
2 Resolution 68-16, ‘Statement of Policy with Respect to Maintaining High Quality
3 Waters in California,’ establishing a nondegradation policy for the protection of
4 water quality. This policy, referred to in this Basin Plan as the Nondegradation
5 Objective, requires continued maintenance of existing high quality waters.
6 Whenever the existing quality of water is better than the quality of water
7 established in this Basin Plan as objectives (both narrative and numerical), such
8 existing quality shall be maintained unless appropriate findings are made under
9 the policy.” (Basin Plan at 3-2)

10
11 And:

12
13 “For the purposes of this Basin Plan, pesticides are defined to include
14 insecticides, herbicides, rodenticides, fungicides, piscicides and all other
15 economic poisons. An economic poison is any substance intended to prevent,
16 repel, destroy, or mitigate the damage from insects, rodents, predatory animals,
17 bacteria, fungi or weeds capable of infesting or harming vegetation, humans, or
18 animals.

19 Pesticide concentrations, individually or collectively, shall not exceed the
20 lowest detectable levels, using the most recent detection procedures available.
21 There shall not be an increase in pesticide concentrations found in bottom
22 sediments. There shall be no detectable increase in bioaccumulation of pesticides
23 in aquatic life.” (Basin Plan at 3-5)

24
25 And:

26
27 “‘The discharge of waste which causes violation of any narrative water
28 quality objective contained in this Plan, including the Nondegradation Objective,
29 is prohibited.” (Basin Plan at 4.1-1)

30
31 And:

1 “The discharge or threatened discharge, attributable to human activities, of
2 solid or liquid waste materials...to lands within the 100-year floodplain of the
3 Truckee River or any tributary to the Truckee River is prohibited.” (Basin Plan at
4 4.1-6)

5
6 **Chronology**

7
8 On December 15, 1986, the USFS Intermountain Region issued a decision to use a
9 variety of methods for weed control, including four pesticides (e.g., 2,4-D, dicamba, glyphosate,
10 picloram).

11
12 On January 13, 1987, the Executive Officer of the RWQCB sent a letter to the USFS
13 Regional Forester for the Intermountain Region requesting the opportunity to review specific
14 project plans and environmental documents for any and all weed control projects conducted by
15 the USFS within the Lahontan Region. No such project plans have been provided to the
16 RWQCB.

17
18 On February 19, 1999, the RWQCB received a scoping letter from the Humboldt-
19 Toiyabe National Forest (HTNF) that announced the development of a new “aggressive broad-
20 scale approach” to controlling weeds. On March 1, 1999, the RWQCB sent scoping comments to
21 the HTNF regarding that proposal. The RWQCB’s scoping comments requested that the HTNF’s
22 environmental document disclose the specific herbicide formulations proposed for use, proposed
23 application methods, proposed application rates, locations where herbicides would be used, and
24 specific monitoring plans. The RWQCB’s scoping comments also requested that the HTNF’s
25 environmental document provide a careful analysis of the available monitoring data to support
26 any conclusions by the HTNF that the proposed herbicide applications could achieve compliance
27 with State water quality standards.

28
29 On May 18, 1999, the RWQCB received the HTNF’s preliminary Environmental
30 Assessment for its Noxious Weed Control Program. On June 14, 1999, the RWQCB sent
31 comments to the Forest Supervisor of the HTNF stating that the preliminary EA failed to

1 adequately address issues related to water quality that were raised in the RWQCB's scoping
2 comments. The RWQCB's June 14, 1999, comments detailed the inadequacies of the
3 preliminary EA in regard to water quality issues, and provided suggestions to remedy the
4 deficiencies.

5
6 On July 13, 1999, the RWQCB received additional materials from the HTNF, including a
7 1992 "risk assessment" prepared by a USFS pesticide specialist, a draft Biological Assessment
8 for noxious weed treatments, and monitoring data for herbicide applications within the State of
9 Nevada that were similar to those being proposed by the HTNF.

10
11 On July 21, 1999, staff of the RWQCB met with Mitch Bulthuis of the HTNF to discuss
12 the preliminary EA for herbicide use. That meeting is documented in a letter from the RWQCB
13 to Mr. Bulthuis dated July 28, 1999. During that meeting, RWQCB staff explained the
14 requirements of the Basin Plan (i.e., State water quality standards) related to pesticide use,
15 detailed the deficiencies of the preliminary EA in regards to water quality issues, and promised
16 to review, in a timely manner, the additional materials received from the HTNF on July 13, 1999.
17 The RWQCB's follow-up letter dated July 28, 1999, also suggested that RWQCB staff be
18 afforded the opportunity to review the revised EA and decision document prior to approval by
19 the USFS, so that any outstanding differences could be resolved in advance.

20
21 On August 17, 1999, RWQCB staff sent written comments to Mr. Bulthuis regarding the
22 RWQCB's review of the additional materials received on July 13. That letter detailed several
23 outstanding concerns, and included the RWQCB staff's conclusion that the use of chemical
24 herbicides, as proposed in the preliminary EA, would likely violate the Basin Plan's objectives
25 for pesticides and nondegradation. The RWQCB's letter provides the specific supporting
26 rationale for its conclusion, and provides specific suggestions for supplementing the preliminary
27 EA to ensure compliance with State water quality standards. The RWQCB's August 17, 1999,
28 letter also repeated the July 28, 1999, request by RWQCB staff that the HTNF "allow us the
29 opportunity to review your revised EA and Decision Notice before they are adopted, so that we
30 may work together to resolve in advance any outstanding differences before your proposal is
31 finalized."

1 On April 6, 2000, Mitch Bulthuis of the HTNF telephoned RWQCB staff (Thomas Suk)
2 and stated that the USFS's weed control EA had been put on the "back burner" for some months,
3 but that he was again working on it. That conversation centered on technical aspects of Mr.
4 Bulthuis' ideas for an herbicide monitoring program, and is documented in a USFS file memo,
5 and in a follow-up e-mail from RWQCB staff to Mr. Bulthuis dated April 26, 2000.
6

7 On August 30, 2000, RWQCB staff submitted written comments to the Forest Supervisor
8 of the HTNF reiterating the RWQCB staff's conclusion that the proposed use of herbicides poses
9 the potential to violate State water quality standards, and detailing the rationale for that
10 conclusion.
11

12 On May 11, 2001 (more than one year since the last communication from the HTNF
13 regarding this project), the RWQCB received a copy of the 3-page DN/FONSI. The final EA was
14 not included with the DN/FONSI received by the RWQCB on May 11, 2001. Therefore, on May
15 15, 2001, RWQCB staff contacted the HTNF (Mr. Brett Glover) via telephone and requested that
16 a copy of the final EA be sent via overnight mail. Eight days later, on May 23, 2001, the
17 RWQCB received a copy of the final EA.
18

19 **Summary of Significant Unresolved issues**

20

21 The proposed use of herbicides within the Lahontan Region threatens to violate State
22 water quality standards. The final EA states that "Comparable treatment programs that have had
23 water quality testing conducted by the Nevada Department of Agriculture have shown that water
24 contamination was not a problem" (final EA at p. 52). RWQCB staff has reviewed the available
25 data for similar herbicide projects conducted in Nevada. Those data document that water samples
26 collected from both the Truckee River and Carson River sites (in Nevada) were shown to contain
27 herbicide active ingredients at concentrations that would violate provisions of the Lahontan
28 Basin Plan if those projects were conducted in California. RWQCB staff provided this analysis
29 and conclusion to the HTNF in a letter dated August 17, 1999, and have not received a reply to
30 this concern. It is not appropriate for the USFS to equate the State of Nevada's standards to those
31 in California, and it is incorrect to conclude that concentrations of pesticide active ingredients

1 that exceed California standards are “not a problem” if similar projects are to be conducted in the
2 Lahontan Region. What the monitoring data from Nevada in fact demonstrate is that projects of
3 the type proposed by the DN/FONSI and final EA clearly pose the potential to violate the Basin
4 Plan’s objectives. The final EA fails to disclose that fact.

5
6 The final EA does not contain a scientifically valid, mandatory monitoring program that
7 is adequate to document compliance (or non-compliance) with State standards. The final EA (at
8 p. 8) correctly recognizes the RWQCB’s responsibility for setting water quality standards, and it
9 also correctly recognizes the Basin Plan’s objective that pesticides in surface and ground waters
10 shall not exceed the lowest detectable levels using the most recent detection procedures
11 available. However, the monitoring provisions in the final EA (at p. 19-20, and Appendix E) are
12 insufficient to demonstrate compliance with that objective. The final EA (at p. 19) states that:
13 *“In specific circumstances, soil or water samples may be taken to determine if environmental*
14 *effects were as predicted”* (emphasis added). However, the final EA does not specify the
15 situations or “circumstances” when monitoring would occur (or criteria for determining those
16 circumstances), nor does it disclose the “predicted” concentrations of pesticide residues in the
17 media (e.g., water, soil) to be monitored. And this provision is further qualified by the term
18 “may,” which renders it non-binding. The final EA (at p. 52) also states that: *“Water quality*
19 *monitoring will occur on a random basis or as deemed necessary”* and that, if sampling is
20 deemed necessary: *“Representative treatment areas will be chosen for surface water testing.”*
21 However, no criteria are provided regarding how USFS staff will determine when monitoring
22 will be (or will not be) “necessary,” and no criteria are provided regarding how the
23 “representative” sites will be chosen. As a whole, the EA’s language regarding water quality
24 monitoring is non-specific and non-binding. The soil monitoring plan is similarly vague.

25
26 The final EA does not contain a scientifically valid, mandatory monitoring program that
27 meets the requirements of the MAA. The MAA requires that all applicable BMPs be
28 implemented to achieve full compliance with State water quality standards. The applicable
29 BMPs are listed in the document titled: “Water Quality Management for Forest System Lands in
30 California,” hereinafter referred to as the USFS’s “BMP Manual.” The BMPs listed in that
31 manual are generic in nature, and are intended to be fleshed out with greater specificity in

1 project-specific environmental documents, such as the final EA under appeal. The BMP Manual
2 (at p. 81) directs that a water quality monitoring plan for pesticide applications will specify: "(1)
3 Who will be involved and their roles and responsibilities; (2) What parameters will be monitored
4 and analyzed; (3) When and where monitoring will take place; and (4) What methodologies will
5 be used for sampling and analysis, and the rationale behind each of the preceding specifications."
6 In contrast, the monitoring plan contained in the final EA does not include key information, such
7 as who will collect the samples (and training requirements for sampling personnel), the analytes
8 to be tested, laboratory methods, detection limits, quality control sampling procedures, holding
9 times, and location and method of sample collection (i.e., grab samples vs. integrated samples).
10 In addition, the final EA arbitrarily states that: "*There is no need to test for water contamination*
11 *for herbicide applications that occur over 100 feet from surface water.*" No supporting rationale
12 is provided for this specification, and this assumption is questionable in light of the fact that it
13 does not account for landscape features (such as slope, ground cover, and soil erodibility), nor
14 pesticide characteristics (such as persistence and mobility). The final EA discloses that certain
15 herbicide formulations proposed for use are highly persistent and mobile, and, as discussed with
16 HTNF staff during the planning process for this EA, limited monitoring data on file at the
17 Central Valley RWQCB indicate that some of the chemical formulations proposed for use have
18 been detected in surface waters even where streamside buffers are maintained. Staff of the
19 RWQCB have also commented on several occasions (see RWQCB written comments dated
20 August 17, 1999, and April 26, 2000) that any scientifically valid monitoring program must
21 provide for at least some sampling during stormwater runoff events (i.e., "first flush" sampling)
22 when a mechanism for overland transport exists. The final EA's monitoring plan is deficient
23 because it does not require any such monitoring.

24

25 The scope of the project is not well defined. The final EA does not disclose the locations
26 where herbicides will be applied, nor does it place any upper limit on the magnitude of herbicide
27 use in either space or time. HTNF staff (e.g., Mitch Bulthuis) has repeatedly indicated to
28 RWQCB staff the USFS's assumption in preparing this EA that herbicide use will be limited to
29 only a few situations. However, the herbicide program described in the final EA is vague and
30 open-ended, and there is no evidence in the final EA to support the HTNF staff's stated
31 assumption that the use of herbicides will be temporally and spatially confined. In fact, the final

1. EA clearly allows for the use of herbicides tiered to this DN/FONSI to significantly increase
2 over time. The final EA states: "There are an estimated 2,000 invasive and noxious weed species
3 already established in the United States. Escalating world-wide trade and travel will only
4 increase the risk of further invasions...On federal lands in the western United States, it is
5 estimated that weeds occur on more than 17 million acres. On National Forest System lands an
6 estimated 6-7 million acres are currently infested and potentially increasing at a rate of 8 to 12
7 percent per year. On the Districts covered by this document it is estimated that over 1,000 acres
8 are affected...With the increased use of National Forest System lands, new infestations can be
9 expected annually." (EA at p. 5). The final EA also improperly provides that additional
10 chemicals not evaluated in the EA may be used (EA at p. 16).

11

12 The EA emphasizes chemical weed control over preventive measures. While the EA lists
13 12 measures intended to prevent the spread of weeds on National Forest System lands, those
14 measures lack specificity and are not mandatory. For example, one such measure states:
15 "Permittees who have infestations of priority 1 and 2 weeds on their private land or other land
16 that they use for pasture or trailing will be asked to hold their livestock in a weed-free pasture for
17 three days before entering the Forest." Simply "asking" permittees to comply with preventive
18 measures renders such measures non-binding. Definitive requirements would likely be more
19 effective at preventing the spread of weeds, and could reduce the need to use herbicides to
20 control new weed infestations. The RWQCB's comments dated June 14, 1999, and April 26,
21 2000, provide additional examples of how the preventive measures, and alternatives to chemical
22 control, might be improved. Those comments are not addressed in the final EA.

23

24 In summary, as detailed above, the DN/FONSI and final EA do not include adequate
25 specificity, mitigation measures, or monitoring requirements to ensure compliance with State
26 water quality standards.

27

28 **Lack of compliance with the Management Agency Agreement**

29

30 The DN/FONSI and final EA are inconsistent with the MAA because, as detailed in
31 written comments from the RWQCB to HTNF (dated March 1, 1999, June 14, 1999, July 28,

1 1999, August 17, 1999, April 26, 2000, and August 30, 2000), and as summarized above, the
2 DN/FONSI and final EA fail to provide adequate specificity, mitigation measures, and BMPs to
3 ensure compliance with applicable State water quality standards.
4

5 **Violations of the Humboldt-Toiyabe LRMP**
6

7 The Land and Resource Management Plan (LRMP) for the Humboldt-Toiyabe National
8 Forest contains mandatory standards that require: (1) full compliance with the MAA, and (2) full
9 implementation of BMPs as described in "Water Quality Management for Forest System Lands
10 in California" (i.e., the USFS BMP Manual) for all projects conducted by the HTNF within
11 California (see FEIS for LRMP at p. 58). Because the DN/FONSI and final EA are inconsistent
12 with the MAA by failing to incorporate specific mitigation and monitoring measures that are
13 adequate to ensure compliance with State water quality standards, and because the DN/FONSI
14 and EA fail to fully incorporate BMPs as described in the USFS BMP Manual, the decision
15 violates these mandatory standards in the LRMP.
16

17 **Violations of the National Environmental Policy Act (NEPA)**
18

19 NEPA requires that federal agencies take a 'hard look' at 'relevant factors' raised during
20 the environmental review process, and that potentially significant environmental effects be
21 evaluated and disclosed. The DN/FONSI and final EA fail to address numerous comments
22 regarding this project submitted by the RWQCB in correspondence dated March 1, 1999, June
23 14, 1999, July 28, 1999, August 17, 1999, April 26, 2000, and August 30, 2000. In particular,
24 RWQCB staff's detailed comments (dated June 14, 1999) on the preliminary EA, and RWQCB
25 staff's additional comments and suggestions dated August 17, 1999, do not appear to be
26 addressed in the final EA.
27

28 **Specific changes in the decision sought by Appellant [36 CFR § 215.14(b)(4)]**
29

30 Staff of the RWQCB request that the decision be remanded to the HTNF with
31 instructions to adequately address the comments provided by RWQCB staff throughout the

1 planning process. At a minimum, the following specific changes to the decision should be
2 required:

3
4 1. The HTNF should be directed to undertake chemical control of weeds only where there
5 is a high likelihood that State water quality standards can be met.

6
7 2. The HTNF should provide in the DN/FONSI and EA a detailed, peer-reviewed
8 monitoring plan that is adequate to demonstrate compliance with State water quality standards.
9 The monitoring plan should include all details outlined in the USFS's BMP Manual, and
10 incorporate comments received from RWQCB staff, as discussed above. The monitoring plan
11 should also describe clearly the categories of herbicide treatment types to be implemented,
12 specify the minimum percentage of sites in each treatment category that will be monitored, and
13 discuss how, and by whom, the monitoring results will be interpreted. The monitoring plan
14 should be accompanied by a quality assurance/control (QA/QC) plan.

15
16 3. The HTNF should prepare and provide an annual report that summarizes: (1) sites
17 within the Lahontan Region where herbicides were applied; (2) alternatives considered for each
18 herbicide treatment and the specific reason(s) why non-chemical alternatives were deemed
19 infeasible (note: this project-specific evaluation is required in the existing DN/FONSI and EA);
20 (3) a brief description of each project, including but not limited to: area treated, proximity to
21 surface and/or ground water, name and quantity of active ingredient(s) and chemical
22 formulation(s) used, and application method(s); (4) a summary of water and soil monitoring
23 conducted, including but not limited to: analytes, methods, detection limits, and monitoring
24 results. This annual report will be used by staff of the RWQCB to track compliance with State
25 water quality standards and the MAA.