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**Pesticides and Permits: *Clean Water Act v.
Federal Insecticide, Fungicide, and
Rodenticide Act***

by

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**PESTICIDES AND PERMITS: CLEAN WATER ACT V. FEDERAL
INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT**

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I. INTRODUCTION

A. THE PROBLEM

The problem is far from academic. Many common land management practices involve the direct application of pesticides into waterways. Such practices include the application of pesticides by aerial spraying and the spraying of invasive plants in and along waterways.¹ Two federal acts, the Clean Water Act (CWA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), contain provisions that regulate the discharge of pollutants into the waters of the United States.² While there is similarity in the language, these two Acts have contrasting objectives.³ The CWA requires a permit for the discharge of pollutants into waterways, while FIFRA

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1. See generally Ben Shouse, *Spraying Plan Approved for City*, Argus Leader, September 9, 2003, at 1B; see generally, *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002) (describing aerial spraying of pesticides over National Forests).

2. See generally Congressional Delegation Of Goals And Policies, Clean Water Act, 33 U.S.C. §1251 (2003). Registration Of Pesticides, Federal Insecticide, Fungicide, Rodenticide Act, 7 U.S.C. §136a (2003).

3. *Id.*

merely requires compliance with an Environmental Protection Agency (EPA) approved label.⁴ Three recent decisions demonstrate the problems presented by common land management practices, and the conflicts between the CWA and FIFRA.

B. A STANCE

Requiring a National Pollution Discharge Elimination System (NPDES) permit before potentially harmful agents are discharged near, or into, a body of water can reduce pollution and avoid harming the environment. The NPDES permit process ensures that a common, site specific procedure is followed.⁵ The permit system also encourages alternative methods of controlling pests that do not require a permit, such as manually removing invasive plants. An agency, or individual, must account for the damage an administered pollutant may cause, thus a permit system requires pesticide administrators to take the necessary actions prior to the discharge of a pollutant to prevent adverse effects on the environment. Increasingly, courts are compelling pesticide administrators to obtain permits before applying pesticides to waterways.⁶ Environmental groups across the nation are presenting courts with situations where the statutory procedures in place may be insufficient at protecting the nation's waters.

II. THE CASES

A. *LEAGUE OF WILDERNESS DEFENDERS V. FORSGREN*

This case begins in the national forests of Washington and Oregon.⁷ In 1999, the United States Forest Service (Forest Service) initiated an annual aerial insecticide-spraying program due to a predicted future outbreak of the Douglas Fir Tussock Moth (Moth).⁸ The Moth feeds on needles of live Douglas Firs and has the ability to devastate vast acres of forest.⁹ The program encompassed approximately 628,000 acres.¹⁰ In the 1970's, the Forest Service developed an early detection program to detect possible future outbreaks of the Moth.¹¹ The detection program predicted an outbreak for the years 2000 through 2002.¹²

4. *Id.*

5. National Pollution Discharge Elimination System, Clean Water Act, 33 USC §1342(a)(1) (2003).

6. *See* *Headwaters, Inc. v. Talent*, 243 F.3d 526 (9th Cir. 2001); *League of Wilderness Defenders*, 309 F.3d 1181 (9th Cir. 2002), *United States Public Interest Research Group v. Atlantic Salmon of Maine*, 215 F.Supp.2d 239 (2002) (describing where offshore net pens are determined a point source), *Barcelo v. Brown*, 478 F.Supp. 646 (1979) (describing where the Navy was required to obtain NPDES permit for dropping bombs in the water as it was considered a point source).

7. *League of Wilderness Defenders*, 309 F.3d at 1182.

8. *Id.*

9. *League of Wilderness Defenders v. Forsgren*, 163 F.Supp.2d 1222, 1231 (Or. 2001). The Moth reaches outbreak level about every seven to 13 years and lasts two to four years ending suddenly. *Id.* The Moth destroyed approximately 700,000 acres of trees in Washington, Oregon, and Idaho in the 1970's. *Id.* *See also*, *League of Wilderness Defenders*, 309 F.3d at 1183.

10. *Id.* at 1182.

11. *Id.* at 1183. The Forest Service observes the Moth and examines its population trends. *Id.*

12. *Id.*

The League of Wilderness Defenders (League) brought a citizens suit under the CWA claiming that the Forest Service was required to obtain a NPDES permit in order to administer the proposed spraying program.¹³ The League argued that a permit was required pursuant to the plain language of the CWA.¹⁴ The spraying project allegedly violated this statute because it “would result in the discharge of insecticides from a point source into streams and rivers without a NPDES permit.”¹⁵

The district court granted summary judgment for the Forest Service concluding that the spraying program was not considered point source pollution as defined under the point source definition for silviculture and therefore an NPDES permit was not required.¹⁶ The League appealed to the United States Court of Appeals for the Ninth Circuit (Ninth Circuit), which reversed and remanded holding that the “EPA may not be exempt from NPDES permit requirements. . . which clearly meets the statutory definition of point source by ‘defining’ it as a non-point source.”¹⁷ The court held that the aerial spraying was a point source and therefore an NPDES permit was required.¹⁸

B. *HEADWATERS, INC. V. TALENT IRRIGATION DISTRICT*

This case originates in Jackson County, Oregon where Talent Irrigation District (Talent) provides water to its clients through a series of irrigation canals.¹⁹ Every two weeks during the growing season, Talent applied an aquatic herbicide to its canals to control weeds and vegetation subsequently slowing the flow of water.²⁰ Headwaters brought a citizen suit against Talent under the CWA for discharging a pollutant into canals without an NPDES permit.²¹ Headwaters sought a declaratory judgment and injunction, arguing that the EPA approved label, on the herbicide, did not require an NPDES permit.²²

13. *Id.* at 1182.

14. *League of Wilderness Defenders*, 163 F.Supp.2d at 1240.

15. *Id.*

16. *League of Wilderness Defenders*, 309 F.3d at 1182-1183. Protection of the Environment Environmental Protection Agency Administered Programs: The National Pollution Discharge Elimination System: Silvicultural Activities, 40 C.F.R. §122.27 (2003). Contained in the Code of Federal Regulations is the provision

(a) Permit requirement. Silvicultural point sources, as defined in this section, as point sources subject to the NPDES permit program. (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 non-point 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. However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit (*See* 33 CFR §209.120 and part 233).

17. *League of Wilderness Defenders*, 309 F.3d at 1190.

18. *Id.*

19. *Headwaters, Inc.*, 243 F.3d at 528.

20. *Id.* Talent applies Magnacide H with an active ingredient of toxic acrolein. *Id.* Talent uses a tank truck and a hose to apply the herbicide. *Id.*

21. *Id.* at 529.

22. *Id.* Headwaters claimed violation of 33 U.S.C. §1342, the section requiring an NPDES permit

The district court granted summary judgment for [Talent]. The court held that the canals were waters of the United States covered by the CWA, and that the active ingredient in Magnacide H was a pollutant. Nevertheless, the court concluded that no permit was required because the label on the herbicide, approved by the EPA under FIFRA, did not require the user to acquire a permit.²³

In 2000, the Ninth Circuit reversed concluding a “label under FIFRA did not eliminate [Talent’s] obligation to obtain a NPDES permit.”²⁴

C. *ALTMAN V. TOWN OF AMHERST*

In 1995, the Town of Amherst (Amherst), New York began applying pesticides to wetlands for the purpose of controlling mosquitoes.²⁵ In 1998, residents of the town brought a citizens suit seeking declaratory and injunctive relief against Amherst.²⁶ The citizens alleged Amherst violated the CWA by discharging pollutants into federal waters without a NPDES permit.²⁷ Amherst filed a motion to dismiss claiming that an NPDES permit was not required and pesticides applied for beneficial use are not considered pollutants under the language of the CWA.²⁸

The District Court granted Amherst’s motion to dismiss concluding that the pesticide program was “more appropriately regulated under FIFRA” and a NPDES permit was not required.²⁹ In 2002, the United States Court of Appeal for the Second Circuit (Second Circuit) vacated the judgment and remanded concluding

[u]ntil the EPA articulates a clear interpretation of current laws – among other things, whether properly used pesticides released into or over water of the United States can trigger the requirement for NPDES permits – the question of whether properly used pesticides can become pollutants that violate the CWA will remain open.³⁰

D. EPA’S POSITION

Recent opinions are causing both confusion and concern. In July of 2003, the EPA issued a memorandum addressing their interpretation of the CWA on the issue of pesticide regulation under FIFRA.³¹ The EPA maintains that under certain situations, the CWA does not require a permit for the application of FIFRA approved, and properly administered, pesticides.³² The circumstances include “the application of pesticides directly to waters of the United States in order to control pests [and] [t]he application of pesticides to control pests that are present over waters

for the discharging of a pollutant. *Id.*

23. *Id.* at 528.

24. *Id.* at 529.

25. *Altman v. Town of Amherst*, 33 E.L.R. 20037(a) (2d Cir. 2002).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Environmental Protection Agency Notice, 68 Fed.Reg. 48385 (August 13, 2003).

32. *Id.* at 48387.

of the United States that results in a portion of the pesticides being deposited to waters of the United States.”³³ The EPA pointed out that most states opt not to require a permit for the application of pesticides.³⁴ However, the EPA’s August 2003 memorandum did not nullify decisions by individual states imposing permit requirements for the application of pesticides to water ways.³⁵

Under FIFRA, the EPA maintains that it must consider the effects of the pesticides on the environment.³⁶ Issues such as whether the pesticide “will perform its intended function without unreasonable adverse effects on the environment, and whether when used in accordance with widespread and commonly recognized practice the pesticide will not generally cause unreasonable adverse effects on the environment.”³⁷ The EPA stated that the “application of a pesticide to waters of the U.S. would require an NPDES permit only if it constitutes the ‘discharge of a pollutant’ within the meaning of the [CWA].”³⁸ The two situations mentioned above are circumstances where the EPA defines pesticides as not being a pollutant; thus an NPDES permit would not be required.³⁹ The EPA stated “under this interpretation, a pesticide applicator is assured that complying with environmental requirements under FIFRA will mean that the activity is not also subject to the distinct NPDES permitting requirements of the CWA.”⁴⁰

III. ANALYSIS

FIFRA states the EPA will register a pesticide if “it will perform its intended function without unreasonable adverse effects on the environment; and when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.”⁴¹ The CWA states the discharging of a pollutant from a point source into the waters of the United States requires a NPDES permit.⁴² The two statutes have distinct purposes where potential conflict exists. More specifically, whether a NPDES permit is required when a regulated pesticide is discharged into waters of the United States in conformity with it’s label is a concern of both statutes interpretation. FIFRA tends to be more lenient on regulating adverse impacts on the environment by only ensuring general accordance while the CWA has firm regulations to protect the environment from adverse impacts.⁴³

33. *Id.* Examples include application to control mosquito larvae or aquatic weeds in U.S. waters; aerial discharge of insecticides over forest canopy where U.S. waters exist; and applying insecticides over water for the control of adult mosquitoes. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 48388.

41. Registration of Pesticides, Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C.A. §136a (5)(C)(D) (2003).

42. National Pollution Discharge Elimination Act, Clean Water Act, 33 U.S.C. §1342(a) (2003). The permit required is issued by the National Pollution Discharge Elimination System. *Id.*

43. Registration of Pesticides, Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136a (5)(D) (2003). Effluent Limitations, Clean Water Act, 33 U.S.C. §1311 (1995). CWA formally known as the Federal Water Pollution Control Acts (2003).

A. IMPACTS ON ENVIRONMENT

In numerous agricultural areas “pesticides constitute a major source of pollution.”⁴⁴ FIFRA does not limit the amount of pesticide discharged so long as it has an EPA approved label and is applied accordingly.⁴⁵ Legal controversy is beginning to surround both FIFRA and the CWA as demonstrated in recent cases, which have ignited the controversy.⁴⁶ Despite interpretations issued by the EPA, the aforementioned opinions present advancement for the protection of the environment.⁴⁷

When agencies are required to obtain NPDES permits for the discharge of pollutants, a thorough evaluation must be completed.⁴⁸ The evaluation analyzes how such discharge will impact the environment, including how it is going to impact specific species and water sources.⁴⁹ This examination must amount to a *hard look* at such impacts.⁵⁰ It also requires that all “foreseeable direct and indirect impacts” be reported.⁵¹ These procedures assist in fully analyzing all possible impacts on the environment. The permit system takes individual conditions into consideration, ensuring the protection of the environment in all areas.⁵² In contrast, a label on a bottle does not ensure that any directions will be followed, and does not take into consideration the sensitivities of specific areas where a pollutant could have devastating effects.

When a permit system is followed a detailed environmental evaluation would have to be performed before discharging pesticides. In *League of Wilderness*, the Forest Service completed an evaluation expressing their program’s goals and the environmental impacts of the pesticide spraying.⁵³ The League claimed the evaluation was inadequate because the Forest Service failed to report the impacts of drifting pesticide outside the target areas.⁵⁴ The court concluded the evaluation failed to amount to a “reasonably complete discussion of possible mitigation measures.”⁵⁵ The insufficient analysis of the environmental impacts in *League of Wilderness* revealed the inaccuracies of the spraying program, and allowed a remedy before any damage was done. Prevention is the main benefit of a permit system.

The EPA stated the interpretations in their memorandum are consistent with how the statutes have been applied for more than 30 years.⁵⁶ The

44. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES §5:96 (2003).

45. *Id.* FIFRA is “a comprehensive federal statute that regulates pesticide use, sales, and labeling, and grants enforcement authority to the EPA.” *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 559 (9th Cir. 1995).

46. *Id. Headwaters, Inc.*, holding the application of herbicides into irrigation canals as point source under CWA, and *League of Wilderness Defenders*, holding the application of pesticides from an aircraft needed a NPDES permit. *Id.*

47. *Id.*

48. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989).

49. *Id.*

50. *Id.* (*Emphasis added*).

51. *City of Davis v. Coleman*, 521 F.2d. 661, 676 (9th Cir.1975). *See also* 40 C.F.R. §1502.16 (2003).

52. *Headwaters, Inc.*, 243 F.3d at 530.

53. *League of Wilderness Defenders*, 309 F.3d at 1192.

54. *Id.* at 1191.

55. *Id.* at 1192.

56. 68 Fed.Reg. at 48387.

EPA does not issue NPDES permits solely for the direct application of a pesticide to target a pest that is present in or over a water of the United States, nor had it ever stated in any general policy or guidance that an NPDES permit is required for such applications.⁵⁷

Traditionally, NPDES permits have not been required as concerns of water quality and supply mount some measures should be taken to protect the nation's water sources.

In *Headwaters, Inc.*, a single application of Magnacide H caused the death of over 92,000 fish.⁵⁸ The court reasoned that the use of this product did not need a permit because it was regulated by FIFRA.⁵⁹ The labeling system did nothing to prevent the unnecessary death of thousands of fish. *Headwaters, Inc.* confirms that labels do not always curb the adverse impacts on the environment.

B. REQUIRING PERMITS

League of Wilderness Defenders focused on what constitutes point source pollution to determine if a permit was a requirement.⁶⁰ The League needed to establish that the Forest Service was discharging 'pollutants' from a point source.⁶¹ The League argued the application of pesticides by aircraft was a point source and the insecticides discharged were pollutants pursuant to the definitions in the CWA.⁶² The court agreed and ordered the Forest Service to obtain a permit.⁶³

The Forest Service attempted to interpret the statutes in their favor.⁶⁴ The CWA and its prodigy were created by Congress, and if a statute is clear and unambiguous, effect must be given to the original intent of Congress.⁶⁵ The attempts of the Forest Service were unpersuasive and the court concluded the CWA statutes in dispute were clear and unambiguous.⁶⁶

The EPA claimed that pesticides administered according to FIFRA do not fall into the definition of a pollutant provided by the CWA.⁶⁷ EPA stated that pesticides are neither chemical nor biological wastes because the term waste refers to something "eliminated or discarded as no longer useful or required after the completion of a process."⁶⁸ It was argued since pesticides applied in compliance with FIFRA are "EPA-evaluated products designed, purchased and applied to

57. *Id.*

58. *Headwaters, Inc.*, 243 F.3d at 528. Magnacide H active ingredient is acrolein and the court determined it was a pollutant under Definitions, Clean Water Act, 33 U.S.C. §1362. *Id.*

59. *Id.* at 529.

60. *League of Wilderness Defenders*, 309 F.3d at 1182. Under the CWA, 33 U.S.C. §1251-§1387, the discharging of pollutants from a point source requires a permit issued by the NPDES. *Id.*

61. *Id.* at 1184. Pollutant is defined as "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." Definitions, Clean Water Act, 33 U.S.C. §1362(6) (*Emphasis added*).

62. *Id.* at 1185.

63. *Id.*

64. *Id.* at 1185-1186.

65. *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

66. *League of Wilderness Defenders*, 309 F.3d at 1185-1186.

67. 68 Fed.Reg. at 48387.

68. *Id.*

perform their intended purpose of controlling target organisms in the environment," therefore they are not wastes.⁶⁹ However, there was no dispute in *League of Wilderness* that the insecticides were pollutants as defined by the CWA.⁷⁰

The insecticide in *Headwaters, Inc.* bore a label with warnings of toxicity to wildlife and fish, along with danger to lakes, ponds and streams or places where runoff or flooding could occur.⁷¹ These are serious and broad warnings. *Headwaters, Inc.* clearly demonstrates that the labeling system cannot ensure the protection of the environment. When dealing with toxic chemicals, strict precautions should be taken instead of relying on the presumption that people will actually read the labels and comply with them. The court in *Talent* agreed that a label does not negate the obligation to obtain a NPDES permit.⁷² Adherence to a permit system would force people to become aware of the local circumstances and consider the effects of the application of harmful agents.

The EPA curtails around the local sensitivities issue by reiterating that states may impose further restrictions on the application of pesticides in accordance with their local water quality needs.⁷³ The problem then arises of which agency has the responsibility to regulate that function. Most states will merely comply with the bare necessity and ignore the local environmental needs.⁷⁴

C. PROTECTING THE ENVIRONMENT

The purpose of permits and regulations is to protect the environment by considering the impacts on the environment. Traditionally, the EPA has argued that the labeling process is sufficient.⁷⁵ The EPA has also stated "the overall economic benefits of allowing the use of the product outweigh adverse environmental effects."⁷⁶ The EPA's purpose should be to enhance the environment, not to protect the economy.

Sometimes, it is beneficial to leave the environment alone and let nature take its course. Although *League of Wilderness Defenders* focused on the water pollution aspect of the spraying program, it also expressed concern for the disruption of natural environmental processes.⁷⁷ Moth outbreaks commonly occur in the wild and play an important role in forest ecology by thinning forests and creating open spaces.⁷⁸ If the Moth populations fall too low, they will no longer be able to naturally thin the forest; which is vital to the survival of the inhabitants of the

69. *Id.* at 48388.

70. *League of Wilderness Defenders*, 309 F.3d at 1184. Definitions, Clean Water Act, 33 U.S.C. §1362(6) (2003).

71. *Headwaters, Inc.*, 243 F.3d at 530.

72. *Id.* at 532.

73. 68 Fed.Reg. at 48388.

74. *See* No Spray Coalition, Inc. v. City of New York, 55 ERC 1830 (2002) (holding NPDES permit was not necessary for aerial spraying of insecticides over New York because label did say one was needed).

75. *See generally*, *Headwaters, Inc.*, 243 F.3d 530 (9th Cir. 2001) and *Altman*, 33 ELR 20037a (2d Cir. 2002) (describing when a labeling system might not be effective and waiting for the E.P.A. to issue a position).

76. *Headwaters, Inc.*, 243 F.3d at 531.

77. *League of Wilderness Defenders*, 309 F.3d at 1183.

78. *Id.*

forest.⁷⁹ The Forest Service's own research emphasized the importance of the Moth as being an "essential part of the forest ecosystem."⁸⁰ The defoliation by the Moths actually helps to promote specie richness by creating food for predators.⁸¹

IV. CONCLUSION

Until the EPA announces a final decision on the issue of pesticide application, it remains open season on the environment. If the EPA wants to end the unnecessary destruction of millions of species and protect the nation's precious water supply, a NPDES permit for the discharging of all harmful agents should be required as provided by the CWA.

Recent cases require agencies to more carefully and completely analyze environmental impacts imposed by programs and procedures. *League of Wilderness Defenders* presents strict compliance with the provisions of the CWA. *Headwaters, Inc.* asserts that the provisions under FIFRA are not always sufficient for the protection of the environment and there should also be compliance with the CWA. *Altman* recognized the conflict between the CWA and FIFRA and asked the EPA to clarify its position. Increasingly, courts are interpreting that pesticides are pollutants under the CWA despite a label monitored by FIFRA, thus requiring a NPDES permit when applied to the waters of the United States.⁸² Requiring agencies to fully examine and report environmental effects and mitigation measures of all applications will lead to better care of the environment by commanding agencies to be more attentive and efficient. By compelling agencies and individuals to educate themselves and adhere to sound regulations, the environment and all that thrive off its wellbeing will triumph.

79. *League of Wilderness Defenders*, 163 F.3d at 1230.

80. *Id.* at 1261. The Forest Service's research suggested the forest recovers well from the damage inflicted by the Moth outbreak and in as little as ten years "growth rates may surpass pre-outbreak rates." *Id.*

81. *Id.*

82. *League of Wilderness Defenders*, 309 F.3d at 1182-1183.