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When Is a Pesticide Not a Pollutant? Never: An Analysis of the EPA's Misguided Guidance

by

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ABSTRACT: The EPA oversees the NPDES program under the CWA and is also responsible for the registration and labeling of pesticides under FIFRA. In a 2001 case, the Ninth Circuit found that pesticides, regulated under FIFRA, discharged into water require an NPDES permit. The EPA recently released Guidance that pesticides applied in compliance with FIFRA do not require NPDES permits under the CWA. This Note reviews these two statutes' histories in an effort to demonstrate that the EPA's Guidance is incorrect.

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I. INTRODUCTION

Imagine that you are a farmer in the Pacific Northwest who wants to apply pesticides to a stream adjacent to your fields that meanders through your property and then empties into a major river. The purpose of using the pesticide is to kill the aquatic weeds that have grown in the stream and blocked the free flow of water, which functions to irrigate your fields. You purchase an aquatic pesticide created for use in water to remove aquatic weeds. You review the label instructions and apply the pesticide to the stream in compliance with all the requirements on the label. But, did you need a permit to put the pesticide into the body of water?

In a 2001 case,[1] the Ninth Circuit held that applicators[2] who apply pesticides directly to waters of the United States must obtain a National Pollution Discharge Elimination System (NPDES) permit as required by the Clean Water Act (CWA).[3] The court discussed the relationship between the NPDES system under the CWA and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[4] which regulates pesticides. The conflict between these two statutes exists because of their overlapping jurisdictions: the CWA regulates discharges of pollutants into waters,[5] and FIFRA regulates pesticides wherever they are used.[6]

The court applied the canon of statutory construction that, if possible, overlapping statutes should be construed so as to give effect to both.[7] The court concluded that "[t]he CWA and FIFRA have different, although complementary, purposes."[8] In making this conclusion, the court relied in part on the Environmental Protection Agency's (EPA) amicus brief in which the agency stated "that pesticides containing pollutants may be discharged from point sources into the navigable waters *only pursuant to a properly issued CWA permit.*"[9] Though the court's decision is not inconsistent with previous

1. Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 528 (9th Cir. 2001).

2. Throughout this Note, references to an "applicator" indicate pesticide applicators and users.

3. 33 U.S.C. §§ 1251–1387 (2000). Though the CWA has gone by many names throughout the course of its evolution, in this Note I will generally refer to it as the CWA to avoid confusion.

4. 7 U.S.C. §§ 136–136y (2000).

5. 33 U.S.C. §§ 1251–1387.

6. 7 U.S.C. §§ 136–136y.

7. *See* Morton v. Mancari, 417 U.S. 535, 551 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

8. Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 532 (9th Cir. 2001).

9. *Id.* (emphasis added).

decisions regarding the need for NPDES permits,[10] it has resulted in legal uncertainty regarding whether the application of pesticides directly to waters of the United States requires an NPDES permit.[11] After *Headwaters*, it was unclear whether our hypothetical farmer needed a CWA permit to apply the aquatic pesticides to the stream running through his property.

The EPA responded to this issue by creating an Interim Statement and Guidance document ("Guidance").[12] The Guidance articulated the agency's position that "the application of a pesticide to waters of the United States consistent with all relevant requirements of FIFRA does not constitute the discharge of a pollutant that requires an [NPDES] permit."[13] Not only is this position contrary to the EPA's previous position on this issue, it is also contrary to Congress's purpose and intent in creating the CWA. Courts apply a highly deferential standard to agency interpretations of laws they are empowered to administer.[14] Nonetheless, even under the highly deferential review afforded an agency's interpretations of the statutes it administers, the EPA's Guidance should be ruled an impermissible interpretation of the CWA.

Part II of this Note discusses the two statutes at issue in the Guidance. A thorough discussion of the legislative history of both the CWA and FIFRA is essential to understanding why the EPA's Guidance is an inappropriate interpretation of these statutes even under a court's deferential standard of review. Part III reviews the lower courts' interpretations of when an NPDES permit is required under the CWA. This section focuses on courts' plain-language interpretations of the statute, as well as the significant role that the CWA's legislative history plays in its interpretation. Part IV presents a discussion of the main components of the EPA's Guidance, specifically examining the EPA's logic and rationale. Part V argues that the EPA's interpretation of the CWA and FIFRA is misguided. Despite a reviewing court's highly deferential standard of review of the EPA's interpretation, the EPA's interpretation is inappropriate both because Congress has directly addressed this issue, and because the EPA's construction of the CWA is impermissible. Part V also gives an alternative method of regulation by

10. *See infra* Part III and accompanying text (discussing court interpretations of the terms of the CWA).

11. *See* Altman v. Town of Amherst, 47 Fed. Appx. 62, 67 (2d Cir. 2002) (finding that "[u]ntil the EPA articulates a clear interpretation of current law . . . the question of whether properly used pesticides can become pollutants that violate the CWA will remain open").

12. Interim Statement and Guidance on Application of Pesticides to Waters of the United States in Compliance with FIFRA, 68 Fed. Reg. 48,385 (Aug. 13, 2003) [hereinafter Guidance].

13. *Id.*

14. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–49 (1984) (delineating the standard by which "a court reviews an agency's construction of the statute which [the agency] administers").

noting the states' ability to set and enforce stricter standards than the federal EPA.

II. HISTORICAL DEVELOPMENT OF THE CWA AND FIFRA

The history of regulation and legislation that spawned both the CWA and FIFRA is extensive, and is necessary to understand Congress's intent behind the statutes. This background is further necessary because Congress's intent is an integral component of a court's determination of the appropriateness of an agency's interpretation of statutes it administers.

A. HISTORY OF THE CWA

Federal regulation of water pollution can be traced to the 1890 Rivers and Harbors Act.[15] This Act was revised in 1899[16] to regulate the discharge of "refuse" into the waters of the United States, and the Act is generally referred to as the Refuse Act.[17] Under the Refuse Act, Congress established a federal permit system that "prohibit[ed] . . . the discharge of any matter into the navigable waters" without a permit.[18] Though the Refuse Act provided a mechanism for federal regulation of discharges into the navigable waters, this potential control was never fully realized because the Refuse Act was not enforced for the majority of its existence.[19]

Congress first enacted the modern-day conception of the CWA in 1948 as an anti-pollution statute called the Water Pollution Control Act ("WPCA").[20] Under the WPCA, Congress "assigned powers for enforcement of water pollution control to Governors of the States."[21] The federal government played a very limited role and was authorized only to support and assist the states in their control efforts.[22] Congress amended the Act five

15. *See* 33 U.S.C.A. § 403 (2000) (noting in the historical notes the history of the Rivers and Harbors Act and its various revisions).

16. 33 U.S.C. §§ 401–467n.

17. *See* WILLIAM H. RODGERS, JR., 2 ENVIRONMENTAL LAW 252 (2d ed. 1994) (noting the role of this statute as an early endeavor in water-pollution control and its role in shaping the current CWA). Although the generic language of the Refuse Act may appear to evidence early efforts at environmentalism, its true purpose was economic: to ensure the navigability of the nation's waters.

18. S. REP. NO. 92-414, at 7 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3672.

19. *See* William H. Rodgers, Jr., *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. PA. L. REV. 761, 768 (1971) (noting that the agency responsible for enforcement of the Refuse Act "has been but sporadically faithful in screening issuance of [Refuse Act] permits to industrial polluters").

20. *See* RODGERS, *supra* note 17, at 252 (discussing the passage of the 1948 Federal Water Pollution Control Act).

21. S. REP. NO. 92-414, at 2.

22. *Id.*

times in the 1950s and 1960s[23] and began to increase federal involvement in the 1956 amendments.[24]

Notably, the WPCA did not replace or supersede the Refuse Act.[25] The focus of the WPCA was on ambient water quality standards; specifically, WPCA standards were based on the quantity of pollutants in a body of water, rather than on the discharge of pollutants into the waters.[26] In fact, the Refuse Act permit program specifically survived the WPCA, as evidenced by a 1970 executive order requiring the Army Corps of Engineers to establish and enforce the permit program.[27] Soon thereafter, the Corps began regulating discharge of refuse into the nation's waters pursuant to final regulations promulgated on April 7, 1971.[28] The Corps's efforts were short-lived, however, because Congress amended the CWA in 1972 to include a permitting program.

B. THE 1972 AMENDMENTS TO THE CWA

Congress amended the CWA extensively in 1972, an action that reflected the general expansion of federal environmental legislation at that time.[29] Congress felt that a "broad policy and a coordinated effort [were] imperative" in order to address "all forms of environmental pollution."[30] Congress was particularly concerned about the "health of the American people."[31] In light of these concerns, Congress's goal was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[32]

An integral part of achieving this goal was the minimization of pollutants discharged into waters.[33] Thus, Congress declared that "the

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23. The amendments were: the 1956 Water Pollution Control Act, the 1961 Federal Water Pollution Control Act Amendments, the 1965 Water Quality Act, the 1966 Clean Water Restoration Act, and the 1970 Water Quality Improvement Act. *Id.*

24. *See* S. REP. NO. 92-414, at 2 (discussing the evolution of the CWA's various amendments).

25. *Id.* at 70–71.

26. *See* Mark C. Van Putten & Bradley D. Jackson, *The Dilution of the Clean Water Act*, 19 U. MICH. J.L. REFORM 863, 869 (1986) (discussing the ambient standards established under the WPCA).

27. Exec. Order No. 11,574, 3 C.F.R. 188, 188–89 (1970), *reprinted in* 33 U.S.C. § 407 (2000).

28. S. REP. NO. 92-414, at 70.

29. *See* Van Putten & Jackson, *supra* note 26, at 866–67 (noting the variety and breadth of the expansion of federal environmental statutes in the early 1970s).

30. S. REP. NO. 92-414, at 3.

31. *Id.*

32. 33 U.S.C. § 1251(a) (2000).

33. *See* S. REP. NO. 92-414, at 72 (noting that the permit program is the "most effective control mechanism").

discharge of any pollutant is illegal" without a permit.[34] To facilitate this, Congress created the National Pollution Discharge Elimination System (NPDES).[35] The roots of the NPDES program stem from the permit program first established under the Refuse Act.[36] Congress acknowledged the efforts and successes of the Refuse Act permit program, but determined that it was "weak in two important respects: It [was] being applied only to industrial polluters, and authority [was] divided between two Federal agencies."[37]

As a result, Congress clearly established that all discharges into waters required NPDES permits and that the EPA, in conjunction with state agencies, was to implement the NPDES permit program.[38] Specifically, the EPA would create a permit program for any discharge of any pollutant into waters of the United States.[39] Congress ensured that the EPA program would be extensive[40] by creating a broad definition of pollutant.[41]

With the creation of the NPDES program, Congress marked a change in the focus of water protection from ambient water quality standards to effluent/discharge standards.[42] This change is significant because the two control strategies reflect vastly different philosophies of water-quality protection.[43] Ambient standards "assume[] a free use of water for waste disposal up to a point of 'unreasonableness,' however legally defined."[44] Conversely, effluent/discharge "prohibitions . . . focus on the source [of a pollutant]—not the size, flow and use of the receiving body of water."[45] As a result of this change, dischargers could no longer release pollutants into waters in hopes that mere dilution would effectively clean the water.[46]

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34. 33 U.S.C. § 131(a).

35. *Id.* § 402(a).

36. *See* RODGERS, *supra* note 17, at 260 (discussing the similarities regarding the approach to discharges of the Refuse Act and the CWA).

37. S. REP. NO. 92-414, at 5.

38. *Id.* at 5–6.

39. 33 U.S.C. § 1342(a)(1).

40. S. REP. NO. 92-414, at 75.

41. *Id.* Under section 502(6) of the CWA, Congress broadly defined pollutant to include "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." 33 U.S.C. § 1362(6).

42. *See* S. REP. NO. 92-414, at 70 (noting the "redirecting [of] the control program from ambient standards to direct effluent controls").

43. RODGERS, *supra* note 17, at 259.

44. *Id.* at 260. "[Ambient standards] presuppose[] that the enforcement authority has the burden of proving that discharges harm marine resources." *Id.*

45. *Id.* Further, "[p]ollution dilution is not part of the [effluent/discharge] lexicon. The concept is absolutist." *Id.*

46. *Id.*

Rather, Congress's mandate was clear: dischargers of pollutants into water were not allowed the necessary NPDES permit.[47]

Congress's 1972 amendments not only shifted water pollution ideology from ambient standards to discharge standards, but also shifted the burden of proving a discharge's effect on the environment.[48] In effect, these changes established that "the discharge of pollutants to navigable waters is not a right."[49]

Congress also stated "that one of the most important aspects of the . . . Refuse Act permit program has been the accumulation for the first time of detailed information on the character of industrial pollution discharges."[50] This comment indicates Congress's approval of this component of the Refuse Act system, and further demonstrates an acknowledgment of the purely informational benefits that a permitting program can provide.

The evolution of the CWA demonstrates Congress's intent to require permits for all discharges of pollutants into the nation's waters. This is evidenced in Congress's efforts to integrate the permit requirements from the Refuse Act into the CWA, in the shift from ambient to discharge standards, and in the change in the burden of proving the effects of discharges. These changes acknowledge that water quality improvements will result from the control of effluents.[51] The NPDES program indicates Congress's intent in its very name: the elimination of pollution.[52]

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47. *Id.* at 261.

48. RODGERS, *supra* note 17, at 261. This is especially significant when considering the many iterations and evolutions of the CWA prior to the 1972 amendments, and that all previous versions of the CWA had focused on ambient water standards. *Id.* Though the major focus of the CWA's regulatory scheme after the 1972 amendments is on discharge standards, it is important to note that ambient standards still play a role, especially in the regulation of Total Maximum Daily Loads (TMDL). *See* 33 U.S.C. § 1313(d) (2000) (discussing the regulation of TMDLs under the CWA).

49. ENVTL. PROT. AGENCY, WATER PERMITTING 101, http://www.epa.gov/npdes/pubs/101pape.pdf (last visited Feb. 18, 2004) (on file with the Iowa Law Review).

50. S. REP. NO. 92-414, at 6 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3673. A section of the Senate Report entitled "Adequacy of Information" notes that "the federal water pollution control program suffers from a lack of information concerning dischargers, amounts and kinds of pollution, abatement measures taken, and compliance." *Id.*

51. *See* RODGERS, *supra* note 17, at 262 (noting the shift that occurred when Congress enacted the 1972 amendments away from an overall water quality standard to an effluent limitations standard). There are water-quality standards under the CWA, but the overall focus of the Act is on permitting and controlling point sources. *Id.* This trend is different from earlier water-protection legislation.

52. S. REP. NO. 92-414, at 72.

C. THE EPA'S ADMINISTRATION OF THE CWA AND NPDES PROGRAM

Section 402 of the CWA provides that the EPA "may, after opportunity for a public hearing, issue a permit for the discharge of any pollutant."[53] Pursuant to Congress's grant of authority,[54] the EPA promulgated regulations implementing the NPDES program.[55] The EPA further clarified that an NPDES permit is required in its definition of "discharge of a pollutant" as "any addition of any 'pollutant' or combination of pollutants to 'waters of the United States' from any 'point source.'"[56] Additionally, the EPA defined "pollutant" as "dredged spoil, solid waste, incinerator residue, filter backwash, 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."[57]

The EPA also set up monitoring systems in the NPDES program. NPDES permit holders have a variety of reporting requirements, including planned changes, anticipated non-compliance, transfers, monitoring results, and discharges exceeding notification levels.[58] When creating the NPDES program, Congress stated "that one of the most important aspects of the . . . Refuse Act permit program has been the accumulation for the first time of detailed information on the character of industrial pollution discharges."[59] The EPA's monitoring requirements continue this collection of information essential to achieving Congress's goal.

The EPA's regulations under the NPDES program provide for two types of permits that the EPA can grant after a hearing: individual and general permits.[60] As the designations imply, the EPA grants individual permits to specific facilities for specific discharges.[61] Similarly, general permits are

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53. Federal Water Pollution Control Act, 33 U.S.C. § 1342 (2000). Congress further noted that it was a "national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. § 1251(a)(1). Though the time for achievement of this goal has long since passed, Congress's intent regarding the need for water-pollution control is evident.

54. Pursuant to the authority granted to it by Congress, the EPA may enact such regulations as "are necessary to carry out the provisions" laid out by Congress in the text of the CWA for NPDES permits. 33 U.S.C. § 1342(a)(1).

55. EPA Administered Permit Programs: The National Pollutant Discharge Elimination System, 40 C.F.R. § 122 (2004) [hereinafter *National Pollutant Discharge Elimination System*].

56. *Id.* § 122.2.

57. *Id.* Note that the EPA's definition of "pollutant" is the same as that actually listed in the CWA by Congress. 33 U.S.C. § 1362(6).

58. *National Pollutant Discharge Elimination System*, *supra* note 55, §§ 122.41–.42.

59. S. REP. NO. 92-414, at 6 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3673.

60. *National Pollutant Discharge Elimination System*, *supra* note 55, § 122.28.

61. *Id.* § 122.21.

granted to categories of similar point sources that have common components, such as location and type of discharge.[62]

The EPA has attempted to achieve Congress's intent in passing the CWA by adopting broad interpretations of when a permit is required.[63] As with many administrative agencies, the policies and statutory interpretations that the EPA has authority to enforce often change from administration to administration.[64] Nonetheless, Congress's intent regarding the scope of the CWA remains constant.[65]

D. HISTORY OF FIFRA

In 1910, Congress enacted the first piece of pesticide regulation in the Insecticide Act.[66] The post-World War II shift in agricultural production to monoculture fields and industrialized processes caused increased pesticide use.[67] In 1947 Congress replaced the Insecticide Act with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[68] through which Congress intended "to protect purchasers of insecticides from deception."[69]

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62. *Id.* § 122.28.

63. *See* WATER PERMITTING 101, *supra* note 49 ("The term *pollutant* is defined very broadly by the NPDES regulations and litigation . . . ."); ENVTL. PROT. AGENCY, NPDES PERMIT PROGRAM BASICS FREQUENTLY ASKED QUESTIONS ("The term pollutant is defined very broadly in the Clean Water Act because it has been through 25 years of litigation."), http://cfpub.epa.gov/npdes/faqs.cfm?program_id=45 (last visited Jan. 18, 2005) (on file with the Iowa Law Review).

64. *See* Eric Pianin, *Senators to Subpoena White House*, WASH. POST, June 24, 2002, at A02 (discussing the change in the EPA's air-pollution standards between the Clinton and Bush administrations).

65. Though Congress and the EPA both look to more than whether a discharge is a pollutant in determining the need for an NPDES permit, this Note focuses on whether pesticides are pollutants under the statutory and regulatory definitions. As a result, it will not discuss in detail the other component requirements that trigger the need for an NPDES permit.

66. Insecticide Act of 1910, ch. 191, 36 Stat. 331, *repealed by* Federal Insecticide, Fungicide, and Rodenticide Act of 1947, ch. 125, § 16, 61 Stat. 172. This original Act "focused on prohibiting the sale of fraudulently labeled pesticides . . . [but] did not establish specific standards for pesticides nor did it require their registration with the government." ELIZABETH C. BROWN ET AL., ENVIRONMENTAL LAW REPORTER, PESTICIDE REGULATION DESKBOOK 10 (2001).

67. CHRISTOPHER J. BOSSO, PESTICIDES AND POLITICS: THE LIFE CYCLE OF A PUBLIC ISSUE 28 (1987). The pesticides that began to be used during that time period have names that are still recognizable today, including: DDT; chlordane; heptachlor; dieldrin; 2,4-D; 2,4,5-T; parathion; and malathion. *Id.* at 30.

68. 7 U.S.C. §§ 135–135(k) (Supp. 1946).

69. Sandra L. Feely, *Dancing Around the Issue of FIFRA Preemption: Does It Really Still Matter That the Supreme Court Has Not Made a Decision?*, 16 J. NAT. RES. & ENVTL. L. 125, 127 (2002) (citing William T. Smith, III & Katheryn M. Coonrod, Cipollone*'s Effect on FIFRA Preemption*, 61 UMKC L. REV. 489, 490 (1991)). In fact, a *New York Times* article published on the day that Congress enacted FIFRA stated that the statute's purpose was to "lessen the chance of housewives putting bug instead of baking powder into their biscuits." *New Law to Color Poisons*, N.Y. TIMES, June 26, 1947, at 26.

When Congress first passed FIFRA, its focus was on the "safety of immediate pesticide users," and not the potential environmental effects of pesticides.[70] Congress authorized the Department of Agriculture (DOA) to enforce FIFRA, but the DOA's authority to regulate was limited to pre-market labeling requirements.[71] The statute required manufacturers "to submit the product's name, a copy of the label, and a statement about all product claims" to the DOA.[72] The concept of pre-market clearance of pesticides was a giant step for Congress, which promised that the requirement "would be of little consequence to the honest operator."[73]

During the environmental era of the 1960s and 1970s, public concern regarding pesticide use expanded beyond the risk to applicators to the variety of potentially adverse effects on the environment and human health that pesticides could cause.[74] Rachel Carson's revolutionary and renowned 1962 book, *Silent Spring*, alerted the nation to the potential impacts of pesticides on humans, animals, and plant life.[75] The publication of this book marked the beginning of increased public concern, as well as congressional concern, regarding the impacts of pesticide use on the environment and public health.[76]

E. THE 1972 AMENDMENTS TO FIFRA

In 1972, Congress amended FIFRA extensively with the passage of the Federal Environmental Pesticide Control Act (FEPCA).[77] This amendment converted the original labeling law "into a comprehensive regulatory statute."[78] Like the 1972 amendments to the CWA, the scope of Congress's

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70. Feely, *supra* note 69, at 128.

71. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 991–92 (1984) (discussing the changes in FIFRA resulting from the 1972 amendments).

72. BOSSO, *supra* note 67, at 55.

73. *Id.*

74. Feely, *supra* note 69, at 128.

75. *See generally* RACHEL CARSON, SILENT SPRING (1962).

76. *See* S. REP. NO. 92-838, at 8 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4000 (noting that "[i]n the early 1960's [there was] increasing public concern regarding the longer run public health and ecological effects of some of the chemical pesticides"); *see also* BOSSO, *supra* note 67, at 118–19 (noting the role of *Silent Spring* in arousing the general public to be concerned about pesticides).

77. Pub. L. No. 92-516, 86 Stat. 973 (1972).

78. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 991 (1984) (discussing the increase in the breadth of regulatory authority under FIFRA pursuant to Congress's 1972 amendments). Overall, these amendments:

> (1) extended the registration requirement to intrastate distribution of pesticides; (2) required establishments that produced pesticides to be registered; (3) authorized EPA to regulate the use of pesticides, such as by registering certain pesticides only for restricted use as opposed to general use; (4) established broad new data submission and recordkeeping requirements; (5) directed EPA to review

amendments to FIFRA resulted in more stringent regulation of pesticides.[79] Specifically, Congress explicitly prohibited the use of any pesticide "inconsistent with its labeling."[80] The crux of the amendments was to expand the labeling power of the EPA, which now enforced FIFRA,[81] and to require registration of all pesticides.[82]

Commentators have suggested that "[t]he most significant change was the adoption of a new standard for registration focusing on whether pesticides cause unreasonable adverse effects on the environment."[83] Before 1972, Congress was concerned with preventing customer fraud.[84] After 1972, the regulatory standards were based on "prevent[ing] any injury to man or any substantial adverse effect on environmental values."[85]

In its first draft of the amended legislation, Congress articulated the new standard: pesticides could not pose "unreasonable adverse affects on the environment."[86] The EPA questioned this language, concerned that it would lead to an interpretation that if no risk to the environment were allowed, then "no pesticide would be registered because all present some risk."[87] Congress did understand the value pesticides have to society, which is reflected in the legislative history of the amendments:

> Pesticides are essential to man's food supply both as to quality and quantity. A generation ago consumers could expect to find occasional worms in apples and more frequent worms in sweet corn. Today we are blessed with wholesome, attractive, pest-free foods, processed, packaged, and marketed under clean and sanitary conditions. . . .
>
> Farm Production has increased by 156 percent since the 1935–39 period notwithstanding the fact that approximately 50 million acres were retired from production in 1970. And this level of production has been achieved in spite of the fact that the farm population has

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the registration of pesticides in use (reregistration); and (6) strengthened EPA's enforcement powers.

BROWN ET AL., *supra* note 66, at 10.

79. *See* S. REP. NO. 92-838, at 5–6 (describing the purposes and changes of the amendments to FIFRA).

80. 7 U.S.C. § 136(ee) (2000).

81. The EPA was vested with the authority to regulate and enforce FIFRA in 1970, when the EPA was first established. *See* BROWN ET AL., *supra* note 66, at 10.

82. *Id.*

83. *Id.*

84. Feely, *supra* note 69, at 127.

85. S. REP. NO. 92-838, at 1 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 3993.

86. *Id.* at 7.

87. *Id.* at 8.

decreased from about 30 million persons to about 9.4 million persons.[88]

Congress revised the legislation, and instead required the EPA to take into account the costs and benefits of pesticide use when determining if any particular pesticide should be registered.[89] This policy decision demonstrates that, even when regulated under FIFRA, pesticides do pose some risk to human health and the environment.

The 1972 amended version of FIFRA is a much broader grant of regulatory authority to the EPA. However, the 1972 amendments do not include a permitting system for individual applicators in their applications of pesticides. An applicator-permit system under FIFRA was contemplated, but was ultimately excluded from the amendments.[90] Instead, FIFRA requires pre-marketing approval of pesticides.[91] FIFRA contains an express preemption in the realm of pesticide labeling.[92] However, this preemption is limited in scope and applicability to the registration and labeling of pesticides.[93]

F. THE EPA'S ADMINISTRATION OF FIFRA

The EPA has the authority to implement and enforce FIFRA.[94] The two main components of the EPA's regulation of pesticides under FIFRA are the pre-market registration of pesticides and the labeling of pesticides.[95]

New pesticide products must be registered with the EPA before being marketed.[96] The application must contain information regarding the producer of the product and the chemical contents of the product.[97] A significant component of each application is a variety of research on human health and environmental impacts, which is explicitly mandated under the

88. *Id.* at 3.

89. *Id.*

90. *See* S. REP. NO. 92-838, at 21 (stating that registration requirements were not intended to be "'permit only' type" requirements).

91. *See* Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 531 (9th Cir. 2001) (contrasting FIFRA with the CWA and finding that although "FIFRA establishes a nationally uniform labeling system to regulate pesticide use, [it] does not establish a system for granting permits for individual applications of herbicides").

92. *See* Feely, *supra* note 69, at 126 (noting that FIFRA preemption in labeling is well established) (citing 7 U.S.C. §§ 136–136y (1998 & Supp. II 1990)).

93. *See* BROWN ET AL., *supra* note 66, at 78–79 (discussing the limits on the scope of FIFRA's preemption ability).

94. 7 U.S.C. § 136(b) (2000).

95. BROWN ET AL., *supra* note 66, at 9.

96. Pesticide Registration and Classification Procedures, 40 C.F.R. § 152.42 (2004) [hereinafter *Pesticide Registration*].

97. *See id.* § 152.50 (describing the detailed list of information that must be included in a pesticide application).

statute.[98] Commentators have further noted that one of the benefits of the pesticide registration requirements of FIFRA is that it "provides EPA with a powerful tool for requiring ongoing research on the effects of pesticides."[99]

Once the application data has been submitted for a pesticide registration, the EPA performs a cost-benefit analysis to determine if the pesticide will cause "unreasonable adverse effects."[100] Really, the "EPA's task . . . is to determine whether the benefits of the pesticide's use outweigh its potential adverse effects."[101] When the EPA reviews the risks associated with pesticides used by the public, like pesticides used for mosquito control, the EPA must consider the risks associated with that pesticide, not controlling the public health threat.[102]

The other main component of the EPA's regulation under FIFRA is the labeling of pesticides. The mandatory labeling of pesticides enables the "EPA to enforce safety and efficacy standards and to communicate with users about risks and proper use."[103] Label drafts must be submitted to the EPA with any pesticide registration application.[104] FIFRA labels must contain the pesticide's ingredients, warnings and precautions for use, and directions for use.[105]

If, during the registration process, the EPA discovers that certain uses of a pesticide cause greater costs to the environment than benefits, the EPA may choose to classify the pesticide for restricted use.[106] This classification is generally applied "to place extra safeguards on highly toxic pesticides."[107] Many pesticides registered for restricted use are classified as such because of their high toxicity to aquatic organisms and environments.[108]

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98. Data Requirements for Registration, 40 C.F.R. § 158 (2004). Section 158 contains the complete list of scientific data requirements that applicants must submit. *Id.* These requirements range from product composition, *id.* § 158.155, to toxicology data requirements, *id.* § 158.340, to wildlife and aquatic organism data requirements, *id.* § 158.490.

99. BROWN ET AL., *supra* note 66, at 22.

100. 7 U.S.C. § 136a(c)(5)(C) (2000).

101. BROWN ET AL., *supra* note 66, at 22.

102. 7 U.S.C. § 136(bb).

103. BROWN ET AL., *supra* note 66, at 16.

104. *Pesticide Registration*, *supra* note 96, § 152.50.

105. Labeling Requirements for Pesticides and Devices, 40 C.F.R. § 156 (2004). The EPA's directions for use include requirements regarding permissible sites for use, target pests, dosage rates, methods and frequency of application, worker protection precautions, limits on re-entry to treated areas, storage and disposal directions, and any other restrictions that safety or environmental protection demand. *Id.* § 156.10(i).

106. *Pesticide Registration*, *supra* note 96, § 152.160. Product restrictions range from use restrictions, to restrictions on what products can list on their labels. *Id.*

107. BROWN ET AL., *supra* note 66, at 18.

108. *See generally* ENVTL. PROT. AGENCY, RESTRICTED USE PRODUCTS REPORT (June 2003), *available at* http://www.epa.gov/opprd001/rup/rupjun03.htm (last visited Feb. 19, 2004) (on file with the Iowa Law Review).

III. JUDICIAL INTERPRETATIONS OF WHEN THE CWA REQUIRES AN NPDES PERMIT

An NPDES permit is required for "any addition of any pollutant to navigable waters from any point source."[109] Many have tried to characterize their actions as compliant with the NPDES permit program because, for instance, they did not discharge a "pollutant" from a "point source" as assumed within the CWA. Courts have addressed the definition of pollutant under the CWA on numerous occasions. In most instances, courts construe the term "pollutant" broadly, in accordance with Congress's purpose and intent under the CWA.

A. THE SUPREME COURT SETS THE STAGE FOR REVIEW UNDER THE CWA

The Supreme Court set the stage for judicial review of the CWA in *Train v. Colorado Public Interest Research Group, Inc.*[110] The issue before the Court was whether the EPA had the authority to regulate the discharge of radioactive waste into the waters of the United States.[111] Congress had previously granted the EPA the authority to set standards for and regulate the production and use of radioactive materials.[112] The EPA had refused to regulate certain radioactive materials, and a group of Colorado citizens sued to force the EPA to regulate certain radioactive discharges through the NPDES program.[113]

The Court began its analysis by acknowledging that the plain language meaning of the CWA provided for the regulation of "radioactive materials."[114] The Court turned to the legislative history of the CWA, which it found "sheds considerable light on the question before the Court."[115] In

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109. 33 U.S.C. § 1362(12)(A) (2000). See also *supra* Part II for a discussion of the CWA's regulatory structure and requirements.

110. Train v. Colo. Pub. Interest Research Group, Inc., 426 U.S. 1 (1976).

111. *Id.* at 3–4.

112. See the Atomic Energy Act of 1954, 42 U.S.C. § 2201(b) (1954), which enables the Atomic Energy Commission (now the Nuclear Regulatory Commission) to:

> establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property.

Id.

113. *See Colo. Pub. Interest Research Group, Inc.*, 426 U.S. at 4 (discussing the facts leading to the citizen-group suit).

114. *Id.* at 7.

115. *Id.* at 10; *see also* United States v. Am. Trucking Ass'ns, 310 U.S. 535, 543–44 (1940) (stating that where an aid to construction of statutory meaning is available, that aid should be used by courts in interpreting the statute).

spite of a broad intent to regulate discharge into waters under the CWA,[116] the Atomic Energy Act (AEA) of 1954 had created a comprehensive regulatory scheme under which the Atomic Energy Commission (AEC) was to regulate radioactive materials, including effluent containing these materials.[117]

The CWA and the AEA could be read so as to give effect to both, but the Court concluded that Congress intended to exempt radioactive materials regulated by the AEC from regulation under the CWA.[118] As a result, the Court held that the term pollutant in the CWA did not include those materials regulated by the AEC.[119] In effect, the Court held that but for the AEC's specific mandate to regulate radioactive effluent, an NPDES permit would be required.[120]

It may appear that the Court narrowly construed the CWA by excluding radioactive materials regulated by the AEC. However, the Court established important precedent regarding the need to evaluate both the plain language of the CWA and its legislative history in determining the meaning of "pollutant." After *Train*, the lower courts consistently look both to the plain language of the CWA and to its legislative history when determining whether an NPDES permit is required.[121]

B. LOWER COURTS' INTERPRETATIONS OF "POLLUTANT" UNDER THE CWA

Relying on the Supreme Court's review of the CWA in *Train*, the courts of appeals have generally construed the term "pollutant" broadly.

The Sixth Circuit addressed the issue of whether oil was a pollutant as defined in the CWA in *United States v. Hamel*.[122] The discharger argued that oil was not a pollutant, and thus no permit was required for the discharge, because oil is not listed in the CWA's definition of pollutant.[123] The court, however, reasoned that the list of pollutants in the CWA was not limiting or exclusive, but rather consisted of broad generic terms that indicated an intent that the statute cover at least as much as the Refuse Act.[124]

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116. *Colo. Pub. Interest Research Group, Inc.*, 426 U.S. at 11–12.

117. *Id.* at 6.

118. *Id.* at 11.

119. *Id.* at 23–24.

120. *Id.*

121. See *infra* Part III.B for a discussion of lower courts' interpretations after *Train*.

122. 551 F.2d 107 (6th Cir. 1977).

123. *See* 33 U.S.C. § 1362(6) (2000) (defining pollutant under the CWA).

124. *Hamel*, 551 F.2d at 110. The court specifically found that:

> [i]t is, of course, true that in hindsight the entire controversy might have been solved by the single addition of the term "petroleum products" to the definitional section. We do not, however, read the failure to do so as an intent to exclude these materials from the [CWA]. On the contrary, we conceive the employment of the

The court then looked to the legislative history. The court noted the CWA's broad "objective to eliminate the discharge of pollutants into the navigable waters," and that the 1972 amendments were intended "to increase federal responsibility."[125] The court also looked to the Refuse Act,[126] from which the statutory permit scheme was derived, which required a permit for any refuse matter of any kind except for sewage.[127] In light of the broad scope of Congress's goals in amending the CWA and the breadth of substances requiring a permit under the Refuse Act, the court broadly construed the definition of pollutant to include oil.[128] The court reasoned that the list of pollutants in the CWA was not limiting or exclusive, but rather consisted of broad generic terms that indicated an intent that the statute cover at least as much as the Refuse Act.[129]

Clearly, the Sixth Circuit did not feel constrained by the language of the CWA and was willing to broaden the meaning of pollutant under the CWA. The government contended that oil was a pollutant by virtue of being a "biological material," which is included in the CWA definition of pollutant.[130] The court, however, determined that it was unnecessary to determine if oil is a "biological material" as the CWA's definition of pollutant was intended to be broadly construed.[131]

The Fifth Circuit later decided *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*[132] The issue before the court was whether water produced as a result of drilling oil was a pollutant as the CWA assumed.[133] The discharger

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broad generic terms as an expression of Congressional intent to encompass at the minimum what was covered under the Refuse Act of 1899.

Id.

125. *Id.* at 109.

126. *Id.* at 110–11.

127. *See* S. REP. NO. 92-414, at 5 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3672 (noting that the Refuse Act declared "a prohibition over the discharge of matter into the navigable waters").

128. *See Hamel*, 551 F.2d at 110–11 (discussing the 1899 Refuse Act's impact on interpreting subsequent legislation).

129. *Id.* The court specifically found that:

> It is, of course, true that in hindsight the entire controversy might have been solved by the single addition of the term "petroleum products" to the definitional section. We do not, however, read the failure to do so as an intent to exclude these materials from the [CWA]. On the contrary, we conceive the employment of the broad generic terms as an expression of Congressional intent to encompass at the minimum what was covered under the Refuse Act of 1899.

Id.

130. 33 U.S.C. § 1362(6) (2000).

131. *Hamel*, 551 F.2d at 110.

132. 73 F.3d 546 (5th Cir. 1996).

133. *Id.* at 550.

claimed that the definition of pollutant in the CWA was meant to limit a court's interpretation of pollutant.[134] In response, the court looked to the plain language of the statute and noted the generic nature of terms like "industrial waste" and "chemical waste."[135] "[T]he statutory definition of pollutant at least appears to invite the inclusion of discharged substances that are not specifically listed into these broad categories."[136]

The court then looked to the legislative history of the CWA, noting in particular that Congress's intent in "listing pollutants was to avoid 'litigable issues' over whether a particular material is subject to the statute."[137] The court held that "while the listing of a specific substance in the definition of pollutant may be significant, the fact that a substance is not specifically included does not remove it from the coverage of the statute."[138] Thus, the Fifth Circuit, like the Sixth Circuit, looked past the statutory definition of pollutant to determine that produced water was a pollutant under the CWA.

These cases demonstrate the courts' understanding that the CWA's definition of pollutant, in order to comply with congressional intent, must be construed broadly.

C. *THE UNCERTAINTY BEGINS:* HEADWATERS, INC. V. TALENT IRRIGATION DISTRICT *AND ITS PROGENY*

In the *Headwaters, Inc. v. Talent Irrigation District* decision, the Ninth Circuit addressed whether a herbicide applied directly to waters of the United States requires an NPDES permit under the CWA.[139] An environmental group brought suit when an irrigation district discharged herbicides into waters, ultimately resulting in a fish kill.[140] The irrigation district argued that an NPDES permit was not required because the district's use of the herbicide complied with FIFRA labeling requirements.[141]

The court acknowledged that FIFRA is "a comprehensive federal statute which [sic] regulates pesticide use, sales, and labeling, and grants enforcement authority to the EPA."[142] Nonetheless, the court determined that the CWA and FIFRA could be read consistently.[143] Specifically, "a FIFRA

134. *Id.* at 565.

135. *Id.*

136. *Id.*

137. *Cedar Point Oil Co.*, 73 F.3d at 565 (citing Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 172 (D.C. Cir. 1982)).

138. *Id.* at 566.

139. 243 F.3d 526, 528 (9th Cir. 2001).

140. *Id.* at 528–29.

141. *See id.* at 530 (stating that the district believed a permit was not required because the herbicide's label did "not mention any permit requirement").

142. *Id.* (citing Taylor AG Indus. v. Pure-Gro, 54 F.3d 555, 559 (9th Cir. 1995)). The court also looked to the EPA's extensive review process for evaluating potential pesticide products. *Id.*

143. *Id.*

label and a NPDES permit serve different purposes."[144] "FIFRA's labels are the same nationwide, and so the statute does not and cannot consider local environmental conditions. By contrast, the NPDES program under the CWA does just that."[145] Determined "to give effect to" both statutes,[146] the court found that "the registration and labeling of [the pesticide] under FIFRA does not preclude the need for a permit under the CWA."[147] Therefore, the court held that the discharge of pesticides requires an NPDES permit even when the pesticide is used in compliance with its FIFRA labeling requirements.[148]

The court next evaluated whether the particular discharge in question required an NPDES permit under the CWA. Thus, the court analyzed whether the "defendants (1) discharged (2) a pollutant (3) to navigable waters (4) from a point source."[149] The court quickly resolved the first issue, finding that the "direct application of [the pesticide] into the irrigation canals qualifies as a 'discharge.'"[150]

In turning to the second issue, whether the pesticides were pollutants, the court undertook a more involved analysis. The court first looked to the statutory definition of pollutant, which "includes 'chemical wastes' but not 'chemicals.'"[151] The court did not feel constrained, however, and looked to scientific evidence that the discharged pesticide was "lethal to fish at a concentration at and below the level required to kill weeds . . . and which takes at least several days to break down into a nontoxic state."[152] The court concluded that "it would seem absurd to conclude that a toxic chemical directly poured into water is not a pollutant."[153] Thus, residual chemicals left in the water long after the pesticide had performed its beneficial function constitute a chemical waste product, which is included in the statutory definition of pollutant and requires an NPDES permit.[154]

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144. *Id.* at 531.

145. *Headwaters*, 243 F.3d at 531.

146. *Id.* at 530 (holding that, wherever possible, statutes should be construed so as to give effect to the meanings in both, and that constructions that would negate the meaning or effect of either statute should be avoided to the extent possible) (quotations and internal alteration omitted) (citing Res. Invs., Inc. v. U.S. Army Corps of Eng'rs, 151 F.3d 1162, 1165 (9th Cir. 1998)).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Headwaters*, 243 F.3d at 532.

151. *Id.* (citing 33 U.S.C. § 1362(6) (2000)).

152. *Id.* at 532.

153. *Id.* at 532–33.

154. *Id.* at 533. The court further determined that the discharge did fall within the definition of "pollutant" under the NPDES program, and so a permit was required. *Id.*

Since the Ninth Circuit's ruling in *Headwaters*, several courts have addressed the same issue regarding whether the application of pesticides to water requires an NPDES permit under the CWA.

The Ninth Circuit again addressed this issue, and ruled similarly to its decision in *Headwaters*, in *League of Wilderness Defenders v. Forsgren*.[155] The court did not evaluate whether the pesticide in question was a pollutant, noting only that "the insecticides at issue meet the definition of 'pollutant' under the Clean Water Act."[156] This case therefore followed the trend established in *Headwaters* and signaled the court's continued belief that the application of pesticides directly to waters of the United States does require NPDES permits.

The repercussions of the post-*Headwaters* uncertainty were again raised in a recent Second Circuit case, where the court addressed whether there was a genuine issue of material fact regarding pesticides' status as pollutants under the CWA.[157] In *Altman v. Town of Amherst*, the court addressed the following specific issues: whether FIFRA preempted the NPDES permit requirements of the CWA, whether the federal and state agencies' failure to enforce the NPDES permit requirements against a municipality was illegal, and whether pesticides used for their intended purpose were "pollutants" under the CWA.[158] The court determined that the EPA's failure to interpret whether FIFRA compliance preempts the CWA's possible classification of pesticides as pollutants constituted a genuine issue of material fact, and remanded the case for trial.[159]

IV. THE EPA GUIDANCE ON PESTICIDES AND NPDES PERMITS UNDER THE CWA

The regulated community was in a state of uncertainty regarding NPDES permitting requirements for pesticides used in accordance with

155. 309 F.3d 1181 (9th Cir. 2002). The court assumed pesticides are pollutants and instead focused on whether their aerial application was a point source. *Id.* at 1183–84.

156. *Id.* at 1185. Interestingly, though the court could have cited *Headwaters* to support this finding, it did not. This may be because the cases are somewhat factually distinct regarding the application of the pesticides.

157. Altman v. Town of Amherst, 47 Fed. Appx. 62 (2d Cir. 2002).

158. *Id.* at 66.

159. *Id.* at 67. The court specifically called upon the EPA to participate in resolving this issue by commenting that

> [u]ntil the EPA articulates a clear interpretation of current law—among other things, whether properly used pesticides released into or over waters 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.

Id.

FIFRA after the *Headwaters* decision.[160] The effects of *Headwaters* were felt by pesticide applicators, but the issue was also a concern for public health officials dealing with mosquito control efforts.[161]

The EPA determined its position that pesticides applied in accordance with their FIFRA labels were not subject to the NPDES permitting requirement under the CWA, and released policy statements to that effect before publishing its Guidance.[162] The EPA finally issued its Guidance in July 2003.[163]

The EPA's Guidance provides an interpretation of the conflicting jurisdictional issues between the CWA and FIFRA.[164] The EPA determined that an NPDES permit is not required under the CWA so long as FIFRA is complied with in circumstances in which "[t]he application of pesticides [is] directly to waters of the United States," and where "[t]he application of pesticides [is] 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."[165] The Guidance discussed the uncertainty resulting from the Ninth Circuit's *Headwaters* decision, and noted that the pesticide application in that case was not made in accordance with the FIFRA labeling requirements.[166] The EPA also commented on the Second Circuit's statement in *Altman* regarding a need for the EPA to intervene and provide

160. *See* Guidance, *supra* note 12, at 48,387 (discussing that "varying [regulatory] practices reflect the substantial uncertainty among regulators, the regulated community and the public regarding how the Clean Water Act applies to the use of pesticides").

161. Karen L. Werner, *Pesticides: EPA Weighs Approaches to Irrigation Case*, 87 DAILY ENVTL. REP. (BNA), at A-9 (May 4, 2001).

162. *See* Susan Bruninga, *Environment: Pesticides Application to Aquatic Areas Needs No Permit if Done Properly, EPA Says*, 198 DAILY ENVTL. REP. (BNA), at A-30 (Oct. 11, 2002) (noting an EPA official's comment that "[a] Clean Water Act permit may not be required for the application of pesticides in aquatic areas to control mosquitoes if the chemical is used properly and has a public benefit"); *EPA Clarifies Rules for CWA Permit on Herbicides in Canals*, 20 ANDREWS TOXIC CHEMICALS LITIG. REP. 14 (2002) (discussing an EPA-issued statement that application of aquatic herbicides to irrigation channels is exempt from CWA permitting requirements so long as FIFRA requirements are complied with); *Pesticides: EPA Says Aquatic Herbicide Applicators Will Not Need Clean Water Act Permits*, 62 DAILY ENVTL. REP. (BNA), at A-19 (Apr. 1, 2002) (discussing an EPA policy exempting from CWA permitting requirements aquatic herbicides that are applied in accordance with FIFRA labeling requirements).

163. *See* Guidance, *supra* note 12, at 48,385 (discussing the July 11, 2003 effective date of EPA Guidance regarding pesticide regulation under FIFRA and the CWA). *See generally* Pamela Najor, *Pesticides: EPA Says Applicators Do Not Need Permits to Apply Pesticides in or Over U.S. Waters*, 137 DAILY ENVTL. REP. (BNA), at A-30 (July 17, 2003).

164. *See* Guidance, *supra* note 12, at 48,387.

165. *Id.*

166. *Id.* According to the EPA, the labeling requirement that the applicator failed to comply with was that the applicator "contain the herbicide-laden water for the requisite number of days." *Id.* at n.2.

some resolution to the issue regarding pesticide applications and the CWA.[167]

The EPA next discussed the definition of "pollutant" under the CWA,[168] and specifically addressed whether pesticides were "chemical wastes" or "biological materials."[169] Noting that the term waste generally means something that is not useful,[170] the EPA determined that "[p]esticides applied consistent[ly] with FIFRA are not such wastes; on the contrary, they are EPA-evaluated products designed, purchased and applied to perform their intended purpose of controlling target organisms in the environment."[171]

The EPA also determined that biological pesticides are not "biological materials" within the definition of "pollutant" under the CWA.[172] The EPA claimed that Congress did not intend an NPDES permit to be required for "any and all material with biological content," because "[t]aken to its literal extreme, such an interpretation could arguably mean that activities such as fishing with bait would constitute the addition of a pollutant."[173] This interpretation also prevented a potentially illogical split interpretation where the CWA's permitting requirements would apply to biological, but not chemical, pesticides.[174]

In conclusion, the EPA claimed that its "interpretation seeks to harmonize the CWA and FIFRA."[175] The EPA noted that the key to its interpretation is "how a pesticide is applied, specifically whether it is applied consistent[ly] with [the] relevant requirements under FIFRA."[176] Thus, if a pesticide is so applied, no NPDES permit is required for its discharge. However, if a pesticide is applied to waters of the United States in violation of FIFRA, such an application would also violate the CWA's NPDES permit requirement.[177]

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167. *Id.* (citing Altman v. Town of Amherst, 46 Fed. Appx. 62, 67 (2d Cir. 2002)).

168. 33 U.S.C. § 1362(6) (2000).

169. Guidance, *supra* note 12, at 48,387–88 (identifying the terms "chemical wastes" and "biological materials" as the most likely terms under which pesticides would fall).

170. *Id.* at 48,388 (citing THE NEW OXFORD AMERICAN DICTIONARY 1905 (2001)).

171. *Id.* The EPA inserted a footnote to this statement explaining that "where . . . pesticides are a waste . . . they are pollutants and require a permit when discharged to a water of the U.S." *Id.*

172. *Id.*

173. *Id.* at n.5.

174. Guidance, *supra* note 12, at 48,388.

175. *Id.*

176. *Id.*

177. *Id.*

V. IS THE EPA'S GUIDANCE A PERMISSIBLE INTERPRETATION OF THE CWA?

However absurd it may sound, according to the EPA's analysis, pesticides, when used in compliance with their FIFRA labeling requirements, are not pollutants within the CWA NPDES permitting scheme.[178] The EPA's Guidance seemingly contradicts common sense, previous agency position,[179] and previous court interpretations of the term "pollutant" in the CWA.[180]

Nonetheless, judicial review of an agency guideline is highly deferential pursuant to the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[181] *Chevron* provides a two-step test for courts to apply to discern if an agency's interpretation of a statute is valid. Under *Chevron*,[182] agencies' interpretive authority is given very broad deference.[183] Even applying the highly deferential *Chevron* analysis, the EPA's Guidance is an impermissible interpretation of the CWA.

A. CHEVRON *DEFERENCE APPLIES TO THE EPA'S GUIDANCE*

Chevron's scope is, theoretically, limited to agency rules adopted through formal rulemaking.[184] For instance, the Court has always applied

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178. *Id.* at 48,387.

179. *See* Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 531 (9th Cir. 2001) (citing an amicus brief stating that the "EPA approves pesticides under FIFRA with the knowledge that pesticides containing pollutants may be discharged from point sources into the navigable waters only pursuant to a properly issued CWA permit").

180. *See supra* Part III (discussing how the courts have interpreted the term "pollutant" under the CWA).

181. 467 U.S. 837 (1984).

182. The Court in *Chevron* articulated a two-step approach to reviewing agency interpretations of statutes:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842–43.

183. *See* Derek P. Langhauser, *Executive Regulations and Agency Interpretations: Binding Law or Mere Guidance? Developments in Federal Judicial Review*, 29 J.C. & U.L. 1, 3 (2002) (noting that "executive regulatory and interpretive authority has, since 1984, been accorded relatively broad deference under the doctrine set forth in *Chevron U.S.A.*").

184. *See Chevron*, 467 U.S. at 844 (noting the controlling weight accorded to legislative (formal) rules); *see also* Langhauser, *supra* note 183, at 12 (stating that *Chevron* only provides "[g]uidance for reviewing formal rules"). The Court has articulated a limit to *Chevron*'s scope in several recent cases. *See* United States v. Mead Corp., 533 U.S. 218, 234 (2001) (holding that certain informal opinion letters were not subject to *Chevron* deference); Christenson v. Harris County, 529 U.S. 576, 588 (2000) (same); *see also* Ronald J. Krotoszynski, Jr., *Why Deference?*

Chevron to situations in which agencies employ notice and comment rulemaking, as this form of rulemaking is purported to provide the necessary checks and balances on administrative action.[185] The EPA's usage of notice and comment rulemaking in creating the Guidance means that *Chevron* review applies.

B. THE APPLICATION OF CHEVRON *TO THE EPA'S GUIDANCE*

A court reviewing a challenge to the current Guidance document would thus be required to apply the *Chevron* two-part test.[186] The Guidance pertains to an interpretation of the term "pollutant" within the CWA in light of FIFRA, and thus the EPA's interpretation of the CWA is subject to the *Chevron* analysis.[187] Though the applicable standard is highly deferential, a court should nonetheless strike down the EPA's interpretation under both prongs of the *Chevron* test.

1. Congress Has Directly Addressed Whether the Application of a Pesticide Used in Accordance with FIFRA Is Subject to Regulation Under the CWA

The first question in *Chevron* is "whether Congress has directly spoken to the precise question at issue."[188] The question here is whether pesticides applied in compliance with FIFRA require an NPDES permit under the CWA.

A reviewing court should look to the "legislation and its history" to determine if Congress addressed the particular issue.[189] The language of the CWA does not explicitly name pesticides in its list of pollutants.[190] However, pesticides could be included under several of the broad categories that are listed. Congress's intent that pesticides be regulated under the CWA is evidenced in CWA section 104(l), which requires the "[c]ollection and dissemination of scientific knowledge on the effects and control of pesticides in water."[191] Further, the legislative history reveals that Congress intended to

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Implied Delegations, Agency Expertise and the Misplaced Legacy of Skidmore, 54 ADMIN. L. REV. 735 (2002) (arguing that courts should withhold applying *Chevron* deference to agencies' informal guidelines and policy statements absent a persuasive showing of agency expertise).

185. *See* Langhauser, *supra* note 183, at 12–14 (discussing the deference *Chevron* affords administrative agencies).

186. *Chevron*, 467 U.S. at 842.

187. *See* Guidance, *supra* note 12, at 48,387 (stating that the purpose of the Guidance is the "interpretation of the Clean Water Act (CWA) to address jurisdictional issues under the CWA pertaining to pesticides regulated under [FIFRA]").

188. *Chevron*, 467 U.S. at 842.

189. *Id.* at 844.

190. 33 U.S.C. § 1362(6) (2000).

191. *Id.* § 1254(*l*).

regulate pesticides under the CWA.[192] The EPA's regulations provide a mechanism for regulation of pesticides applied to waters through the NPDES permit system.[193]

a. Pesticides Are Included Under the Plain Language of the CWA Definition of Pollutant

The EPA concluded in its Guidance that pesticides are not pollutants under the CWA because pesticides are neither "chemical wastes" nor "biological materials."[194] However, despite the EPA's conclusion, strong arguments exist that pesticides do fall within the scope of "chemical wastes" and "biological materials."

In determining that pesticides are not "chemical wastes," the EPA relied on two factors: that pesticides are not wastes, and that a pesticide's use in accordance with its FIFRA labeling requirements is its intended purpose.[195]

In *Headwaters*, the Ninth Circuit did not determine whether pesticides themselves constituted "chemical wastes."[196] Instead, the court looked to the residual chemicals that remained in the water after the pesticide had killed off the aquatic weeds.[197] The EPA failed to take into account the degradation of pesticides in the water and the resulting effect of these residual chemicals.[198] As a result, though the pesticides themselves may not be wastes, the residual chemicals that remain in the water are certainly "chemical wastes" within the EPA's definition.

The EPA's contention that pesticides perform a beneficial use is also faulty because a pollutant's usefulness does not negate its adverse environmental impacts.[199] "[A] pollutant is a pollutant no matter how useful

192. *See supra* notes 15–52 and accompanying text (discussing Congress's intent to make "pollutant" as broad as possible).

193. EPA Administered Permit Programs: The National Pollutant Discharge Elimination System, 40 C.F.R. § 122.28 (2004).

194. 33 U.S.C. § 1362(6).

195. Guidance, *supra* note 12, at 48,388.

196. Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 532–33 (9th Cir. 2001).

197. *Id.* However, the court did note that "it would seem absurd to conclude that a toxic chemical directly poured into water is not a pollutant." *Id.*

198. *See generally* CARSON, *supra* note 75 (discussing the adverse effects of residual chemicals that remain in the environment long after their beneficial use has expired). *See also* P.S.C. Rao et al., *Pesticides and Their Behavior in Soil and Water* (discussing the adverse effects of metabolites of pesticides that persist in water), *available at* http://pmep.cce.cornell.edu/facts-slides-self/facts/gen-pubre-soil-water.html (last visited Feb. 19, 2004) (on file with the Iowa Law Review).

199. Again, it is important to keep in mind that, under FIFRA's registration scheme, adverse environmental and human health impacts are expected in exchange for the pesticide's social and economic benefits. *See* 7 U.S.C. § 136a(B)(2)(a) (2000) (stating the need to balance adverse effects with benefits in determining unreasonable effects).

it may earlier have been."[200] Thus, the use of a pesticide for its intended purpose cannot negate the fact that the pesticide is a pollutant under the CWA. FIFRA's language further reinforces this argument because it recognizes that pesticide use causes some adverse human health and environmental effects.[201]

The EPA was also incorrect in its decision that pesticides are not biological materials as regulated by the CWA. In light of the fact that pesticides are "chemical wastes" under the CWA, it seems counterintuitive to conclude that pesticides comprised of "biological materials" are not also subject to the CWA permitting provisions.[202] From a scientific perspective, pesticides are generally considered pollutants when they are present in water.[203] The EPA itself treats pesticides as pollutants in most situations, including when pesticides are found in point and non-point source discharges.[204]

Therefore, the EPA's interpretation that pesticides used in compliance with FIFRA do not require NPDES permits under the CWA is flawed. The interpretation is inconsistent with the language of the Act because it does not account for the facts that pesticides remain in waters after they perform their function, that a beneficial use does not prevent a substance from being a pollutant, and that pesticides in water are generally considered pollutants.

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200. Hudson River Fishermen's Ass'n v. City of New York, 751 F. Supp. 1088, 1101 (S.D.N.Y. 1990); *see also* Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617, 627 (8th Cir. 1979) (finding that there is "no justification . . . that whether the discharge of a particular substance listed in [the CWA] constitutes the discharge of a 'pollutant' . . . depends upon the purpose for which the discharge is made").

201. 7 U.S.C. § 136a(bb).

202. This argument is the mirror image of the EPA's argument in its Guidance. *See* Guidance, *supra* note 12, at 48,388 ("As a matter of policy, it makes little sense for [biological pesticides] to be subject to CWA permitting requirements when chemical pesticides are not.").

203. *See* Karen L. Werner, *Pesticides: EPA Reviewing Water Protection Rule; Several Options Possible, Official Says*, 49 DAILY ENVTL. REP. (BNA), at A-50 (Mar. 13, 2002) (discussing the claim that several pesticides "may be harmful to human health and the environment"); ENVIROSENSE, FACT SHEET: PREVENTING PESTICIDE POLLUTION OF SURFACE AND GROUND WATER (discussing that pesticide contamination of water is a serious health threat, which may also adversely impact fisheries and wildlife, a result that may threaten "the economic and aesthetic well being of the state"), *available at* http://es.epa.gov/techinfo/facts/nc/nc-fs7.html (last visited Feb. 18, 2004) (on file with the Iowa Law Review); FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, CHAPTER 4: PESTICIDES AS WATER POLLUTANTS (noting that pesticides "now threaten the long-term survival of major ecosystems by disruption of predator-prey relationships and loss of biodiversity"), *available at* http://www.fao.org/docrep/W2598E/w2598e07.htm (last visited Feb. 18, 2004) (on file with the Iowa Law Review).

204. *See* Guidance, *supra* note 12, at 48,388 n.4 (noting that pesticides are point-source pollutants when in runoff); Storm Water Discharge, 40 C.F.R. § 122.26(b)(12) (2004) (including pesticides in the definition of significant materials regulated in storm-water discharge as point-source pollutants).

b. The Legislative History of the CWA Indicates Congress's Intent to Regulate Pesticides

The vast legislative history of the 1972 amendments to the CWA clearly shows that Congress intended to include pesticides within the rubric of discharges subject to the NPDES permit requirements.[205] In addition to the explicit intent of Congress as expressed in the regulatory history, a common sense review of pesticides' human health and environmental effects demonstrates that pesticides are exactly the type of chemicals that Congress intended to regulate under the CWA.

The legislative history of the 1972 CWA amendments clearly shows Congress's intent to regulate discharges into waters of the United States. In enacting the 1972 amendments to the CWA, Congress intentionally chose to integrate permitting requirements from the Refuse Act of 1899[206] into the new legislation. The effect of this integration was "to redirect[] the control program from ambient standards to direct effluent controls."[207] Basically, Congress used the revisions to the CWA to integrate and strengthen the Refuse Act's permitting program.[208] In fact, Congress expanded the scope of the permitting programs to include sewage, "so that before any material can be added to the navigable waters authorization must first be granted."[209]

The legislative history also demonstrates Congress's specific intent to include pesticides as regulated substances under the NPDES permit system of the CWA. In his supplemental comments to the Senate report discussing the 1972 amendments to the CWA, Senator Bob Dole noted that:

> The committee report discusses the operative provisions of the bill in considerable detail and describes some of the problems associated with agricultural pollution. Since this is a new area for pollution control legislation, I would like to discuss some of the more important aspects of this area which lie within the scope of the bill's operations.
>
> Agricultural pollution control is concerned primarily with . . . pesticides, fungicides and herbicides . . . .[210]

Senator Dole noted that the majority of agricultural wastes are non-point,[211] and thus would not be subject to NPDES requirements. However,

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205. *See supra* Part II.A (discussing Congress's intent in passing the CWA to create a broad definition of pollutant).

206. S. REP. NO. 92-414, at 70 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3736.

207. *Id.*

208. *Id.* at 72.

209. *Id.* at 76.

210. *Id.* at 98.

211. S. REP. NO. 92-414, at 98.

his rationale regarding the negative environmental and health impacts of pesticides is equally applicable to point sources.

Senator Dole also noted that "[t]he chief hazard of pesticide use lies in the long-lasting properties possessed by many of them."[212] He further commented that "alternative chemicals which are non-persistent are extremely toxic."[213] Furthermore, "[s]hortly after application, these chemicals start to disintegrate and are soon absorbed by natural processes leaving no residual accumulation to endanger wildlife or man. The difficulty in their use arises out of their high original toxicity."[214] As a result, "[e]very possible effort must be made to see that in achieving control appropriate chemicals are applied at carefully controlled minimum rates."[215]

These comments demonstrate Congress's concerns both with pesticides that are acutely toxic and with pesticides that are more chronically toxic. Congress undoubtedly recognized the pollution problem caused by pesticides, and intended that their application to waters would trigger the NPDES permitting requirements.

Courts consistently look to legislative history when interpreting the term "pollutant."[216] Courts' interpretations of congressional intent show Congress's desire to regulate pesticides under the CWA.

The first step in *Chevron* asks whether Congress had "directly spoken" to the issue involved in the EPA's interpretation of "pollutant" under the CWA. Both the plain language of the CWA and its vast legislative history illustrate Congress's statement on this issue—that the CWA regulates the application of pesticides. As a result, the EPA's interpretation of the CWA is inconsistent with the plain language, the legislative history, and the courts' interpretations of the meaning of "pollutant" under the CWA.

2. The EPA's Construction of the CWA Is Impermissible

A reviewing court should conclude that Congress has directly spoken to the issue of whether pesticides, even when applied in accordance with FIFRA labeling requirements, are pollutants under the CWA. If the court does not reach this conclusion, however, the second step under *Chevron* is "whether the agency's answer is based on a permissible construction" of the CWA.[217]

The EPA's interpretation in its Guidance is impermissible because it does not enable both the CWA and FIFRA to be read consistently. When two statutes are capable of co-existence, they should be read to give effect to

212. *Id.* at 99.
213. *Id.*
214. *Id.* at 100.
215. *Id.* at 99.
216. *See supra* Part III and accompanying text.
217. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

each.[218] As the court noted specifically in *Headwaters*, "[t]he CWA and FIFRA have different, although complementary, purposes."[219]

a. FIFRA Does Not Necessarily Preempt the Jurisdiction of the CWA

Nothing in either its express language or in the courts' application of FIFRA requires that FIFRA be the exclusive method of regulating pesticides applied to waters of the United States.[220] In fact, the generally accepted method of statutory construction is that, where possible, two statutes should be read so as to give effect to both.[221]

Congress created FIFRA and the CWA to regulate very different environmental issues, and each statute approaches regulation differently. Though it is generally acknowledged to be a comprehensive statute,[222] FIFRA's focus on regulation of pesticide use is limited to registration and labeling requirements.[223] Congress did not intend FIFRA to be a permit-based statute,[224] but rather Congress intended FIFRA to create requirements for pesticide registration on a national scale.[225] Conversely, the NPDES permit system created under the CWA is designed to be a system of localized permits for discharges of pollutants.[226]

Exempting FIFRA pesticides applied in accordance with their labeling from regulation under the CWA frustrates the purpose of the CWA. Congress created the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[227] The EPA and the states cannot achieve this goal if they do not know what substances are being discharged into the waters. Congress sought to achieve and maintain this goal by gathering information and specifically noting the significant accomplishment of the Refuse Act of collecting the information through the

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218. Morton v. Mancari, 417 U.S. 535, 551 (1974).

219. Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 531 (9th Cir. 2001).

220. *Id.*

221. *Morton*, 417 U.S. at 551.

222. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 991–92 (1984) (discussing the breadth of the amended regulatory regime under FIFRA).

223. *See* Feely, *supra* note 69, at 126 (noting that FIFRA preemption in labeling is well established) (citing 7 U.S.C. §§ 136–136yy (2000)).

224. *See* S. REP. NO. 92-838, at 76 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4013 (stating that it was not intended that registration requirements be "'permit only' type" requirements).

225. *See supra* Parts II.D–E (discussing the legislative history and congressional intent of FIFRA and its various amendments).

226. *See* Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 531 (9th Cir. 2001) ("FIFRA's labels are the same nationwide, and so the statute does not and cannot consider local environmental conditions. By contrast, the NPDES program under the CWA does just that.").

227. 33 U.S.C. § 1251(a) (2000).

permitting process.[228] The EPA will not be able to gather information on all discharged pollutants if FIFRA compliance excuses the need to obtain an NPDES permit.

The EPA's interpretation fails to give effect to both FIFRA and the CWA. It is possible, however, that both FIFRA and the EPA can concurrently regulate pesticide use. In fact, the regulation of pesticides under both FIFRA and the CWA would be more effective.

One of the most common uses of pesticides being applied over or directly to waters of the United States is for public-health mosquito control.[229] Public health officials address the mosquito control problem by aerial spraying to kill adult mosquitoes or by applying larvicides directly to water to kill mosquito larva.[230] Many of these pesticides have adverse affects on the aquatic ecosystems,[231] but their use is nonetheless appropriate because of their human health benefits.[232] This is the type of situation in which it is most clear that the information provided by an NPDES permit would benefit local officials in attempting to achieve Congress's goal of cleaning up the waters of the United States.

As a result of the limited scope of FIFRA and the breadth of the scope of the CWA, the EPA's interpretation of the statutes' jurisdiction expands FIFRA's scope while frustrating the CWA's purpose. The above examples make clear that not only can the two statutes be read consistently with each

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228. *See* S. REP. NO. 92-414, at 6 ("[O]ne of the most important aspects of the . . . 1899 Refuse Act permit program has been the accumulation . . . of detailed information on the character of industrial pollution discharges.").

229. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 991–92 (1984) (discussing the changes in FIFRA resulting from the 1972 amendments).

230. *See* ENVTL. PROT. AGENCY, PESTICIDES & MOSQUITO CONTROL (discussing the use of pesticides to control mosquitoes), http://www.epa.gov/pesticides/factsheets/mosquitocontrol.htm (last visited Feb. 4, 2005) (on file with the Iowa Law Review).

231. For example, two pesticides that officials use for mosquito control through aerial spraying are malathion and synthetic pyrethroids. *See* ENVTL. PROT. AGENCY, PESTICIDES: TOPICAL & CHEMICAL FACT SHEETS: SYNTHETIC PYRETHROIDS FOR MOSQUITO CONTROL [hereinafter SYNTHETIC PYRETHROIDS] (stating that "synthetic pyrethroids [are] commonly used in mosquito control programs to kill adult mosquitoes"), http://www.epa.gov/pesticides/factsheets/pyrethroids4mosquitos.htm (last updated Apr. 17, 2002) (on file with the Iowa Law Review); ENVTL. PROT. AGENCY, QUESTIONS & ANSWERS: MALATHION PRELIMINARY RISK ASSESSMENT (May 11, 2000) [hereinafter MALATHION RISK] (noting that 8–15% of malathion's use is for mosquito control), http://www.cmmcp.org/malathionqa.pdf (last visited Feb. 4, 2005) (on file with the Iowa Law Review). The EPA has found that "[r]isks from malathion are lower than for most other organophosphate pesticides," but it is still "toxic to beneficial insects, and there are risks of concern to aquatic animals." MALATHION RISK, *supra*. Synthetic pyrethroids are highly toxic to aquatic species, and thus synthetic pyrethroid use is prohibited near or over water. SYNTHETIC PYRETHROIDS, *supra*.

232. *See* MALATHION RISK, *supra* note 231 (discussing the efficacy of malathion in killing mosquitoes); SYNTHETIC PYRETHROIDS, *supra* note 231 (discussing the efficacy of synthetic pyrethroids in killing mosquitoes).

other, but that in order to effect Congress's intent, both the CWA and FIFRA must be applied to the application of pesticides to waters of the United States.

b. Diverging Interpretations: States Requiring Permits for Pesticides Applied to Waters

In response to *Headwaters, Inc. v. Talent Irrigation District*,[233] California decided to require NPDES permits for applications of pesticides to the waters of California.[234] The California EPA has even submitted a recommendation to the EPA that the Guidance should be revised so as to be consistent with *Headwaters*.[235] Several other states require permits for applications of pesticides to waters,[236] though it is unclear if these requirements are in response to *Headwaters*. These states' interpretations may not be dispositive, but they certainly indicate that applying both the CWA and FIFRA to pesticide applications to waters of the United States is not only appropriate, but also feasible.

C. ALTERNATIVE METHOD OF REGULATION: THE STATES' CAPACITY TO REGULATE THE USE OF PESTICIDES

If the EPA's interpretation stands, as articulated in its Guidance, the states still have an avenue for regulating the use of pesticides in water under FIFRA.[237] In fact, the Supreme Court has already held that a local ordinance regulating pesticide use was not preempted by FIFRA.[238]

The Supreme Court was faced with the question of whether local ordinances requiring permits for pesticide application were preempted by FIFRA in *Wisconsin Public Intervenor v. Mortier*.[239] The town of Casey, Wisconsin, had adopted an ordinance regulating the use of pesticides.[240]

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233. 243 F.3d 526 (9th Cir. 2001).

234. CALIFORNIA ENVTL. PROT. AGENCY, AQUATIC PESTICIDES PERMIT, *available at* http://www.swrcb.ca.gov/rwqcb9/misc/aquatic_pesticides.html (last visited Jan. 18, 2005) (on file with the Iowa Law Review).

235. *Id.*

236. *See* CONN. GEN. STAT. §§ 22a-66a(h), 22a-66z (2001) (requiring permits for aquatic pesticide regulation); IOWA CODE § 455B.186 (2003) (same).

237. *See* 7 U.S.C. § 136v(a) (2000) ("A State may regulate the sale or use of any federally registered pesticide or device in the State . . . .").

238. *See* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 607 (1991) (discussing Congress's grant of regulatory authority to the states in FIFRA); *see also* Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 179 (D.C. Cir. 1982) (discussing the flow of waters through dams and the lack of federal regulatory authority under the CWA, instead leaving the regulation to the states).

239. *Mortier*, 501 U.S. at 600.

240. *Id.* at 602. The Court noted that "[t]he town board may 'deny the permit, grant the permit, or grant the permit with . . . any reasonable conditions on a permitted application related to the protection of the health, safety and welfare of the residents of the Town of Casey.'" *Id.* at 603 (internal citations omitted).

Ralph Mortier, a property owner whose permit request had been granted with restrictions, brought an action for a declaratory judgment claiming that the ordinance was preempted by FIFRA.[241] In reviewing the preemption issue, the court stated that "[a]bsent explicit pre-emptive language, Congress'[s] intent to supersede state law in a given area may nonetheless be implicit if a scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'"[242]

The Court determined that the language of FIFRA did not preempt local regulation.[243] "FIFRA nowhere expressly supersedes local regulation of pesticide use,"[244] and the Court found that "neither the language of the statute nor its legislative history, standing alone, would suffice to pre-empt local regulation."[245]

The Court found that FIFRA permits state regulation of "the sale or use of any federally registered pesticide,"[246] but does not address political subdivisions.[247] The locality whose ordinance was in question was a political subdivision of the state, and not the state itself.[248] The Court thus found that "[t]he exclusion of political subdivisions cannot be inferred from the express authorization to the 'State[s]' because political subdivisions are components of the very entity the statute empowers."[249]

Nor did the Court find that the legislative history demonstrated any congressional intent to prevent local regulation of pesticide use. FIFRA's limitation on the states' capacity to regulate labeling and packaging "would be pure surplusage if Congress had intended to occupy the entire field of pesticide regulation."[250] The Court thus determined that "[w]hatever else FIFRA may supplant, it does not occupy the field of pesticide regulation in general or the area of local use permitting in particular."[251]

Though the Court limited its holding in this case to the issue of whether FIFRA preempts local ordinances regulating pesticide use, dicta indicates that FIFRA's preemptive authority is limited to the areas of pesticide registration and labeling.[252] The Court's finding that there was "no actual

241. *Id.* at 603.
242. *Id.* at 605 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
243. *Id.* at 606.
244. *Id.*
245. *Id.* at 607.
246. 7 U.S.C. § 136v(a) (2000).
247. *Mortier*, 501 U.S. at 607–08.
248. *Id.* at 608.
249. *Id.*
250. *Id.* at 613.
251. *Id.* at 614.
252. *Mortier*, 501 U.S. at 614–15.

conflict . . . between FIFRA and the ordinance" was supported by its determination that FIFRA has a limited scope.[253] The Court looked to the "regulatory partnership [that FIFRA requires] between federal, state, *and* local governments."[254] Additionally, the Court determined that "no indication that any coordination which the statute seeks to promote extends beyond the matters with which it deals, or does so strongly enough to compel the conclusion that an independently enacted ordinance that falls outside the statute's reach frustrates its purpose."[255] The Court's holding demonstrates an acknowledgement of FIFRA's limited regulatory authority, which also provides state and local governments with the authority to regulate local pesticide use.

VI. CONCLUSION

Headwaters has resulted in much uncertainty for members of the public, regulators, and courts.[256] Unfortunately, the EPA's response contravenes congressional intent in favor of the administrative convenience of narrowing the scope of the CWA's NPDES program. The current Guidance does not require applicators to obtain an NPDES permit prior to applying pesticides over or directly to waters of the United States.[257] In spite of the EPA's efforts to shield the Guidance from a lenient standard of review, a court should find the Guidance to be an impermissible interpretation of the CWA even under the highly deferential *Chevron* standard.

It is important to understand that this Note does not deny the benefits of pesticides or the need for their use in public health control of mosquitoes. The use of pesticides is an integral component of many public health and agricultural projects because they provide great benefits in control of disease and protection of crops. Rather, this Note demonstrates that discharges of pesticides into the waters of the United States can and should be regulated, as Congress intended, under the CWA's NPDES program. The EPA and the states already have the capacity to regulate these discharges through the use of general permits. However, even if the EPA's Guidance persists, states maintain the authority under FIFRA to regulate the

253. *Id.* at 614.

254. *Id.* at 615.

255. *Id.*

256. *See* Werner, *supra* note 161 (noting the uncertainty following the *Headwaters* decision).

257. *See* Guidance, *supra* note 12, at 48,387 (providing that compliance with FIFRA exempts the need for an NPDES permit under the CWA).

use of pesticides,[258] including their application to and over waters of the United States.[259]

258. *See* 7 U.S.C. § 136v(a) (2000) ("A state may regulate the sale or use of any federally registered pesticide or device in the State . . . .").

259. *See Mortier*, 501 U.S. at 607 (discussing Congress's grant of regulatory authority to the states in FIFRA).