



# Aquatic Pesticide Application, FIFRA and the CWA

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Reminder: Environmental Reporting - Posting Annual Workplace  
Illness & Injury Summary

## EPA's Recent Attempt to Reconcile Competing Mandates

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# Overview

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- Summary of EPA rule exempting certain aquatic pesticide applications from NPDES requirements

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- Legal issues surrounding controversy
- 9<sup>th</sup> Circuit case law
- States' regulatory response
- Current litigation challenging surrounding rule

# Summary of EPA's New Rule

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- EPA exempts pesticide applications on or near waters of the U.S. from NPDES requirements, so long as applicator complies with all water quality related FIFRA labeling requirements.
- Example: pesticide applications to control mosquito larvae, aquatic weeds or other pests that are present in the waters of the U.S.

# Limits to EPA's Rule

- New exclusion does not apply to application of pesticides to terrestrial agricultural crops or associated spray drift.
- Pesticides are still wastes when contained in a waste stream (for example if a pesticide ends up in a regulated storm water system).
- Residual materials from pesticides that remain in the water after application are wastes and theoretically subject to regulation.

# Text of New Rule

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- EPA's new Final Rule excludes:  
The application of pesticides consistent with all relevant requirements under FIFRA (i.e., those relevant to protecting water quality), in the following two circumstances:

# Text of New Rule

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(1) The application of pesticides directly to waters of the United States in order to control pests. Examples of such applications include applications to control mosquito larvae, aquatic weeds, or other pests that are present in the waters of the United States.

# Text of New Rule

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(2) The application of pesticides to control pests that are present over waters of the United States, including near such waters, where a portion of the **pesticide will unavoidably be deposited in waters of the U.S. in order to target the pests effectively**; for example, when insecticides are aerially applied to a forest canopy where waters of the U.S. may be present below the canopy or when pesticides are applied over or near water for control of adult mosquitoes or other pests. (emphasis added).

# Summary of EPA's New Rule

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- EPA's justification (how did EPA get here?):
  - EPA interprets the definition of pollutant under CWA 502(6) to not include pesticides because they are useful products and not a “chemical waste” or “biological material,” when applied consistent with labeling instructions.

# Summary of EPA's New Rule

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- The CWA defines a pollutant 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 discharged into water . . . ” 33 U.S.C. § 1362(6).

# Summary of EPA's New Rule

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- The CWA prohibits “discharge of a pollutant by any person” unless in compliance with a valid CWA permit. 33 U.S.C. § 1311(a).
- EPA (or delegated states) may issue NPDES permits authorizing discharge of pollutants into navigable waters.

# Legal Issues Surrounding Controversy

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- CWA strictly prohibits the discharge of a pollutant (including chemical wastes and biological material) into waters of the U.S., absent an NPDES permit.

# Legal Issues Surrounding Controversy

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- Fundamental issue presented by this rule: Is the application of a pesticide which results in the addition of a pesticide to waters of the U.S. subject to NPDES requirements when it is already subject to FIFRA requirements?
- Does FIFRA compliance exempt CWA coverage?

# EPA's Historical Position

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- “In the more than 30 years that EPA has administered the CWA, the Agency has never issued an NPDES permit for the application of a pesticide to or over water to target a pest that is present in or over the water.” 71 Fed. Reg. at 68484.

# 9<sup>th</sup> Circuit Case Law

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- Ninth Circuit Case Law casts some doubt on EPA's views.

# 9<sup>th</sup> Circuit Case Law: The *Talent Case*

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- *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9<sup>th</sup> Cir. 2001)
  - Facts: Herbicide was applied in irrigation canal in excess of labeling requirement, resulting in kill of more than 92,000 juvenile steelhead.
  - Citizen group filed suit under CWA for discharging a pollutant without an NPDES permit.

# 9<sup>th</sup> Circuit Case Law : the *Talent* Case

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- *Talent* decision:
  - FIFRA label and NPDES permit serve different purposes – registration and labeling does not preclude the need for a permit under the CWA.
  - EPA authorizes pesticide use under FIFRA determining whether a pesticide “will perform its intended function without unreasonable adverse effects on the environment.” 7 U.S.C § 136a(c)(5).
  - Residual chemical left in water after application is a “chemical waste” product and therefore a pollutant under the CWA.

# 9<sup>th</sup> Circuit Case Law: the *Forsgren Case*

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- *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9<sup>th</sup> Cir. 2002)
  - Facts: Forest Service conducted aerial spraying of insecticide over 628,000 acres of national forest, including directly over streams.
  - Citizen groups filed suit under CWA, alleging NPDES permit was required.

# 9<sup>th</sup> Circuit Case Law: the *Forsgren* Case

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- *Forsgren*:
  - Court decided that an aerial application constituted a “point source” under CWA
  - Insecticides met the definition of pollutant under the CWA, as per *Talent* (this was not contested by the government).
  - Forest Service must obtain an NPDES permit before it resumes spraying.

# 9<sup>th</sup> Circuit Case Law: the *Fairhurst Case*

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- *Fairhurst v. Hagener*, 422 F.3d 1146 (9<sup>th</sup> Cir. 2005).
  - Facts: Montana Department of Fish and Game applied pesticide in creek to kill off non-native fish. Application was consistent with the labeling requirements.
  - Citizen sues for violation of CWA for failing to get an NPDES permit prior to application.

# 9<sup>th</sup> Circuit Case Law: the *Fairhurst* Case

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- The *Fairhurst* Decision (a *per curiam* opinion):
  - EPA persuades 9<sup>th</sup> Circuit, in the wake of *Talent*, that a “chemical waste” under the CWA is superfluous or damaged material;
  - A pesticide, applied in accordance with its label, that leaves no residue, is not a “chemical waste” and therefore not a pollutant under the CWA.

# 9<sup>th</sup> Circuit Case Law : the *Fairhurst* Case

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- *Fairhurst* distinguished *Talent*, on the grounds that the pesticide at issue in *Talent* left a residue.
- *Fairhurst* relied on the then interim EPA guidance that pesticides applied consistent with a FIFRA label are not chemical wastes.

# States' Regulatory Response to *Talent*

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- States within the 9<sup>th</sup> Circuit with delegated NPDES authority responded by issuing permits.
- California, Nevada, Oregon, Washington developed general and/or individual permits.
- States outside of 9<sup>th</sup> Circuit continued practice of not requiring permits.

# Washington's Response

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- Following *Talent*, Washington began issuing individual permits for aquatic pesticide application, as well as developing four classes of general permits.
- However, by statute, WA only intended to require such permits as long as *Talent* remained good law, or until EPA clarified the scope of CWA requirements. See RCW 90.48.465 (referencing *Talent*).

# Current Litigation and Controversy

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- EPA's rule generated hundreds of comments from industry groups, mosquito control districts, health organizations, environmental groups, cities, and state agencies.
- Lawsuits were filed in every circuit in the country challenging rule from both sides. Case is being consolidated in the 6<sup>th</sup> Circuit.

# EPA's Justification for Rule

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- Intentionally applied pesticides are not chemical wastes because they are not “eliminated or discarded as no longer useful or required after the completion of a process.” Relying on *Fairhurst*.

# EPA's Justification for Rule

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- Similarly, intentionally applied biological pesticides are not “biological matter.”
  - Logical conclusion: Otherwise biological pesticides would require an NPDES permit but chemical pesticides would not.

# EPA's Justification for Rule

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- EPA acknowledges that pesticides applied in excess amounts that do not reach target organisms or that remain after the application are waste materials. *See Talent.*
- However, these pesticides were not “wastes” at the time they were discharged – so the CWA prohibition against discharge of a pollutant does not apply.

# EPA's Justification for Rule

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- EPA dismisses *Forsgren* because “the Ninth Circuit erroneously assumed that the question of whether the applications were pollutants was not in dispute.”
- EPA distinguishes *Talent* on the grounds that the pesticide in that case was applied inconsistent with the label.

# Industry Complaint

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- Rule does not go far enough:

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- Exclude from NPDES requirements all pesticide applications consistent with FIFRA – including terrestrial applications.

# Industry Complaint

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- Clarify that a pesticide is a product and not a pollutant under any circumstances
  - Residual pesticides are residual “products” not pollutants or chemical wastes
  - Concern: residue will practically always exist; don’t want to be excluded in the front end only to get regulated in the back end

# Environmental Complaint

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- EPA misreads definition of pollutant
  - EPA’s interpretation of “biological materials” in conjunction with “chemical wastes” contorts the meaning of CWA and misrepresents existing judicial authority.
  - Intended purpose of discharger does not transform a pollutant into a product

# Environmental Complaint

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- FIFRA does not override the CWA, so compliance with FIFRA labeling is irrelevant in CWA context.
- FIFRA labeling does not adequately protect the chemical, physical, and biological integrity of the nations waters

# Public Health Complaint

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- Mosquito Control Districts urge that this rule is absolutely essential in their attempts to prevent the West Nile virus from spreading in the United States.

# State Response to Rule

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- Washington
  - Continue to require permits pending outcome of legal challenges to rule (decision announced on 2/9/07 – See Focus 07-10-013)
  - “At this time, these permits provide the best protection of water quality, human health, and the environment.”

# State Response to Rule

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- California
  - No longer requiring NPDES permits, but not rescinding general permits pending outcome of challenges to the rule
  - Permit holders may file notice of termination (NOT)
  - Publicly critical of EPA's rule
- Oregon
  - Same as above.

# Conclusion

- Where does this leave us?
  - Regulatory morass;
  - Resolution of this issue must await outcome of judicial challenge;
  - Pesticide applicators within the 9<sup>th</sup> Circuit should continue to obtain coverage under existing general permits to avoid exposure to citizen suit;

# Conclusion

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- 6<sup>th</sup> Circuit is by no means bound by 9<sup>th</sup> Circuit case law and may not be bound by EPA's rule which interprets plain language of CWA;
- This is an area to continue to follow.