

Pesticide Application & the CWA: Is a permit needed?

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◆ Serve as Counsel to:

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I. History

- ◆ A. Clean Water Act (CWA) 1972
33 U.S.C. § 1251

1. Since 1972 -- No EPA permit required to apply pesticides directly to or over waters of the US to control pests

2. Decisions of Federal Courts of Appeals

History

- ◆ B. Federal Insecticides Fungicide & Rodenticide Act (FIFRA)
 - EPA attempts to clarify when NPDES Permit needed*
- ◆ A. Application of pesticides to waters of US in compliance with FIFRA
 - B. Application directly to waters including near waters of U.S.

71 Fed Reg 68,483 November 27, 2006*

History - Definitions

- ◆ A. **Pollutant:** dredged spoil, solid waste sewage, garbage, munitions, "chemical wastes," "biological materials," municipal & agricultural wastes discharged into water

33 U.S.C. § 1362 (6)

History - Definitions

- ◆ **B. Discharge of a pollutant:** any addition of any pollutant to navigable waters from any point source

33 U.S.C. §1362 (12)

History - Definitions

- ◆ C. **Point source** is a discernable, confined and discrete conveyance.

33 U.S.C. §1362 (14)

History - Definitions

◆ A. **FIFRA**

- Regulates sale, distribution, & use of pesticides with a licensing registration program
- EPA may not register pesticide that causes “unreasonable adverse effects on the environment”

7 U.S.C. §136 a (c) (5) & (7)

History - Definitions

◆ FIFRA

- No unreasonable risk to man or the environment or a human dietary risk from residues that result from a use of pesticide in or on any food inconsistent with Section 408 of Federal Food, Drug & Cosmetic Act

7 U.S.C. §136 (bb)

History - Cases

- ◆ *U.S. v. Tropical Fruit, SE, et al 2001 – Consent Agreement*
 1. 2300 acre banana and mango farm in Puerto Rico
 2. Applied Malathion, Captan 50 and Kocide

History - Cases

- ◆ *U.S. v. Tropical Fruit, SE, et al 2001*

3. Complaints from local residents – video taping of spray drift

Negative health effects alleged

Workers not given proper safety information

4. DOJ & EPA filed civil action

History - Cases

- ◆ Results: Consent Decree Requirements
 - Prevent drift
 - Plant vegetative barriers of trees near homes
 - Remove fruit trees or other crops along perimeter
 - Establish 173 ft. buffer next to vegetative barrier & no spraying in this zone

History - Cases

- ◆ Results (continued):
 - Must remove all crops in no spray zone
 - Buy new equipment to measure windspeed before & during application
 - Notify EPA 72 hrs. in advance of all pesticide & fertilizer applications
 - Hire an EPA monitor to track agreement for 3 years

History - Cases

- ◆ *Headwaters, Inc. v. Talent Irrigation District*, 243 F. 3^d 526 (9 Cir. 2001)

1. Irrigation district controlled aquatic weeds & vegetation in its canals & applied with hose from a truck every 2 weeks

- ◆ Magnacide H kills fish & wildlife
- ◆ Never applied for NPDES permit
- ◆ Continuing discharge into canal
- ◆ Gives Court jurisdiction
- ◆ No need to show harm

History - Cases

- ◆ *Headwaters, Inc. v. Talent Irrigation District*, 243 F. 3^d 526 (9 Cir. 2001)

2. Label approved by EPA

3. EPA in amicus brief – User's compliance with pesticide label instruction does not satisfy all other environmental laws

History - Cases

◆ *Headwaters, Inc. v. Talent Irrigation District*, 243 F. 3^d 526 (9 Cir. 2001)

4. EPA "approved pesticides...with the knowledge that pesticides containing pollutants may be discharged from point sources into navigable waters only pursuant to a properly issued CWA permit."

History - Cases

- ◆ *Headwaters, Inc. v. Talent Irrigation District*, 243 F. 3^d 526 (9 Cir. 2001)

5. Water of U.S. can be when there is “no evidence that streams that connected to tributary with navigable water were running at the time”

- ◆ *US v Ashland Oil*, 504 F. 2d 1317, 1329 (6th Cir. 1974)

History - Cases

- ◆ *Headwaters, Inc. v. Talent Irrigation District*, 243 F. 3^d 526 (9 Cir. 2001)

6. Court held CWA permit required:

- ◆ Magnacide left water after application & became a waste or pollutant
 - Chemical Waste
 - Biological Material

History - Cases

- ◆ *League of Wilderness Defenders v. Forsgren* 309 F.3^d 1181 (9th Cir. 2002)
 1. U.S. Forest Service aerial pesticide spraying
 2. Aerial spraying is a “point source” under CWA
 3. Insecticides a pollutant under CWA

History - Cases

◆ *League of Wilderness Defenders v. Forsgren* 309 F.3^d 1181 (9th Cir. 2002)

4. Spraying was to control Tussock Moth

5. Point source v. non-point source:

Non-point source activities such as site preparation, reforestation, pest and fire control or road construction “from which there is natural runoff.”

No NPDES Permit required

History - Cases

- ◆ *League of Wilderness Defenders v. Forsgren* 309 F.3^d 1181 (9th Cir. 2002)

6. Spraying from plane was from a point source

- ◆ Non-point source pollution caused primarily by rainfall

History - Cases

- ◆ *League of Wilderness Defenders v. Forsgren* 309 F.3^d 1181 (9th Cir. 2002)
- ◆ Court – Non-point sources have 3 characteristics:
 1. Induced by natural processes, rain, seepage, & runoff
 2. Not traceable to discrete or identifiable facility
 3. Pollutants are better controlled through BMPs

History - Cases

◆ *Fairhurst v. Hagen* 422 F.3^d 1146
(9th Cir, 2005)

1. Pesticide injected into water kills non-native fish
2. Determine pesticide not a chemical waste
 - No residue left
 - Dissipated rapidly
 - No NPDES permit needed

History - Cases

- ◆ *U.S. v. Wabash Valley Service*, Case No. 05-CR-40029-JPG (March 16, 2006)
 1. Criminal case against company & employee applicators
 2. Neighbor videotaped spray drift
 3. DOJ & EPA claimed wind speed at 20 mph

History - Cases

- ◆ *U.S. v. Wabash Valley Service*, Case No. 05-CR-40029-JPG (March 16, 2006)
- ◆ 4. Spraying Atrazine – label states “Do not apply under windy conditions.”
 - Criminal penalties for failure to comply
- ◆ 5. Statute unclear on what conduct subjects a person to criminal indictment
- ◆ 6. Case dismissed by the Court on Motion to Dismiss as label unconstitutionally vague

Latest Case

- ◆ *The National Cotton Council v. EPA*
April 29, 2009

1. EPA rule: pesticides not generally pollutants

- Claimed pesticide residuals are wastes but not subject to NPDES permitting
- Claimed pesticide residuals not from a point source
- Claimed residue a non-point source
 - ◆ No NPDES permit required

Latest Case

- ◆ *The National Cotton Council v. EPA*
April 29, 2009

2. EPA Policy & Criteria Notice 2180.1 (1977)

- Pesticide labels are required to contain notice
- Pesticide cannot be discharged into lakes, streams, ponds, or public water without NPDES permit

Latest Case

3. EPA's Final Rule

- No NPDES permit needed if applying pesticides directly to waters of U.S. to control pests
- No NPDES permit needed if applying pesticides to control pests present over water including near such waters where portion will unavoidably be deposited to waters of U.S. in order to target pests effectively

Latest Case

◆ 4. The Court

- Cites *Fairhurst* – if pesticide intentionally applied to water & leaves no excess portions it is not a chemical waste & needs no NPDES permit
- If pesticide applied to land or dispensed in air “near” waterways & in “excess,” “discarded,” “superfluous” – NPDES permit needed
 - ◆ Lasting effects beyond intended target – NPDE permit needed

Latest Case

◆ 5. The Court

- Rejects EPA's position that excess must be at time of discharge
- No temporal element in CWA
- No discussion of agricultural stormwater exemption
- If there is an "addition" NPDES permit needed

EPA Position

1. Opposed rehearing of decision
2. EPA estimates 365,000 applications impacted
 - 5.6 million pesticide applicators annually
3. Do you need an NPDES permit before spraying near a navigable water of the U.S.?
 - What is a “navigable water of the U.S.?”

Questions?

Thank you