
**Agriculture & Ecology
Committee**

HB 2867

Brief Description: Mitigating the effects of the aquatic pesticide national pollutant discharge elimination system permit required as the result of a recent court decision.

Sponsors: Representatives Fromhold, Ogden, McMorris, Grant, Haigh and Delvin.

Brief Summary of Bill

- Sets a maximum \$300 permit fee for discharge permits developed after a recent Ninth Circuit Court of Appeals decision.

Hearing Date: 2/8/02

Staff: Caroleen Dineen (786-7156).

Background:

Federal and State Discharge Permits

The federal Clean Water Act (CWA) sets a national goal to restore and maintain the chemical, physical, and biological integrity of the nation's waters and to eliminate discharge of pollutants into navigable waters. The CWA establishes the National Pollution Discharge Elimination System (NPDES) permit system to regulate wastewater discharges from point sources to surface waters. NPDES permits are required for anyone who discharges wastewater to surface waters or who has a significant potential to impact surface waters.

Washington's Department of Ecology (DOE) has been delegated authority by the United States Environmental Protection Agency (EPA) to administer NPDES permits. The DOE also administers state discharge permits. State permits are required for anyone who discharges waste materials from a commercial or industrial operation to ground or publicly-owned treatment plants and for municipalities that discharge to ground. The DOE issues both individual permits (covering single, specific activities or facilities) and general permits (covering a category of similar dischargers) in the state and NPDES permit programs.

A wastewater discharge permit places limits on the quantity and concentrations of contaminants that may be discharged. Permits may require wastewater treatment or impose operating or other conditions, including monitoring, reporting, and spill prevention planning.

The DOE establishes annual fees to collect expenses for issuing and administering state and NPDES discharge permits. Fees must be based on factors relating to the complexity of permit issuance and compliance and must be established to fully recover but not exceed expenses of:

- processing permit applications and modifications;
- monitoring and evaluating compliance with permits;
- conducting inspections;
- securing laboratory analysis of samples taken during inspections;
- reviewing plans and documents directly related to permittees' operations;
- overseeing performance of delegated pretreatment programs; and
- supporting overhead expenses directly related to these activities.

Fees may be based on pollutant loading and toxicity and may be designed to encourage recycling and reduction of pollutant quantity. Fees collected are deposited into the water quality permit account.

Aquatic Pesticides

The federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) regulates pesticide use, sales, and labeling. FIFRA requires that all pesticides and herbicides sold in the United States be registered with the EPA. The EPA has authority under FIFRA to approve the label under which the product is marketed. The EPA also has authority for enforcement under FIFRA.

Aquatic pesticides are chemicals that kill, attract, repel, or control the growth of aquatic pests. The DOE issues administrative orders for short-term water quality standards modifications when pesticides are applied in or near waterways.

Headwaters, Inc. v. Talent Irrigation District

The Ninth Circuit Court of Appeals (Ninth Circuit) is a federal appellate court with jurisdiction over cases filed in federal district courts in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. In March 2001 the Ninth Circuit determined the registration and labeling requirements of FIFRA did not preclude the need for a NPDES permit under the CWA. *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (2001). In the *Talent* case, an Oregon irrigation district's direct application of Magnacide H, an aquatic herbicide, to an irrigation canal without a NPDES permit was challenged after dead fish were found in a creek downstream from the canal's leaking waste gate. The Ninth Circuit concluded in *Talent* that the herbicide application met the four-part test for establishing a violation of the CWA's NPDES permit requirement: a showing that a defendant (1) discharged (2) a pollutant (3) to navigable waters (4) from a point source. Further, the Ninth Circuit determined in *Talent* that the EPA-approved label on the herbicide

did not eliminate the irrigation district's obligation to obtain a NPDES permit.

Department of Ecology Permit Development

In October 2001 the DOE issued notice of development of NPDES permits for the use of aquatic pesticides in lakes, rivers, and estuaries in this state. Permits are being developed for:

- aquatic plant management in irrigation ditches;
- mosquito larva control in still waters;
- aquatic plant management in lakes and streams;
- burrowing shrimp control on oyster beds;
- noxious emergent plant management in wetlands and shorelines;
- nuisance plant management in ditch banks and mitigated wetlands; and
- fish management in lakes.

Summary of Bill:

A maximum discharge permit fee of \$300 is established for any permit fee and costs required solely as a result of the Ninth Circuit Court of Appeals' decision in *Headwaters, Inc. v. Talent Irrigation District*. The Department of Ecology (DOE) may transfer up to \$200,000 per biennium from the state toxics control account to recover any other costs of developing, implementing, and monitoring the permit program established as a result of the *Talent* decision.

Appropriation: None.

Fiscal Note: Requested on February 5, 2002.

Effective Date: An emergency clause is included for the provisions to take effect immediately.