

HOUSE BILL REPORT

2SHB 2867

As Amended by the Senate

Title: An act relating to mitigating the effects of the aquatic pesticide national pollutant discharge elimination system permit required as a result of a recent federal court decision.

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: By House Committee on Agriculture & Ecology (originally sponsored by Representatives Fromhold, Ogden, McMorris, Grant, Haigh and Delvin).

Brief History:

Committee Activity:

Agriculture & Ecology: 2/8/02 [DPS];
Appropriations: 2/9/02 [DP2S(w/o sub AGEC)].

Floor Activity:

Passed House: 2/17/02, 94-0.
Senate Amended.
Passed Senate: 3/8/02, 47-0.

Brief Summary of Second Substitute Bill

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

HOUSE COMMITTEE ON AGRICULTURE & ECOLOGY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 13 members: Representatives Linville, Chair; Hunt, Vice Chair; Schoesler, Ranking Minority Member; Chandler, Cooper, Delvin, Dunshee, Grant, Holmquist, Kirby, Quall, Roach and Sump.

Staff: Caroleen Dineen (786-7156).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second

substitute bill do pass and do not pass the substitute bill by Committee on Agriculture & Ecology. Signed by 25 members: Representatives Sommers, Chair; Doumit, 1st Vice Chair; Fromhold, 2nd Vice Chair; Sehlin, Ranking Minority Member; Alexander, Boldt, Buck, Clements, Cody, Cox, Dunshee, Grant, Kagi, Kenney, Kessler, Linville, Lisk, Mastin, McIntire, Pearson, Pflug, Ruderman, Schual-Berke, Talcott and Tokuda.

Staff: Jeff Olsen (786-7157).

Background:

Federal and State Discharge Permits

The federal Clean Water Act (CWA) establishes the National Pollution Discharge Elimination System (NPDES) permit system to regulate wastewater discharges from point sources to surface waters. The 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. 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 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.

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. Fees must be established to fully recover but not exceed expenses of the program, including permit processing, monitoring, compliance, evaluation, inspection, and program overhead. 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. The 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 has issued 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 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 Second Substitute Bill:

A maximum National Discharge Elimination Permit System (NPDES) permit fee of \$300 is established for any individual or general permits required as a result of the Ninth Circuit of Appeals' decision in *Headwaters, Inc. v. Talent Irrigation District*. These permits may be required only if and as long as the United States Environmental Protection Agency requires such permits in states that do not have delegated authority to issue NPDES permits.

Technical revisions eliminate provisions related to expired requirements.

EFFECT OF SENATE AMENDMENT(S):

The Senate striking amendment specifies permits developed solely as a result of the Talent decision may be required only as long as the interpretation of Talent is not overturned or modified by future court rulings, administrative rule making, or legislative action, rather than conditioning the requirement on action by the United States Environmental Protection Agency in nondelegated states. The Senate striking amendment also makes the \$300 maximum permit fee for these permits effective only until June 30, 2003.

Appropriation: None.

Fiscal Note: Available.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: (Agriculture & Ecology) **Testimony for:** (Original bill) The *Talent* decision affected a number of entities across the state, including irrigation districts, lake management districts, mosquito districts, the state for spartina control, and oyster growers. The National Pollution Discharge Elimination System (NPDES) was never envisioned to cover these types of entities. Oyster growers already have to jump through a number of hoops in order to farm in an estuary and do not need an additional permit requirement.

This bill is a good approach for what many expect may be a short-lived situation while we wait for changes at the federal level.

Testimony For: (Appropriations) Irrigation districts are faced with a new, expensive permit due to a recent federal court ruling. Irrigation districts support the agricultural industry, and agriculture cannot afford more increased costs. These permit costs are duplicative and will not provide any increased environmental benefits. Lake management districts face expensive permits. Oyster growers face a permit fee of over \$30,000.

Testimony Against: (Agriculture & Ecology) **Testimony against:** (Original bill) The amendments help to resolve some major concerns regarding the bill. The Department of Ecology (DOE) is working with an advisory committee to develop the permits. The DOE is currently required by statute to charge fees in order to fully recover its costs. The concern regarding use of the Toxics Control Act is addressed by an amendment appropriating funds from the Water Quality Permit Account.

Testimony Against: (Appropriations) None.

Testified: (Agriculture & Ecology) (In support) Ed Owens, Willapa-Grays Harbor

Oyster Growers; Heather Hansen, Washington Friends of Farms and Forests; Mike Schusow, Washington State Water Resources Association; and Brian Sheldon, Oyster Grower Association and Northern Oyster.

(Con) Megan White, Department of Ecology; and Greg Hanon, Western States Petroleum Association.

Testified: (Appropriations) Mike Schusow, Washington State Water Resources Association; Ed Owens, Willipa Bay & Grays Harbor Oyster Growers; and Dan Coyne, Far West Agribusiness Association/CropLife America.