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Pesticides and Water Don't Mix: Addressing the Need to Close a Regulatory Gap Between FIFRA and the CWA

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The failure to adequately regulate the application of pesticides over and into water bodies is a troubling example of the left hand not knowing what the right hand is doing in federal environmental regulation. Under existing federal law, pesticide applicators who comply with the requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[1] may then proceed to apply such FIFRA-regulated pesticides in a manner that may constitute a violation of the Clean Water Act (CWA).[2] Moreover, the CWA does not contain any provisions, or enumerate any exceptions, pertaining to the application of FIFRA-regulated pesticides that reach "waters of the United States"[3] regulated under the Act. The federal courts and the U.S. Environmental Protection Agency (EPA) have failed to resolve the relationship between these two statutes. Therefore, the U.S. Congress needs to bridge the gap between FIFRA and the CWA to ensure that these statutes' objectives to protect the environment and public health are fulfilled.

Federal courts have been one of two battlegrounds where the conflict between the regulatory scope of these two statutes has been waged. A circuit split is developing concerning the applicability of national pollutant discharge elimination system (NPDES) permits under the CWA for the application of pesticides regulated under FIFRA. The U.S. Court of Appeals for the Ninth Circuit and the U.S. Court of Appeals for the Second Circuit each have heard cases within the last four years on this issue, with the Ninth Circuit generally ruling in favor of requiring NPDES permits for FIFRA-regulated pesticides that are applied into or over waters regulated under the CWA.[4] The Second Circuit cases,[5] however, applied a stricter interpretation of the arguably conflicting Acts, and have limited the factual circumstances under which an NPDES permit is required for application of FIFRA-regulated pesticides.

The controversy over whether NPDES permits should be required for the application of FIFRA-regulated pesticides has not been limited to federal court cases. On July 11, 2003, EPA issued the *Interim Statement and Guidance on Application of Pesticides to Waters of the United States in Compliance With FIFRA*.[6] This document states EPA's position that, until the Agency issues a final policy following public notice and comment, EPA will not require NPDES permits for the application of pesticides used in compliance with their FIFRA labels. The public comment period, which ended on October 14, 2003, drew extensive and conflicting commentary from private citizens, environmental groups, industry representatives, and a variety of government entities responsible for pest control.

Part I of this Article addresses two aspects of how courts have addressed NPDES permitting requirements of FIFRA-regulated pesticides applied into or over waters of the United States. The first issue is whether the two statutes can coexist when there is compliance with FIFRA and a potential violation of the CWA. This analysis considers whether compliance under FIFRA precludes any action under the CWA for an alleged violation of the Act. The issue is examined under the U.S. Court of Appeals for the Tenth Circuit's test in *Chemical Weapons Working Group, Inc. v. U.S. Department of the Army*,[7] and the U.S. Supreme Court's decision in *Wisconsin Public Intervenor v. Mortier*.[8]

Part I also evaluates whether the application of FIFRA-regulated pesticides into or over waters of the United States complies with NPDES permit requirements under the CWA. This analysis is further divided into three subparts: (1) whether the methods and means for the FIFRA-approved application of such pesticides are "point sources" as that term has been defined under the CWA; (2) whether

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1. 7 U.S.C. §§136-136y, ELR STAT. FIFRA §§2-34.
2. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
3. Section 301(a) of the CWA, *id*. §1311(a), refers to "navigable waters," which is then defined expansively in §502 of the Act to mean "waters of the United States." *Id*. §1362. This fourth element of whether the water body in question qualifies as "navigable waters" typically is not in dispute in the context of FIFRA-approved pesticides that reach water bodies.
4. *See* Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 31 ELR 20535 (9th Cir. 2001); League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren, 309 F.3d 1181, 33 ELR 20107 (9th Cir. 2002).
5. *See* No Spray Coalition v. City of New York, 15 Env't Rep. Cas. (BNA) 1508 (S.D.N.Y. 2000), *aff'd*, 252 F.3d 148, 31 ELR 20707 (2d Cir. 2001); Altman v. Town of Amherst, N.H., 190 F. Supp. 2d 467 (W.D.N.Y. 2001).
6. 68 Fed. Reg. 48385 (Aug. 13, 2003).
7. 111 F.3d 1485, 27 ELR 21130 (10th Cir. 1997).
8. 501 U.S. 597, 21 ELR 21127 (1991).

such pesticides, when used for their FIFRA-approved purposes, can be classified as "pollutants" under the CWA; and (3) whether such applications of those chemicals should be considered "discharges" under the CWA. Part I examines this second issue under the guidelines established in *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*,[9] *Headwaters, Inc. v. Talent Irrigation District*,[10] and *No Spray Coalition v. City of New York*,[11] respectively.

Part II examines the clash between FIFRA and the CWA in the regulatory arena. This section discusses the regulatory response after the Ninth Circuit in *Headwaters* underscored the need for EPA guidance on this issue for the regulated public as well as the courts. Part II also addresses: (1) *Altman v. Town of Amherst, New Hampshire*,[12] the Second Circuit case that prompted EPA to act; (2) the interim guidance issued in July 2003, in response to the court's decision in *Altman*; and (3) the public response to the request for comments.

Part III considers possible regulatory options to address FIFRA-approved pesticides that are sprayed over and into water bodies regulated under the CWA. Individual or general NPDES permits should be required; however, they should not be administered on a piecemeal basis. Congress should amend FIFRA and the CWA to clarify that FIFRA-approved pesticides that are applied over or into waters of the United States are subject to NPDES permitting requirements. Federal courts have reached conflicting interpretations and EPA has flip-flopped in its interpretation of this issue. Therefore, Congress must intervene to reconcile the relationship between these statutes and leave EPA only with the task of promulgating regulations to address how to implement this mandate. Part of that EPA implementation process should involve whether and under what circumstances emergency exemptions to the NPDES permit requirements can be made for spraying that is undertaken to combat an imminent public health threat, like the West Nile Virus problem that New York City faced in *No Spray.*

I. FIFRA and the CWA in the Courts

The potential for overlapping and potentially conflicting regulatory scope between two federal statutes is common, especially in the heavily regulated area of environmental protection. *Mortier* and *Chemical Weapons* shed some light on how courts should address whether an action is precluded from being raised under the CWA when the underlying activity allegedly violates the CWA but complies with FIFRA. This question represents the threshold of the evaluation of the relationship between FIFRA and the CWA. In *Mortier*, the Court held that FIFRA does not preempt local ordinances regulating pesticides.[13] It noted that FIFRA implied a partnership between federal, state, and local governments.[14] In 1997, the Tenth Circuit, in *Chemical Weapons*, addressed the framework by which courts in that circuit should resolve a potential conflict between federal statutes. In *Chemical Weapons*, the statutes that were potentially in conflict were the CWA and the Clean Air Act (CAA). The court held that it would reject broad interpretations of statutes when a regulatory conflict results.[15]

The courts also have decided other cases that may help to resolve whether activity that complies with FIFRA constitutes a violation of the CWA. These cases addressed whether the challenged activity constituted a "discharge" of "pollutants" from a "point source" as those terms are defined under the CWA. To date, there have been three decisions that have explored what these terms mean in the context of activity that is in compliance with FIFRA. The first was *Headwaters*, which the Ninth Circuit decided on March 12, 2001. *Headwaters* is helpful to guide courts in deciding what constitutes a "pollutant" in such cases. The next case, *No Spray*,[16] was brought in the Second Circuit and is yet unresolved. *No Spray* has thus far laid groundwork for interpreting the term "discharge" where, as in that case, FIFRA-regulated pesticides are sprayed from implements designed for that purpose. Finally, in *League of Wilderness Defenders*, the Ninth Circuit held that the statutory definition of "point source" under the CWA "clearly encompasses an aircraft equipped with tanks spraying pesticide from mechanical sprayers directly over covered waters."[17] *League of Wilderness Defenders* may serve as guidance on how courts should address what types of FIFRA-approved discharges may constitute "point sources" for CWA permitting purposes.

These cases began what could develop into a circuit split over whether CWA permits are required for the point-source discharge of FIFRA-regulated pesticides over or into waters of the United States. Thus far, the Ninth Circuit cases have held that CWA permits are required for at least some of this activity.[18] The Second Circuit, while not holding the opposite, appears to be less willing to interpret the CWA to require NPDES permits for application of FIFRA-regulated chemicals.[19] An in-depth examination of these three cases, in light of the threshold issue addressed in *Mortier* and *Chemical Weapons*, is warranted to understand the reasoning underlying these decisions, and to evaluate whether this issue can properly be resolved in the courts.

A. The Threshold Issue: Can FIFRA and the CWA Coexist When FIFRA-Approved Activity Is an Alleged Violation of the CWA?

In situations in which two statutes potentially cover the same subject matter, courts must determine whether those statutes can coexist in a rational and workable manner.[20] The courts have provided some guidance on how this question should be answered; however, they have not yet done so within the parameters of a CWA-FIFRA conflict.

In *Mortier*, the Court addressed an alleged conflict between FIFRA and a local ordinance that regulated pesticide

9. 309 F.3d 1181, 33 ELR 20107 (9th Cir. 2002).
10. 243 F.3d 526, 31 ELR 20535 (9th Cir. 2001).
11. No. 02-9484, 2003 U.S. App. LEXIS 24675, 34 ELR 20007 (2d Cir. 2003).
12. 47 Fed. Appx. 62, 33 ELR 20037 (2d Cir. 2002).
13. 501 U.S. at 600.
14. *Id.* at 615.
15. *Chemical Weapons*, 111 F.3d at 1490.
16. 2003 U.S. App. LEXIS 24675.
17. 309 F.3d at 1185.
18. *See Headwaters*, 243 F.3d at 526; *League of Wilderness Defenders*, 309 F.3d at 1181.
19. *See No Spray*, 2003 U.S. App. LEXIS 24675; *Altman*, 47 Fed. Appx. at 62.
20. *See Chemical Weapons*, 111 F.3d at 1490.

use.[21] Ralph Mortier, the plaintiff-respondent, was a farmer who applied for a permit for aerial spraying of pesticides on his land.[22] The local ordinance required a permit for the aerial application of pesticides to land, whether public or private land.[23] The town granted Mortier's permit, but allowed only ground spraying, and even then only on certain areas of Mortier's lands.[24] Mortier sought a declaratory judgment against the town, claiming that the local ordinance was preempted by state and federal law, namely FIFRA.[25] After exhausting all state remedies, with the Supreme Court of Wisconsin holding that the ordinance was preempted by FIFRA,[26] the Court granted certiorari to decide the issue.[27]

In an opinion by Justice Byron White, the Court held that FIFRA does not preempt the local government's regulation of pesticides.[28] The Court reasoned that neither the language of FIFRA, nor its legislative history, revealed any congressional intent that FIFRA preempt local regulation.[29] The Court further held that it found no actual conflict between the local ordinance and FIFRA.[30] Mortier argued that the town's ordinance conflicted with FIFRA because it was an "obstacle to the statute's goals of promoting pesticide regulation that is coordinated solely on the federal and state levels, that rests upon some degree of technical expertise, and that does not unduly burden interstate commerce."[31] The Court found these arguments unpersuasive, noting that FIFRA was not meant to "sweep either as exclusively or as broadly as Mortier contends."[32] Importantly, the Court stated that FIFRA "implies a regulatory partnership between federal, state, *and* local governments."[33]

Most importantly for the purposes of this Article, however, are the comments that the Court made regarding FIFRA's scope in the field of pesticide regulation:

> FIFRA nonetheless leaves substantial portions of the field vacant, including the area at issue in this case. FIFRA nowhere seeks to establish an affirmative permit scheme for the actual use of pesticides. It certainly does not equate registration and labeling requirements with a general approval to apply pesticides throughout the Nation without regard to regional and local factors like climate, population, geography, and water supply. Whatever else FIFRA may supplant, it does not occupy the field of pesticide regulation in general or the area of local use permitting in particular.[34]

As this language strongly suggests, there is ample room for regulation from sources other than FIFRA to regulate the application of FIFRA-approved pesticides. The Court noted that FIFRA is not comprehensive, and that it is neither intended to, nor capable of, addressing all aspects of pesticide regulation.

Chemical Weapons[35] is another case that is instructive on the issue of whether FIFRA and the CWA may be applied harmoniously to promote responsible regulation of pesticides. In *Chemical Weapons*, the plaintiff, an environmental group, sought an injunction to halt the operation of an incinerator that the U.S. Department of the Army (Army) was planning to use for disposal of chemical weapons.[36] The Army obtained all of the necessary permits under the CAA and the Resource Conservation and Recovery Act (RCRA) from the Utah Department of Environmental Quality.[37] The plaintiff argued that §301(f)[38] of the CWA should apply to the operation of the incinerator because the stack emissions from the incinerator would result in the discharge of chemical warfare agents into navigable waters protected under the CWA.[39]

The Tenth Circuit stated that courts "must construe apparently conflicting statutes harmoniously where possible," and avoid statutory construction that results in irrational results and creates a conflict between the two statutes.[40] It noted that applying the plaintiff's interpretation of §301(f) to the case would effectively shut down the operation of the incinerator indefinitely, which would be inconsistent with Congress' use of incineration as the baseline technology for destroying chemical weapons.[41] The court further reasoned that because the incinerator's stack emissions were discharges into the air, rather than into navigable waters, regulation of those emissions under the CWA would lead to irrational results.[42] Finally, the court concluded that because the CAA permit specifically allowed discharges from the incinerator stacks, and the plaintiffs claimed that those emissions should be barred under the CWA, the plaintiffs' proposed construction of the CWA would result in an irreconcilable conflict between the two statutes.[43]

In the FIFRA-CWA context, therefore, courts may apply the *Chemical Weapons* test to address whether requiring NPDES permits under the CWA for FIFRA-approved activity: (1) leads to irrational results; (2) creates an irreconcilable conflict between the two statutes; or (3) is contrary to congressional intent. Although there is potential for some overlap between the purposes of the two Acts, FIFRA does not and cannot protect the nation's waters in the comprehensive manner that the CWA does. The purpose of the CWA is "[to restore and maintain] the chemical, physical and biological integrity of the Nation's waters."[44] FIFRA's purpose is to promote health and safety by protecting the public and the environment from possible harm caused by pesticides by establishing and maintaining a pesticide registration sys-

21. 501 U.S. at 597.
22. *Id.* at 603.
23. *Id.* at 602-03.
24. *Id.* at 603.
25. *Id.*
26. *See* Mortier v. Town of Casey, 154 Wis. 2d 18, 21 ELR 20062 (Wis. 1990).
27. *Mortier*, 501 U.S. at 604.
28. *Id.* at 600.
29. *Id.* at 607.
30. *Id.* at 614.
31. *Id.* at 614-15.
32. *Id.* at 615.
33. *Id.* (emphasis in original).
34. *Id*. at 613-14.
35. 111 F.3d at 1485.
36. *Id.* at 1488.
37. *Id.*
38. The applicable provision states: "[I]t shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste into the navigable waters." 33 U.S.C. §1311(f).
39. *Chemical Weapons*, 111 F.3d at 1490.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 1490-91.
44. 33 U.S.C. §1251(a).

tem.[45] FIFRA does not, however, specifically address the protection of the waters of the United States. EPA has stated that compliance with a FIFRA label does not ensure compliance with all other laws, and that the Agency approves pesticides under FIFRA with the understanding that use of those pesticides may be subject to CWA permits.[46]

In this regard, courts that address whether the CWA and FIFRA can coexist should decide that the Acts can do so because they serve different purposes. FIFRA was not enacted to supplant the CWA when the issue is protecting waters of the United States from the discharge of pollutants from point sources. As EPA's amicus brief filed in the *Headwaters* case noted: "FIFRA and the CWA establish separate statutory programs, serve distinct purposes, and call for very different environmental analyses."[47] The EPA brief further explained the compatibility of the two statutes, stating that "a person seeking to discharge a pollutant into a public water body from a point source may comply with both FIFRA and the CWA by following the directions on a pesticide label approved under FIFRA *and* by obtaining a permit when required by the CWA."[48] EPA adopted this simple and common-sense approach to address the issue of statutory conflict between the CWA and FIFRA, and the courts should adopt this approach as well.

Consistent with the Tenth Circuit's approach in *Chemical Weapons*, courts should recognize that FIFRA is adequate to regulate only activity that is exclusively within its regulatory scope. However, when FIFRA-approved pesticides are applied to waters of the United States, or affect such waters in ways that are not contemplated and tested for under the FIFRA registration process, only the CWA can properly protect the waters from harm. Under such circumstances, courts should hold that the threshold issue is crossed when FIFRA-approved pesticides are applied to U.S. waters, and that the CWA applies in such circumstances. Such an outcome does not lead to irrational results or create an irreconcilable conflict between the two statutes, and is wholly consistent with the congressional intent underlying each statute.

B. The CWA Framework: Whether FIFRA-Approved Activity Constitutes a CWA Violation

After the threshold issue is resolved, a court then must address whether the application of FIFRA-approved pesticides to waters of the United States constitutes a violation of the CWA. Under CWA §301(a), a discharge of pollutants into navigable waters of the United States is prohibited.[49] Furthermore, the CWA dictates that any facility that discharges a pollutant into navigable waters does so unlawfully without first obtaining an NPDES permit.[50] In cases in which it is alleged that a facility is in violation of NPDES permit requirements, a court must first determine whether the challenged activity meets the CWA criteria defining the "discharge of a pollutant from a point source into navigable waters" before it can ascertain the need for an NPDES permit.

Courts that have addressed possible violations of §301(a) of the CWA have divided the inquiry into four distinct steps. For a challenged activity to constitute a violation, it must involve (1) a discharge, (2) of a pollutant, (3) from a point source, (4) into navigable waters of the United States.[51] If a court finds that the challenged application of a FIFRA-approved pesticide satisfies all four of these elements, there is a CWA violation. The following cases have analyzed these elements in the context of application of FIFRA-registered pesticides over or into waters of the United States.

1. *Headwaters*—FIFRA Chemicals as Pollutants

The *Headwaters* case arose from a challenge to certain practices of the Talent Irrigation District (TID), a municipal corporation in Oregon. Part of TID's responsibilities is to ensure that the irrigation canals it operates are free of algae and excessive weed growth.[52] To accomplish this goal, TID used Magnacide H, an aquatic herbicide, to kill weeds and algae in the canals by spraying the chemicals into the canals every two weeks from a hose connected to a tanker truck containing the herbicide.[53] The active ingredient in Magnacide H is acrolein, a chemical that is toxic to fish and wildlife in concentrations below the level that TID used in its canals.[54] After an application of the herbicide to one of the canals, a leak occurred in the canal system, which is hydrologically connected to natural water bodies. That leak ultimately resulted in a fish kill of more than 92,000 juvenile steelhead in one of the natural water bodies connected to the canals.[55]

The plaintiff, Headwaters, Inc., a nonprofit environmental organization, filed a citizen suit under the CWA[56] in the U.S. District Court for the District of Oregon. Headwaters sought an injunction prohibiting TID from discharging the herbicide without an NPDES permit.[57] The district court granted TID's cross-motion for summary judgment. The district court held that Headwaters had standing to bring a citizen suit under the CWA; that the irrigation canals were "waters of the United States" subject to the Act; and that Magnacide H was a "pollutant."[58] However, the court further held that an NPDES permit was not required because Magnacide H was properly regulated by FIFRA and had an EPA-approved FIFRA label that did not require an NPDES permit.[59]

On appeal, the Ninth Circuit reversed the district court's grant of summary judgment in favor of TID and entered an order of partial summary judgment for Headwaters.[60] The court first examined the CWA and FIFRA to determine whether the absence of any mention of a CWA permit on a

45. *See* 7 U.S.C. §136.

46. *See* Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 531, 31 ELR 20535 (9th Cir. 2001).

47. Amicus Brief of EPA for Appellants at 8, *Headwaters* (No. 99-35373).

48. *Id.* at 8-9 (emphasis in original).

49. 33 U.S.C. §1311(a).

50. *Id.* §1342(a).

51. *See* League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren, 309 F.3d 1181, 1184, 33 ELR 20107 (9th Cir. 2002).

52. *Headwaters*, 243 F.3d at 528.

53. *Id.*

54. *Id.*

55. *Id.*

56. 33 U.S.C. §1365 (2004).

57. *Headwaters*, 243 F.3d at 529.

58. *Id.*

59. *Id.*

60. *Id.* at 534.

FIFRA label indicates that such a permit is not required.[61] It determined that FIFRA and the CWA have different purposes and, as such, that neither could be controlling on the application of the other.[62] More specifically, the Ninth Circuit noted that while FIFRA labels are the same nationwide, NPDES permits under the CWA must account for local conditions and circumstances.[63] Therefore, a blanket nationwide label on a FIFRA-regulated chemical could not possibly be controlling on whether an NPDES permit is required at a specific location because it does not account for location-specific factors.[64]

The court upheld the other findings of the district court that the direct application of the herbicide into the canals, as well as the leakage of the chemical residue into the natural water bodies, constituted a "discharge" under the Act.[65] The court also held that the chemical was a "pollutant" under the CWA because the residual acrolein left in the water after the applications was a chemical waste product and thus a pollutant under the CWA.[66] Finally, the court agreed with the lower court that the irrigation canals were "waters of the United States" as defined in the CWA because they "are tributaries to the natural streams with which they exchange water."[67]

The court's discussion of how it determined that the chemicals in the *Headwaters* case were pollutants is instructive. TID argued that Magnacide H is not a pollutant because it was applied for its FIFRA-approved purpose—clearing weeds.[68] The court noted that while it found it "absurd to conclude that a toxic chemical directly poured into water is not a pollutant," it did not need to decide that point directly because it agreed with the lower court's reasoning and conclusion that the herbicides were indeed chemical wastes, and thus pollutants.[69]

Courts should follow the logic applied in this case when FIFRA-registered pesticides leave toxic chemical residues in the waters to which they are applied or where they eventually are deposited. The discharge of pesticides into those waters, where those chemicals will leave behind a toxic residue that is dangerous to the aquatic environment, is contrary to the CWA's purpose to protect the integrity of the nation's waters. While chemicals may be a product as they are applied for their intended use, they should be considered chemical wastes if they are toxic to non-target organisms when they have served their intended purpose.

2. *League of Wilderness Defenders*—The Point Source Issue

Another case concerning FIFRA-regulated pesticides and NPDES permits made its way through the courts in the Ninth Circuit at the same time as *Headwaters*. In *League of Wilderness Defenders*, the plaintiffs, several environmental groups, sued the Regional Forester of the Pacific Northwest Region and others in the Oregon district court.[70] The plaintiffs argued that the U.S. Forest Service was required to obtain an NPDES permit in order to continue its aerial pesticide spray program over 628,000 acres of national forest lands in Oregon and Washington.[71] The plaintiffs introduced evidence that showed that the aerial spraying, which was meant to alleviate the damage from outbreaks of the Douglas Fir Tussock Moth, also was harmful to beneficial species, such as other insects, birds, and plants.[72]

On plaintiffs' NPDES claim, the district court heard arguments regarding whether the aerial application devices used for the spraying of pesticides in this case were "point sources" under the CWA.[73] The parties did not dispute that the pesticides were "pollutants," that the waters into which the spray fell were "waters of the United States," and that the spraying constituted a "discharge." The court reasoned that in keeping with prior cases,[74] activities that are not specifically listed as point source silvicultural activities by EPA regulation 40 C.F.R. §122.27 are not point sources requiring NPDES permits.[75] The district court then granted the Forest Service's motion for summary judgment on that issue.[76]

On appeal, the Ninth Circuit reversed the district court's grant of summary judgment and ordered the "district court to enter an injunction prohibiting the Forest Service from further spraying until it acquires an NPDES permit . . . ."[77] The court reasoned that the regulation on which the defendants and the lower court relied was not controlling because the statutory language regarding point sources was clear and unambiguous.[78] The court held that 33 U.S.C. §1362(14)—the statutory definition of "point source"—"clearly encompasses an aircraft equipped with tanks spraying pesticides from mechanical sprayers directly over covered waters."[79] The court further explained that the EPA regulation actually conformed to the statutory language regarding silvicultural activities because that regulation stated that *runoff* from certain activities, such as pest control, was not point source pollution and subject to NPDES requirements.[80] The court concluded that the type of activity in question, spraying pesticides from mechanical sprayers, was exactly the type of "discrete and confined conveyances" that are "most amenable to control through the NPDES program . . . ."[81] It ordered the Forest Service to halt the aerial application of pesticides over the forest in the Region in the absence of an NPDES permit.[82]

The opinion in *Forsgren* contains succinct reasoning to guide other courts in evaluating whether the discharge of

61. *Id.* at 530.
62. *Id.* at 531.
63. *Id.*
64. *Id.*
65. *Id.* at 532.
66. *Id.*
67. *Id*. at 533.
68. *Id.* at 532.
69. *Id.*
70. 309 F.3d at 1182.
71. *Id.*
72. *Id.* at 1183.
73. League of Wilderness Defenders v. Forsgren, 163 F. Supp. 2d 1222, 1240, 31 ELR 20692 (D. Or. 2001).
74. *See* Newton County Wildlife Ass'n v. Rogers, 141 F.3d 803, 28 ELR 21125 (8th Cir. 1998); Sierra Club v. Martin, 71 F. Supp. 2d 1268 (N.D. Ga. 1996).
75. *Forsgren*, 163 F. Supp. 2d at 1243.
76. *Id*.
77. *League of Wilderness Defenders*, 309 F.3d at 1182.
78. *Id.* at 1185.
79. *Id.*
80. *Id.* at 1186.
81. *Id.* at 1188.
82. *Id.* at 1190.

FIFRA-registered pesticides comes from a point source under the CWA. The decision offers a straightforward reading of the statute because the legislation is "clear and unambiguous."[83] The court further noted that arguments that obfuscate the intent of Congress should fail because when "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency (EPA), must give effect to the unambiguously expressed intent of Congress."[84]

3. *No Spray*—"Discharge" of FIFRA Pesticides

The most recent case regarding NPDES permit requirements for FIFRA-regulated pesticides was decided on December 9, 2003. That decision, *No Spray*, also involved aerial application of pesticides over waters of the United States, but in this case for control of mosquitoes to fight the spread of West Nile Virus, a virus reportedly capable of causing serious illness in humans.

No Spray has gone through the courts several times. Several environmental groups filed the original complaint in the U.S. District Court for the Southern District of New York seeking an injunction to order the city to stop spraying insecticides over waters of the United States. The plaintiffs alleged that the spraying violated the CWA, RCRA, and state environmental law.[85] The plaintiffs argued that while the pesticides were properly regulated under FIFRA, any deviation from strict compliance with the EPA-approved FIFRA label could be a violation of the CWA or RCRA, thus allowing citizen suits authorized in those Acts but not available under FIFRA.[86]

In this first round, the district court denied the injunction and dismissed all claims except for those that alleged that spraying of insecticides directly over waters of the United States surrounding New York City violated the CWA.[87] The plaintiffs appealed to the Second Circuit, arguing that the insecticides were "discarded hazardous wastes" under RCRA.[88] The Second Circuit upheld the district court, reasoning that "material is not discarded until after it has served its intended purpose," and that spraying the insecticide into the air with the intention of controlling and killing mosquitoes and their larvae did not constitute "discarding" the insecticide.[89] The court noted that while the city's methods and activities in spraying the insecticide could potentially be a violation of FIFRA, the plaintiffs could not craft their claim by improperly using RCRA in order to take advantage of RCRA's citizen suit provision, a provision that FIFRA lacks.[90]

The case was then remanded to the district court and both parties moved for summary judgment on the remaining issue: whether spraying the insecticides directly over waters of the United States without a permit is a violation of the CWA.[91] In support of their motion, the plaintiffs introduced evidence that the city had sprayed the insecticide over protected waters, while the defendants argued that those responsible for spraying were instructed to stop spraying when they came within 100 feet of water.[92] The court granted the defendants' motion to dismiss the plaintiffs' claims, holding that the allegations in the complaint amounted to no more than FIFRA violations that were not actionable under the CWA.[93]

The plaintiffs again appealed to the Second Circuit. The court reversed the lower court and remanded for further proceedings on the CWA claims, reasoning that while activity may be a violation of or regulated under FIFRA, that fact does not bar a claim brought under the CWA's citizen suit provision.[94] The court noted that the district court's reasoning impermissibly removed the citizen suit mechanism from the CWA by refusing to allow the CWA claim when FIFRA might also apply under the circumstances of the case.[95] The court refused to answer the question of whether application of a pesticide in substantial compliance with its FIFRA label would preclude finding a CWA violation.[96]

Importantly, the *No Spray* court also addressed the issue of whether pesticides, sprayed into the air from a helicopter, were "discharged" within the meaning of the CWA.[97] In the case's first proceeding in the district court, the court analyzed whether the aerial spraying of pesticides constituted a discharge under the CWA.[98] There, the court stated that spraying pesticides into the air from helicopters or trucks resulted in a discharge into the air, but not into waters of the United States.[99] Citing *Chemical Weapons*,[100] the court noted that "[t]he fact that a pollutant might ultimately end up in navigable waters as it courses through the environment does not make its use a violation of the [CWA]."[101] The court contrasted the de minimis, inadvertent and inevitable drift into navigable waters against intentional application of pollutants directly into waters.[102] The court reasoned that classifying such inadvertent drift of a pollutant into waters as a discharge under the CWA would result in a strained reading of the CWA.[103]

While the *No Spray* court found that spraying chemicals into the air could not be considered a discharge under the CWA, the Second Circuit and the U.S. Court of Appeals for the Eleventh Circuit applied different reasoning to reach different results in interpreting the term. In *Catskill Mountains*

83. *Id.* at 1185.

84. *Id*. at 1186 (quoting Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43, 14 ELR 20507 (1984)).

85. No Spray Coalition v. City of New York, 2000 U.S. Dist. LEXIS 13919, at *4 (S.D.N.Y. 2000).

86. *Id.* at **6-7.

87. *Id.* at *17.

88. 42 U.S.C. §6925(a).

89. No Spray Coalition v. City of New York, 252 F.3d 148, 148, 31 ELR 20707 (2d Cir. 2001).

90. *Id.*

91. No Spray Coalition v. City of New York, 2002 U.S. Dist. LEXIS 22936, at *2 (S.D.N.Y. 2002).

92. *Id.* at *3.

93. *Id.* at *7.

94. No Spray Coalition v. City of New York, No. 02-9484, 2003 U.S. App. LEXIS 24675, at *5, 34 ELR 20007 (2d Cir. 2003).

95. *Id.* at **9-10.

96. *Id.* at *12.

97. *See* 33 U.S.C. §1362(12). The "discharge of a pollutant" means "[a]ny addition of any pollutant to navigable waters from any point source."

98. 15 Env't Rep. Cas. (BNA) 1508 (S.D.N.Y. 2000), *aff'd*, 252 F.3d 148, 31 ELR 20707 (2d Cir. 2001).

99. *Id.*

100. 111 F.3d at 1485.

101. 15 Env't Rep. Cas. (BNA) at 1508.

102. *Id.*

103. *Id.*

Chapter of Trout Unlimited, Inc. v. City of New York,[104] the court held that the artificial diversion of polluted water from one source to another different water body qualified as an "addition of a pollutant" under the CWA.[105] The court reasoned that where pollutants enter waters from a source outside of the waters protected under the CWA, an "addition" and a "discharge" occurs.[106] The Eleventh Circuit refined the *Catskill Mountains* holding in *Miccosukee Tribe of Indians of Florida v. South Florida Water Management District*,[107] when it found that an "addition of a pollutant" existed where, but for the point source (in this case, a pump station), the pollutants would not have reached the navigable waters. Therefore, the court concluded that there was a discharge under the CWA.[108]

The reasoning of the *Catskill Mountains* and *Miccosukee* courts is persuasive. More importantly, this reasoning supports the basic purpose of the CWA. As the court in *Catskill Mountains* noted, the CWA expressly includes a broad, uncompromising policy of protecting and maintaining the integrity of the nation's waters.[109] Therefore, the courts should find that where a pollutant has been added to a protected water body, and the pollutant would not be present but for the point source, such activity constitutes a discharge for purposes of the CWA.

II. The Regulatory Response

The issue of whether FIFRA-registered pesticides should be subject to NPDES permits has prompted the regulated community and the courts to seek guidance from EPA. Following the *Headwaters* decision in the Ninth Circuit, many pesticide applicators, including numerous public health entities such as mosquito control districts, were uncertain as to how they should proceed in applying pesticides. The outbreak of mosquito-borne West Nile Virus also brought the issue to the forefront due to public outcry for aggressive government action to control mosquito populations with aerial pesticide spraying.

On October 10, 2002, the U.S. House of Representatives Subcommittee on Water Resources and Environment held an oversight hearing regarding control of the spread of West Nile Virus and how that goal could be achieved effectively without compromising the waters and environmental laws of the nation.[110] Specifically, the subcommittee was concerned about the potential conflict between CWA regulation of pesticide spraying activity to stagnant waters, notably stormwater control facilities such as retention ponds.[111] At the hearing, Ben Grumbles, EPA Deputy Assistant Administrator for Water, testified that the Agency would work with other federal agencies and with local governmental bodies to better understand the connections between stormwater facilities and mosquito problems.[112] Grumbles stated that EPA maintains that "there are instances where a [CWA] permit is, in fact, not required in terms of the direct application of pesticide."[113]

A. The Courts Invite EPA to Provide Guidance—Altman

After the Second Circuit's decision in *Altman*,[114] EPA became aware of the urgent need that the regulated public and the judiciary had for guidance from the Agency as to whether and when discharging FIFRA-regulated pesticides into protected waters requires an NPDES permit. In *Altman*, a group of residents of the town of Amherst, New York, filed an action against the municipality in the U.S. District Court for the Western District of New York. The plaintiff alleged that the town violated the CWA and state laws when it sprayed pesticides for mosquito control over marshes without obtaining an NPDES permit.[115] The complaint alleged that the pesticides, including malathion, resmethrin, and permethrin, constituted "pollutants," that the federal wetlands over which the pesticides were sprayed were "waters of the United States," and that the spray equipment used to discharge the pesticides was a "point source" under the CWA.[116]

The town moved to dismiss the plaintiffs' claims, arguing that no additional permits were required for the pesticide applications other than those that the town already possessed.[117] The motion was accompanied by an affidavit from the U.S. Army Corps of Engineers, which referred to an EPA letter prepared for the litigation. EPA's letter stated that an NPDES permit had never been required for spraying of pesticides for mosquito control where the pesticide is discharged directly into the waters of the United States.[118]

The district court granted the town's motion, stating that "spray drift from a pesticide used for its intended purpose is [not] a chemical waste within the meaning of the [CWA] . . . ."[119] Finally, the court held that "pesticides, when used for their intended purpose, do not constitute a 'pollutant' for purposes of the [CWA], and are more appropriately regulated under FIFRA."[120]

On appeal, the Second Circuit vacated the lower court's grant of the town's motion to dismiss, stating that the district court "acted on the basis of an incomplete record, having unnecessarily curtailed or foreclosed the discovery sought by plaintiffs, and having failed to consider a number of threshold issues of law."[121] The court ordered the district court to allow the plaintiffs the discovery they sought to sup-

104. 273 F.3d 481, 32 ELR 20229 (2d Cir. 2001).

105. *Id.* at 492.

106. *Id.* at 491.

107. 280 F.3d 1364, 32 ELR 20475 (11th Cir. 2002).

108. *Id.* at 1368. The Court issued its decision in the *Miccosukee* case on March 23, 2004. 541 U.S. __, 124 S. Ct. 1537 (2004). In an opinion by Justice Sandra Day O'Connor, the Court vacated the Eleventh Circuit's decision and remanded the case to determine whether a "discharge" occurred based on whether the two water bodies in question are meaningfully distinct water bodies.

109. *Catskill Mountains*, 273 F.3d at 494.

110. *See* http://www.house.gov/transportation/water/10-10-02/10-10-02memo.html.

111. *Id.*

112. *See* http://www.epa.gov/ocir/hearings/testimony/2002_1010_bhg.pdf.

113. *Hearings on West Nile Virus, Clean Water, and Mosquito Control Before the House Water Resources Subcomm.*, 107th Cong. (2002).

114. 47 Fed. Appx. at 62.

115. *Id.* at 63.

116. *Id.*

117. *Id.* at 63.

118. *Id*. at 63-64.

119. *Id.* at 65 (citing Altman v. Town of Amherst, 190 F. Supp. 2d 467, 470 (W.D.N.Y. 2001)).

120. *Altman*, 190 F. Supp. 2d at 471.

121. *Altman*, 47 Fed. Appx. at 63.

port their claims that: (1) the methods that the town used to apply pesticides constituted a "point source"; (2) the waters into which the pesticides were applied were "waters of the United States"; and (3) the pesticides applied should be considered "pollutants" under the CWA.[122]

B. EPA Responds—The July 11, 2003 Interim Guidance Memorandum

The Second Circuit in *Altman* invited EPA to assist the courts in evaluating whether NPDES permits are required for circumstances like those in *Altman*.[123] The Agency's response came on July 11, 2003, in a memorandum from G. Tracy Mehan III, Assistant Administrator for Water, entitled *Interim Statement and Guidance on Application of Pesticides to Waters of the United States in Compliance With FIFRA*.[124]

The memorandum outlined EPA's interpretation of whether an NPDES permit is required for the application of pesticides that comply with FIFRA.[125] EPA's position in the memorandum was that pending a final agency position after solicitation and consideration of public comment, "the application of pesticides in compliance with relevant FIFRA requirements is not subject to NPDES permitting requirements . . . ."[126] The memorandum noted that applications in violation of FIFRA would be subject to enforcement under all relevant statutes, including the CWA.[127] The Agency's rationale for this position is that it is consistent with over 30 years of CWA administration.[128] More importantly, the memorandum stated that EPA concludes that "chemical wastes" under the definition of pollutant in the CWA do not include pesticides applied in a manner consistent with FIFRA.[129] Finally, the interim guidance statement noted that "whether a pesticide is a pollutant under the CWA turns on the manner in which it is used, i.e., whether its use complies with all relevant requirements of FIFRA."[130]

Unfortunately, EPA's long-awaited interim guidance memorandum represents a reversal from the Agency's position on this issue in the *Headwaters* litigation. In *Headwaters*, EPA submitted an amicus brief in support of the environmental groups who appealed the district court ruling against them. In that brief, EPA argued that FIFRA and the CWA are two distinct statutes that serve different purposes, and as such, compliance with one could never automatically mean compliance with the other.[131] The Agency noted in its brief that "registration of a pesticide under FIFRA does not take into account the range of considerations necessary for determining whether a particular discharge of a pesticide into a particular water body should be permitted under the NPDES program."[132] The brief stated that the regulatory review required by each of these statutes was different and considered different factors; hence, "EPA's approval of a pesticide under FIFRA does not mean that it may be used without a CWA permit."[133]

The Agency further noted in its amicus brief that under the CWA, the entity that issues NPDES permits considers the rates and quantities of pollutant discharges allowed under the permit. The conditions under which such discharges will be allowed are determined by taking into account "the specific environmental conditions affected by a project involving pollutant discharges."[134] In contrast, in determining under FIFRA "whether a pesticide causes 'unreasonable adverse effects on the environment,' the EPA conducts a cost-benefit analysis, examining 'the economic, social, and environmental costs and benefits of the use' of the pesticide."[135] Thus, the interim guidance statement of July 11, 2003, represents a dramatic change in the Agency's approach to the issue.

EPA invited comments to the interim guidance statement from the public through October 14, 2003.[136] The comments received provide a cross-section of the concerns that the regulated public has on all sides of this issue. A large number of responses came from mosquito control entities and irrigation districts, as well as from members of the pesticide industries. These commenters generally agreed with and supported EPA's position that NPDES permits should not be required for activity that complies with FIFRA.

Prominent among the concerns that these commenters cited was that individual permitting could prove to be such a burden to public entities charged with pest control that public health could be affected. The burdens mentioned with permitting were slower response time to emergency situations,[137] greater costs in meeting the permit monitoring requirements, and the potential need for different permits for each chemical use and each water body treated. Specifically with regard to mosquito control, some commenters noted that with the unpredictable nature of the breeding times of certain mosquito species, the permitting timetable could render control efforts virtually useless. Interested parties agreed with EPA that FIFRA-approved pesticides cannot constitute pollutants when applied consistent with FIFRA because they are subjected to intense scrutiny from EPA's Office of Pesticide Programs (OPP), and that any product that requires so much investment could not possibly be characterized as a waste. Finally, some of these commenters cited scientific studies that state that any harm caused by chemical products in the environment is vastly outweighed by the harms eradicated or controlled by those same chemicals.

Other members of the concerned public held radically different views on EPA's guidance statement and EPA's position expressed in the document. These commenters noted that the purposes of the CWA and FIFRA were too different for one to usurp the other. Some cited a report which noted that "[t]he [OPP] process for reviewing and accepting pesticide labels did not include verifying that toxicity studies ex-

122. *Id.*

123. *Id.* at 67.

124. 68 Fed. Reg. 48385 (Aug. 13, 2003).

125. *Id.* at 48387.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 48387-88.

130. *Id.* at 48388.

131. Amicus Brief of EPA for Appellants at 10, *Headwaters* (No. 99-35373).

132. *Id*. at 11.

133. *Id.* at 15.

134. *Id.* at 5.

135. *Id.* at 6 (quoting 7 U.S.C. §136(bb)).

136. OW-2003-0063; FRL-7542-9.

137. The commenters frequently cited West Nile Virus in this regard.

isted prior to accepting pesticide labels."[138] The report further observed that "[a]lmost half the pesticide labels evaluated had missing or inaccurate precautionary statements . . . ."[139] These commenters also stated that FIFRA methods of evaluating environmental impact are outdated and have not kept pace with scientific advances. Moreover, they addressed the West Nile Virus scare that many proponents of widespread spraying have used as a primary justification for their position.[140] In this regard, the commenters noted that, over the long term, repetitive mosquito spraying has actually resulted in dramatic increases in the population of disease-bearing mosquitoes.[141] Finally, these commenters referred to the massive fish kill that resulted from the application of Magnacide H in the *Headwaters* case[142] as a telling example of the reason why CWA intervention is needed in addition to the pesticide label use restrictions that FIFRA already provides.

III. What Are the Regulatory Options?

The first and most obvious step that EPA can take is to reverse its current position and simply require individual NPDES permits for all applications of FIFRA-regulated chemicals into or near protected waters. This may not be the most realistic alternative, however, because there are thousands of applicators, both individuals and public entities, that engage in activity that would require a permit. The added burden of processing and monitoring all of those individual NPDES permits would require an enormous increase in the resources of the state and federal agencies that are responsible for processing and monitoring the permits.

Another possible option is for these state and federal agencies to issue general permits in combination with individual permits. An example of such a solution in action is the Washington State Department of Ecology's use of general permits such as the Irrigation System Aquatic Weed Control NPDES Waste Discharge General Permit.[143] This permit regulates the application of herbicides to water in irrigation canals or ditches that flow to natural surface waters of the state of Washington.[144] The coverage area is all of the irrigation supply systems throughout the entire state.[145] To obtain permit coverage, existing irrigation supply systems already applying herbicides had to notify the department by submitting an application no later than 90 days after the issuance date of the general permit, and were covered on the effective date of the permit unless notified otherwise.[146] The application process starts for new applicators at least 90 days prior to the start of the planned activity, and allows for a public comment period and public notice of the application via newspaper publication.[147]

Like the Washington State general permit mentioned above, general permits for the application of FIFRA-regulated chemicals should limit the daily concentrations of water quality monitoring compounds and elements in natural waters. Such permits also should establish a comprehensive monitoring system with recordkeeping requirements, and provide for public access to all data recorded. The agencies also should delineate the geographic areas covered by such permits as well as the activities covered. Finally, the general permits should contain public notice procedures for informing the public of such details as the purpose of the application; the chemicals to be used; the dates and, if possible, the time of day of treatment; locations to be treated; and the names and contact information of the permittee and the office in charge of monitoring.

Public health emergencies could be exempted from such general permit requirements, however. The court in *No Spray* acknowledged the possible need for an emergency exemption from NPDES permit compliance under circumstances that may pose imminent health emergencies. Aerial pesticide spraying to combat the threat of West Nile Virus is an example of a situation that could justify an emergency exemption from permit compliance. The court in *No Spray* noted that this mosquito-borne infectious disease that already had caused several deaths constituted an emergency warranting an exemption from NPDES permit compliance.[148] There is no reason, however, to justify an exemption from CWA permit requirements for non-emergency applications of pesticides.

In addition, the courts in *No Spray*[149] and *Altman*[150] expressed justifiable concern about the special situation of pesticide drift. EPA also would need to promulgate proximity-based regulations to evaluate whether an application of pesticides may properly be considered "over or into" waters of the United States.

Apart from such emergency exemptions and proximity restrictions to address pesticide drift, Congress could amend FIFRA and the CWA to clarify that FIFRA-registered pesticides are "pollutants" and that aerial spraying of such pesticides over waters of the United States constitutes a "discharge" from a "point source."

IV. Conclusion

While the discharge of a pollutant from a point source into the navigable waters of the United States without a permit is a violation of the CWA, it is unclear under the current state of the law as to whether FIFRA-regulated activity is exempt from NPDES permit compliance. As of this writing, there is confusion in the courts and a lack of clear regulatory guidance from EPA on the issue. While FIFRA-regulated pesticides can be beneficial to commerce and human health, they also can pose serious threats to aquatic ecosystems in the nation's waters—the same waters that the CWA was enacted to protect. Requiring individual permits under the NPDES

138. Executive Summary of the EPA Inspector General Audit, Labeling of Pesticides, Report No. E1EPF1-05-042902100613.

139. *Id.*

140. For an analysis that supports widespread pesticide spraying to combat the spread of West Nile Virus and questions the scientific support underlying environmentalists' claims about the perils of such spraying, see generally Angela Logomasini, Pesticides and the West Nile Virus: An Examination of the Environmentalist Claims (Competitive Enterprise Institute, Spring 2004).

141. *See* Oliver Howard, *Are Mosquito Spray Pesticides Worsening the Encephalitis Problem?*, 13 J. Am. Mosquito Control Ass'n 315-25 (1997).

142. *Headwaters*, 243 F.3d at 528.

143. Permit No: WAG-991000 (Apr. 10, 2002).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. 15 Env't Rep. Cas. (BNA) at 1508.

149. *Id.*

150. 47 Fed. Appx. at 65.

permitting scheme may be too cumbersome to be a feasible solution to the problem, and simply allowing FIFRA to be the sole regulatory authority on the issue of spraying potentially harmful chemicals into protected waters is insufficient as well. A compromise that promotes the goals of both statutes needs to be reached.

A split is developing in the federal courts that may exacerbate the confusion and inconsistent enforcement on this issue in different areas of the country. The courts should seek common ground in determining whether a statutory conflict exists between the CWA and FIFRA. They also should develop a reliable approach to resolving any conflict if one does arise. Furthermore, there must be uniformity in the manner in which courts examine FIFRA-compliant activity as a potential CWA violation under the NPDES program.

The current EPA interim guidance policy that was issued on July 11, 2003, may result in a formal rulemaking after regulators have had opportunity to discuss the public commentary and debate the issue. The courts, too, may reach some uniform resolution by an eventual Court case involving facts such as those in the *No Spray* or *Altman* cases. There is a danger, however, that any resolution that the courts or EPA reach on this issue may not adequately resolve the problem.

The overwhelming challenge that this issue has presented in the courts and before EPA leads to the inevitable conclusion that Congress should amend FIFRA and the CWA to expressly acknowledge and resolve the regulatory gap. Using a FIFRA-approved pesticide should not enable a pesticide applicator to bypass compliance with the CWA. Likewise, the CWA should expressly identify, subject to limited exemptions, that FIFRA-approved pesticides are pollutants, regardless of whether they are used consistent with their FIFRA-approved labels.

The EPA interim guidance memorandum conveys the disturbing message that as long as FIFRA-registered pesticides are applied in a manner consistent with their FIFRA-approved labels, there can be no violation of NPDES permit requirements. Such a reading suggests that as long as pesticide applicators are spraying chemicals that are potentially toxic to aquatic ecosystems in a manner consistent with a FIFRA-approved label, the Agency is satisfied that the quality of the nation's waters is being protected. Such an approach belies the opposite and aggressive regulatory stance that EPA embraced just a few years earlier on this issue. More importantly, EPA's new position severely undermines the CWA's goal to protect the "chemical, physical, and biological integrity of the Nation's waters"[151] and the more than 30 years of progress in pursuit of that objective.

151. *See* 33 U.S.C. §1251(a).