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IS FIFRA ENOUGH REGULATION?: FAILURE TO OBTAIN A NPDES PERMIT FOR PESTICIDE APPLICATIONS MAY VIOLATE THE CLEAN WATER ACT

REBECCA E. LEINTZ*

INTRODUCTION

In the summer of 1999, West Nile Virus arrived in the United States in New York City and surrounding counties.1 Humans contract this arbovirus (arthropod-borne virus) through mosquito bites.2 Mild cases of the virus, known as West Nile Fever, are manifested through flu-like symptoms lasting only a few days.3 More severe forms of the disease, however, involve inflammation of the brain, or the membrane surrounding the brain, and can result in death.4 Scientists first speculated that West Nile would spread slowly, remaining concentrated in the northeast and along the Atlantic coast.5 For the first few years, West Nile progressed as scientists expected, with reports of just 149 human cases from 1999 though 2001.6 However, in the summer of 2002, virus transmission exploded, infecting animals and humans across the country. 138 different species of birds were infected with the virus.7 In total, for 2002, the Centers for Disease Control and Prevention received reports of 4,156 human cases of

2. Id.
4. Id.
West Nile Virus and 284 West Nile Virus deaths. The Midwest and the South, in particular, were hard hit. West Nile Virus continued its westward march across the country in the summer of 2003, infecting over 8,000 persons and causing 182 fatalities.

Communities were not completely unprepared to combat West Nile Virus. Like any other arboviral disease, effective mosquito control is the key to slowing and preventing the spread of the virus. Many communities have established mosquito abatement plans. Often these plans employ integrated mosquito management ("IMM"), a management plan that considers a variety of economic, social, and ecological factors to develop interdisciplinary mosquito control methods. In addition to public education, mosquito control utilizing IMM includes source reduction, ground and aerial application of insecticides, and other non-chemical control methods. While practitioners of IMM do utilize ground and aerial applications of insecticides, they are cautious, and apply adulticides or larvicides only "after the presence of mosquitoes has been demonstrated by surveillance procedures." This combining of alternative strategies with traditional pesticide applications is often quite successful.

9. Id. (In 2002, human case counts in the following states were especially high: Illinois (884), Indiana (293), Louisiana (329), Michigan (614), Mississippi (192), Ohio (441), and Texas (202)).
10. Division of Vector-Borne Infectious Diseases, CDC, West Nile Virus 2003 Human Cases as of November 5, 2003, 3am MDT, http://www.cdc.gov/ncidod/dvbid/westnile/surv&controlCaseCount03.htm (last modified Nov. 5, 2003) (The states reporting the highest number of cases in 2003 were: Colorado (2477), Nebraska (1594), South Dakota (972), Texas (513), and Wyoming (399)).
12. For a description of various local mosquito abatement districts ("MAD"), see, e.g., http://www.mosquitoes.org (Alameda County, Cal.); http://www.smcmad.org (San Mateo County, Cal.); http://www.nwmadil.com (Northwest Cook County, Ill.).
14. Id.
15. Id. See also U.S. EPA, Integrated Pest Management (IPM) and Food Production, http://www.epa.gov/pesticides/factsheets/ipm.htm (last updated July 21, 2003): Effective, less risky pest controls are chosen first, including highly targeted chemicals. . . . If further monitoring, identifications and action thresholds indicate that less risky controls are not working, then additional pest control methods would be employed, such as targeted spraying of pesticides. Broadcast spraying of non-specific pesticides is a last resort.
However, as human cases of West Nile Virus increased, public pressure forced many communities to step up their mosquito abatement actions. As the mosquito season progresses, alternative control strategies no longer remain viable options.\textsuperscript{17} In response, communities across the country instead focused their efforts on traditional pesticide spraying as a last ditch effort to protect their populations from disease.\textsuperscript{18}

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA")\textsuperscript{19}, the primary federal statute for pesticide regulation, imposes registration and labeling requirements for all pesticides, and requires that pesticides be used in accordance with these labels.\textsuperscript{20} The pesticides that these communities are utilizing in their mosquito abatement strategies must be used in compliance with FIFRA.

Following the application procedures specified on pesticide labels, these pesticides are frequently applied using ultra-low volume ("ULV") sprays.\textsuperscript{21} These sprayers "dispense very fine aerosol droplets that stay aloft and kill flying mosquitoes on contact."\textsuperscript{22} Pesticides applied with this method have a tendency to drift from the original application area and to deposit onto water.\textsuperscript{23} Citizens and environmental groups argue that the deposition of these chemicals in water is a violation of the Clean Water Act ("CWA").\textsuperscript{24} It is a violation of the CWA to discharge a pollutant into the waters of the United States without a permit.\textsuperscript{25} These groups contend that pesticides are a pollutant; if they are deposited into navigable waters of the United States without a permit, the pesticide applicator has violated the CWA.\textsuperscript{26}

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\textsuperscript{17} Id. See also Information on Arboviral Encephalitides, supra note 11 ("Selection of mosquito control methods depends on what needs to be achieved; but, in most emergency situations, the preferred method to achieve maximum results over a wide area is aerial spraying.").
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\textsuperscript{18} See generally Christine Woodside, No Big Fall in Mosquitoes After Communities Spray, N.Y. TIMES, Oct. 6, 2002, at 6.
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\textsuperscript{22} Id.
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\textsuperscript{24} 33 U.S.C. § 1251 et seq. (2000). See infra notes 30–95 and accompanying text for a discussion of the debate; see also League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren, 309 F.3d 1181 (9th Cir. 2002).
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\textsuperscript{26} See infra notes 30–95 and accompanying text.
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An examination of FIFRA and CWA, in addition to relevant judicial decisions and Environmental Protection Agency ("EPA") interpretations, suggests that, in certain situations, the deposition of pesticides into water without a permit is a violation of the CWA. Part I of this Note will examine the current conflict in the courts over the proper way to address this issue. Three cases in particular, *Headwaters, Inc. v. Talent Irrigation District*, No. 97 Civ. 10302, *No Spray Coalition Inc. v. New York City*, and *Altman v. Town of Amherst*, will provide the basis for this discussion. Part II will explore the statutes at issue here, FIFRA and CWA, in an effort to gain insight into the possibility of reconciling the statutes. Analysis of the language of the statutes, EPA interpretations, and relevant judicial decisions will reveal the regulatory gap between FIFRA and the CWA, as currently interpreted by the EPA and the courts. Having recognized this gap, the EPA, at the Second Circuit Court of Appeal's request, developed a four-step analysis for determining whether pesticide applicators must obtain a CWA permit. Part III examines this four-step analysis in detail. Finally, in Part IV, this Note proposes that because pesticides may fall within the CWA definition of a pollutant, and consequently that the permitting process, as envisioned by the EPA, may not adequately protect the environment, an innovative rulemaking approach is needed whereby the EPA and concerned stakeholders work together to develop strategies to bridge the regulatory gap between FIFRA and the CWA.

I. THE EPA'S SILENCE LEAVES THE COURTS UNCERTAIN

While communities and environmental groups struggle with the issue of whether pesticide application may violate the CWA, the EPA has said little about the subject. The EPA's most specific comments on the issue, to date, came on October 10, 2002, when Benjamin Grumbles, the Deputy Administrator of Water Programs for the EPA, testified before the House Subcommittee on Water Resources and the Environment. He stated that, in an effort to stop the spread of West Nile, the EPA would allow some direct applications of pesti-

27. 243 F.3d 526 (9th Cir. 2001).
cides to water without a permit. Grumbles explained that the EPA "[does] have the view that there are instances where a Clean Water Act permit is, in fact, not required in terms of the direct application of pesticide." 

Because FIFRA and the CWA do not directly resolve the issue of whether a pesticide deposited in U.S. waters without a permit is a pollutant, and the EPA has offered little interpretation of the statutes in that regard, the courts have been left with little guidance for decisions. The conflicting decisions in Talent, Altman, and No Spray I and II highlight the need for definitive resolution of the issue of whether pesticide usage without a permit violates the CWA.

A. Ninth Circuit Holds that FIFRA is not Enough

In January of 1998, Headwaters, Inc. and the Oregon Natural Resources Council Action brought suit against the Talent Irrigation District ("TID"), alleging a violation of the CWA. TID, which operated a series of irrigation canals in Oregon, regularly applied the aquatic herbicide Magnacide H to the canals to control the growth of weeds and vegetation. The active ingredient in Magnacide H kills fish. Because of a leaking waste gate in the Talent Canal, residue from a May 1996 application of Magnacide H entered Bear Creek and killed about 92,000 juvenile steelhead fish. The district court granted summary judgment to TID, concluding that the application of Magnacide H was not an activity requiring a National Pollution Discharge Elimination System ("NPDES") permit under the CWA.

31. Id.
32. Id.
33. 243 F.3d 526 (9th Cir. 2001).
34. 190 F. Supp. 2d 467.
36. Talent, 243 F.3d at 528–29.
38. Talent, 243 F.3d at 528.
39. Id.
40. Id. at 529. Although the court held that a NPDES permit was not required, the court held that "the irrigation canals were ‘waters of the United States’ subject to the Act; and that Magnacide H... is a ‘pollutant’ under 33 U.S.C. §1362." Id.
quate. 41 "Because the EPA-approved label on Magnacide H did not require a permit, the court held that none was required." 42

On appeal, the Ninth Circuit reversed the district court and held that registration and labeling of a pesticide pursuant to FIFRA "does not preclude the need for a permit under the CWA." 43 In determining whether FIFRA adequately regulates pesticide application, the court considered the purposes of the respective statutes. 44

Through FIFRA, the court found, Congress created a "comprehensive regulatory scheme for the labeling of pesticides and herbicides, requiring that all herbicides sold in the United States be registered with the EPA." 45 The labeling system established under FIFRA is designed to create national standards for pesticide registration and labeling; where a pesticide is discharged into a particular water of the United States, "FIFRA provides no method for analyzing the local impact and regulating the discharge from a particular point source." 46

It is in this respect, the court noted, that the CWA differs from FIFRA. To achieve the objective of restoring and maintaining the "chemical, physical, and biological integrity of the Nation's waters," 47 the CWA established the NPDES permitting program. 48 Unlike FIFRA, which establishes nationwide standards, the CWA permitting program, in addition to protecting the nationwide integrity of the waters, is designed with the capacity to consider local environmental problems. 49

In reaching its decision, the court also relied on EPA interpretations of the interaction between FIFRA and the CWA. In 1995, the EPA issued a public notice stating that producers or users of pesticide products are not exempted from CWA requirements if the pesticide label fails to state that a CWA permit may be required. 50 In addition, the EPA submitted an amicus brief to the Ninth Circuit describing

41. Id.
42. Id.
43. Id. at 532.
44. When conducting this analysis, the court noted, the two statutes must be interpreted in a manner that gives effect to both, while maintaining their "sense and purpose." Id. at 530-31 (quoting Resource Invs., Inc. v. U.S. Army Corps of Eng'rs, 151 F.3d 1162, 1165 (9th Cir. 1998)).
45. Id. at 530 (citing Andrus v. AgrEvo USA Co., 178 F.3d 395, 398 (5th Cir. 1999)).
46. Id. at 531.
47. Id. (quoting 33 U.S.C. § 1251(a) (2000)).
48. Id. (citing 33 U.S.C. § 1342(1) (2000)).
49. Id.
50. Id. at 532 (quoting U.S. EPA, PESTICIDE REGISTRATION (PR) NOTICE 95-1 (May 1, 1995)).
the pesticide registration process involved in FIFRA, and pointing out that compliance with labels does not guarantee satisfaction of all other federal environmental laws. "Indeed, EPA approves pesticides under FIFRA with the knowledge that pesticides containing pollutants may be discharged from point sources into the navigable water only pursuant to a properly issued CWA permit."\textsuperscript{51}

The court then briefly addressed the issue of whether TID's application of Magnacide H to the irrigation canal violated the CWA permitting requirements. The court held that a violation had occurred; TID had discharged a pollutant into navigable waters from a point source.\textsuperscript{52} Significantly, the court held, without discussion, that residue of Magnacide H in water after application "qualifies as a chemical waste product and thus as a 'pollutant' under the CWA."\textsuperscript{53}

**B. The Talent Decision Aftermath**

The Ninth Circuit's ruling in Talent raised concerns for mosquito abatement districts, as well as pesticide applicators in general, across the country. Although the district court, on remand, ultimately held that TID had applied the pesticide in violation of the EPA-approved label and issued relief on that theory, the Ninth Circuit's dicta concerning properly applied pesticides suggests that the court would be willing to find a violation of the CWA if the issue were to come before the court.\textsuperscript{54}

Mosquito control organizations were concerned that the cost of obtaining permits, as well as defending potential lawsuits, would hinder their ability to provide services necessary to protect public health.\textsuperscript{55} When asked to comment on California's draft of a general NPDES permit for discharges of aquatic pesticides, the Mosquito and Vector Control Association of California ("MVCAC") responded that compliance with the permit was "essentially an impossible

\textsuperscript{51} Id. at 531 (quoting Brief of Amicus Curiae U.S. EPA at 12).

\textsuperscript{52} Id. at 532–33. Since neither side disputed that "the hose that delivered the herbicide to the canals" was a point source for purposes of the CWA, the court did not discuss that element. Id. at 532.

\textsuperscript{53} Id. at 533.

\textsuperscript{54} In deciding to grant summary judgment to TID initially, the district court based its holding on the conclusion that TID complied with the requirements of the FIFRA label. Id. at 529. However, on remand from the Ninth Circuit, the district court found that, in fact, TID had not complied with the label and, therefore issued relief based on that finding.

task." The President of MVCAC went on to explain the impact of a permitting requirement:

To increase our revenue requires property owner or voter approval, we cannot simply increase our fees or prices to cover new regulatory requirements. Every dollar spent on NPDES permit compliance would result in an equivalent reduction of mosquito control and public health protection. . . . [T]here will be more mosquitoes and greater public health and nuisance impacts, with no added protection of the environment.

Although the potential cost of compliance with NPDES would be burdensome on pesticide applicators, the potential penalties for non-compliance could be substantial, "Application [of pesticides] without [a] NPDES permit could expose applicators to citizen [suits] that could result in large fines ($25,000 per day) and felony convictions for repeat offenders."

C. No Spray and Altman Conflict with Talent

In addition to the confusion created by the limited precedential value of Talent, the issue of possible CWA permitting violations was further complicated by two cases holding that failure to obtain a NPDES permit for pesticide usage does not violate the CWA: No Spray I and II and Altman.

1. No Spray

The controversy in No Spray revolved around the City of New York's insecticide spraying program. Acting in coordination with the Centers for Disease Control and Prevention, the EPA, and the New York State Departments of Health and Environmental Conservation, New York City conducted widespread insecticide spraying in an effort to stop the spread of West Nile Virus. The No Spray Coalition brought suit against the City of New York in the United States District Court for the Southern District of New York. The group con-


57. Id.


59. 51 Env't Rep. Cas. (BNA) 1508 (S.D.N.Y. 2000).

60. Id. at 1509.

61. Id. at 1508.
tended that New York City violated the CWA when the pesticide spray drifted and deposited into the waters surrounding the city.62

Just as the Ninth Circuit proceeded in Talent, the district court in No Spray I examined the purposes of FIFRA and the CWA.63 The court emphasized that the pesticides are approved under FIFRA only if the EPA determines that proper use of the pesticide will not have unreasonable adverse effects upon the environment.64 New York City used pesticides that were EPA-approved for ground and aerial spraying "where mosquitoes are present 'in vegetation surrounding parks, woodlands, swamps, marshes . . .'."65

The court then considered the requirements of the CWA. "The Clean Water Act prohibits the (1) discharge (2) of a pollutant (3) from a point source (4) into the waters of the United States."66 The court held that finding a violation of the CWA from the use of pesticide in a manner approved by the EPA stretches the CWA beyond its intended purpose:

Given the broad definition of navigable waters in the Clean Water Act . . . any approved use of the pesticide, other than in a desert, will inevitably result in a drift of the spray into navigable waters . . . [I]t would frustrate the intent of the regulatory scheme to hold that such an approved use violates the Clean Water Act.67

Therefore, the court held that as long as a pesticide is used for an EPA-approved purpose for that pesticide, a violation of the CWA will not be found.68

The court also considered the possibility of a CWA violation if FIFRA did not bar citizen suits.69 In conducting this analysis, the court focused on the requirement that there be a discharge of a pollutant into navigable waters.70 The court held that "incidental drift

62. Id. at 1509.
63. Id. at 1509-11.
64. Id. at 1509.
65. Id. at 1509, 1510.
66. Id. at 1509 (citing 33 U.S.C. § 1311(a) (2000)).
67. Id. at 1510. In reaching this conclusion, the court considered that the current regulatory schemes of FIFRA and the CWA were amended within three days of each other. Id. The court found it significant that FIFRA did not allow citizens to file suit under the act; that decision was left to the EPA and the Attorney General. Id. The court held that since "Congress made a deliberate decision not to provide a private right of action under FIFRA, it did not intend to permit private parties to circumvent that decision through an action under the Clean Water Act." Id.
68. Id.
69. Id.
70. Id. The court stated, without explanation that, "trucks and helicopters used to spray insecticides may be point sources." Id. at 1511 (citing 33 U.S.C. § 1362(14) (2000)). The court also did not fully resolve the issue of whether a properly applied pesticide satisfies the CWA
over navigable waters" does not violate the CWA.\textsuperscript{71} The court reasoned that this was not inconsistent with prior case law, as the only cases that the No Spray Coalition presented in support of its position involved \textit{deliberate} discharges into navigable waters.\textsuperscript{72}

Although initially the court declined to consider whether deliberate spraying of insecticides over navigable waters would violate the CWA, the court addressed the issue in \textit{No Spray II}.\textsuperscript{73} In opposition to the defendant's motion to dismiss, the No Spray Coalition pointed out that pesticides were deliberately applied to protected waters.\textsuperscript{74} Though the court recognized that pesticides were deliberately applied to the waters, it declined to hold that failure to obtain a NPDES permit violated the CWA.\textsuperscript{75} The court emphasized, as it did in \textit{No Spray I}, that the lack of a private right of action under FIFRA establishes "beyond a doubt" that Congress did not intend for "private parties to circumvent that decision through an action under the Clean Water Act."\textsuperscript{76} Characterizing most of the applications as "technical violations," the court held that they were insufficient to support an action under the CWA, and that, if a FIFRA action were warranted, it would have to be brought by the EPA and the Attorney General, and not by private citizens.\textsuperscript{77}

\textsuperscript{71} Id. at 1511 (citing Chem. Weapons Working Group, Inc. v. Dep't. of the Army, 111 F.3d 1485 (10th Cir. 1997)). The court went on to explain that, "[t]o so hold would bring within the purview of the Clean Water Act every emission of smoke, exhaust fumes, or pesticides in New York City." \textsl{Id.}

\textsuperscript{72} Id.

\textsuperscript{73} 55 Env't Rep. Cas. (BNA) 1830 (S.D.N.Y. 2002).

\textsuperscript{74} \textsl{Id.} at 1831. The No Spray Coalition directed the court's attention to several incidents of pesticide misuse: (1) once in 1999, and once in 2000, a helicopter spraying over City Island applied pesticides over the marina, (2) a helicopter spraying over Staten Island applied pesticides to the Loretto pond and wetlands, and (3) employees testing ground spraying equipment applied pesticides to the Bronx River. \textsl{Id.}

\textsuperscript{75} \textsl{Id.} at 1832.

\textsuperscript{76} Id. (citing \textit{No Spray I}, 51 Env't Rep. Cas. (BNA) 1508).

\textsuperscript{77} \textsl{Id.} In determining that these were "technical violations" the court relied on the EPA approved pesticide label for Anvil (a product of Clarke Mosquito Control Products, Inc.), which authorized the product for usage on "swamps and marshes." \textsl{Id.} From this, the court extrapolated that application of the pesticide to waters close to the shore, such as marinas or ponds, was not inconsistent with these label instructions. \textsl{Id.} Although the court concludes that by authorizing the use of Anvil in swamps and marshes, "the EPA clearly anticipated their use over protected waters," this logic does not follow from the express wording of the pesticide label. \textsl{Id.} at n.1. The label states: "For terrestrial uses, do not apply directly to water, or to areas where surface water is present or to intertidal areas below the mean high water mark." Clarke Mosquito Control Products, Inc., \textit{Anvil 10+10 ULV Pesticide Label} (EPA Reg. No. 1021-1688-8329), http://chppm-www.apgea.army.mil/ento/Contingency/Labels/Anvil\%2010\%20+\%20.pdf (Oct. 1999).
2. Altman

In *Altman*, residents of the Town of Amherst, New York, alleged that the town's mosquito spraying program violated the CWA. In this case, the spraying in question occurred over federal wetlands, which the plaintiffs alleged constituted navigable waters.

The United States District Court for the Western District of New York began its discussion by examining whether the spraying of insecticides violates the CWA. The court conducted its analysis under the assumption that the pesticide application constituted a "discharge" from a "point source," and only considered whether "pesticides, as used in the manner for which they were intended, constitute 'pollutants' for purposes of the CWA." Examining prior case law, the court concluded that the fact that a substance "had a beneficial purpose at one time" does not exempt the substance from the meaning of "pollutant." However, whether a pesticide falls within the CWA meaning of pollutant was a question of first impression.

The court held that there were no cases in which a properly used pesticide was found to be a pollutant, requiring a CWA permit. In support of this contention, the court identified a declaratory ruling issued by the New York State Department of Environmental Conservation ("NYDEC"). In *Matter of Booth*, the NYDEC found that use of a pesticide to control the sea lamprey, an aquatic pest, "did not constitute the discharge of a chemical waste product."

The court, in making its decision, also relied upon correspondence between the Town of Amherst and the EPA. Kathleen Calla-

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79. *Id.* The district court did not address the issue of whether, in light of the United States Supreme Court's decision in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001), these wetlands are contained within the meaning of navigable waters. In *SWANCC*, the Court held that the meaning of "navigable waters" under the Clean Water Act does not permit the Corps to exercise jurisdiction over isolated wetlands because they are potential habitat for migratory birds. *Id.* at 174. In the aftermath of *SWANCC*, the extent of the jurisdictional impact on isolated wetlands is unclear.
81. *Id.* at 470.
82. *Id.* (citing United States v. Schallom, 998 F.2d 196 (4th Cir.), *cert. denied*, 510 U.S. 902 (1993); Hudson River Fishermen's Ass'n v. City of New York, 751 F. Supp 1088 (S.D.N.Y. 1990), *aff'd*, 940 F.2d 649 (2d Cir. 1991)).
83. *Id.* (citing *No Spray 1*, 51 Env't Rep. Cas. (BNA) 1508, 1511 n.2 (S.D.N.Y. 2000)).
84. *Id.*
86. *Id.* (citing *Matter of Booth*, supra note 85, at 27).
87. *Id.* at 471–72.
han, Regional Director of Environmental Planning and Protection for the state of New York, stated that:

[T]he EPA has "no specific policy under the NPDES program on the spraying of pesticides to control mosquitos where the pesticide is discharged directly to waters of the United States" . . . EPA Region 2 "has not issued NPDES permits for such activities in the past, nor has Region 2 sought to compel New York to do so." 88

Since the EPA did not require a NPDES permit for the application of pesticides to water, deferring to the State permitting program policies instead, the district court held that no permit was required and granted summary judgment for the Town of Amherst. 89

On appeal, the Second Circuit issued a slip opinion vacating the district court’s order of summary judgment and remanding the case to the district court for further proceedings. 90 Upon review of the record, the Second Circuit concluded that the district court unnecessarily curtailed discovery. 91 The court also recognized the impact of the EPA’s failure to clearly interpret the connection between FIFRA and the CWA, stating that “[u]ntil the EPA articulates a clear interpretation of current law . . . the question of whether properly used pesticides can become pollutants that violate the CWA will remain open.” 92 In remanding the case, the Second Circuit directed the district court to allow the plaintiffs a reasonable opportunity to conduct discovery on the issues of whether the pesticide spraying was from a point source, whether the pesticides were deposited into navigable waters, and whether the pesticides were pollutants subject to permitting requirements of the CWA. 93 The Second Circuit also directed the district court to consider the position advocated by the EPA in an amicus brief, which the EPA submitted at the Second Circuit’s request, when determining the appropriate resolution of the Altman case. 94 In the brief, the EPA suggested that in certain circumstances a pesticide applicator might need to obtain a CWA permit. 95 The district court has yet to issue a decision on remand.

88. Id. at 468–69 (citing Aff. of Phillip A. Thielman, filed Aug. 8, 2000 (Docket #10), at Ex. D).
89. Id. at 471.
90. Altman v. Town of Amherst, 47 Fed. Appx. 67 (2d Cir. 2002).
91. Id. at 66.
92. Id. at 67.
93. Id.
94. Id.
95. See infra Part III for a discussion of the EPA’s suggestions.
II. FIFRA AND CWA: CAN THE STATUTES BE RECONCILED?

In Talent, No Spray I and II, and Altman, the courts dedicated large portions of their opinions to an examination of the language of FIFRA and the CWA and how the two statutes have been interpreted. These courts reached different conclusions about the need for pesticide applicators to attain CWA permits. This Part will explore these statutes in depth in an attempt reveal the reasons for these conflicting opinions.

A. FIFRA

When determining whether to register a pesticide, the EPA considers the effect that it will have on the environment. FIFRA sets out the following guidelines for the registration process:

The Administrator shall register a pesticide if the Administrator determines that, when considered with any restrictions imposed under subsection (d) of this section . . .

(C) it will perform its intended function without unreasonable adverse effects on the environment; and

(D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.\(^\text{96}\)

In order to ensure that pesticides do not cause unreasonable adverse effects to the environment, the EPA conducts ecological risk assessments.\(^\text{97}\) These risk assessments consider the ecological effects that the pesticide may have upon non-target fish and wildlife species.\(^\text{98}\) Utilizing data submitted by the pesticide manufacturers, risk assessors determine the relationship between possible exposure to a pesticide and the resulting harmful effects.\(^\text{99}\)

When conducting the registration process, the EPA does not consider the possibility that usage or discharge of approved pesticides may violate other federal environmental laws.\(^\text{100}\) Although the EPA does not consider these possibilities when approving a pesticide, the Agency does consider the possibility when developing pesticide la-

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98. Ecological Risk Assessments, supra note 97.
99. Id.
100. See supra note 51 and accompanying text.
bels. For example, in July of 1993, the EPA issued a pesticide regulation notice specifying required discharge statements for certain pesticide products.\textsuperscript{101} The label reads as follows:

Do not discharge effluent containing this product into lakes, streams, ponds, estuaries, oceans or other waters unless in accordance with the requirements of a National Pollutant Discharge Elimination System (NPDES) permit and the permitting authority has been notified in writing prior to discharge. Do not discharge effluent containing this product to sewer systems without previously notifying the local sewage treatment plant authority. For guidance contact your State Water Board or Regional Office of the EPA.\textsuperscript{102}

In a subsequent notice, the EPA clarified the purpose of the discharge effluent statements.\textsuperscript{103} The statements were intended to serve only as a reminder to pesticide users of their obligations under the CWA:

While OPP has required variations of the . . . labeling statements since the late 1970's, the purpose of these statements has been to simply augment other mechanisms used by the Office of Water, the states and local POTWs to inform pesticide producers and users of their obligations under the CWA or local authorities.\textsuperscript{104}

The notice further stated that, "[t]he exemption of certain containers from the labeling requirements . . . does not relieve a producer or user of such products from the requirements of the Clean Water Act or state or local requirements."\textsuperscript{105}

In addition, the Supreme Court has interpreted the lack of preemptive language in FIFRA to indicate that Congress, when drafting the statute, did not intend to preclude the state and local governments from supplementing the Act with their own laws.\textsuperscript{106} After examining the statutory language\textsuperscript{107} and legislative history,\textsuperscript{108} the Court held that,

\begin{footnotes}
\footnote{102. \textit{Id}.}
\footnote{104. \textit{Id}.}
\footnote{105. \textit{Id}.}
\footnote{107. \textit{Id}. at 606. Contrary to the Wisconsin Supreme Court's reading of 7 U.S.C. §136(v), the provision in the Act articulating State authority, the Court held that the section's silence on the issue of local governmental authority did not "suffice to establish 'a clear and manifest purpose' to pre-empt local authority." \textit{Id}. at 606–07 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).}
\footnote{108. \textit{Id}. at 609–10. The Court pointed out that legislative history is ambiguous as to Congress' ultimate intent regarding local governmental regulation. \textit{Id}. While some Congressmen rejected language authorizing political subdivisions to regulate pesticide usage, others observed}
\end{footnotes}
“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.”

B. CWA

The stated purpose of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” To that end, Congress articulated a national goal “that the discharge of pollutants into the navigable waters be eliminated by 1985.”

The main focus of the CWA today is on controlling point source pollution through the National Pollutant Discharge Elimination System (“NPDES”). It is a violation of the CWA to discharge a pollutant from a point source into waters of the United States without a NPDES (or State Pollution Discharge Elimination System (“SPDES”) permit, in the case of state regulation) permit. Unlike FIFRA, which assesses pesticides solely from a national standpoint, the NPDES permitting program enables the EPA to establish national limitations on pollutant discharge, as well as distinguish, on a case-by-case basis, between “classes, types, and sizes within any category of point sources.”

The main disagreement involved in the pesticide permitting debate is over whether pesticides fall within the definition of a pollutant. The CWA defines “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.” So far, the exclusive use of chemical pesticides for mosquito control has limited the debate

that local governments were best equipped to address local concerns and language was needed to protect their ability to regulate. Id.

109. Id. at 613–14.
to whether a chemical pesticide qualifies as a chemical waste.\textsuperscript{115} In general, the courts have broadly construed the term “pollutant” to encompass such diverse things as water quality changes induced by dams,\textsuperscript{116} bombs dropped from a plane during military target practice,\textsuperscript{117} dead fish entrained by power plants,\textsuperscript{118} and materials added at a water treatment plant for purification that are ultimately released into surface waters.\textsuperscript{119} In light of the conflicting circuit court opinions on the classification of pesticides as pollutants, the EPA and the courts will need to work together to resolve this issue.

C. EPA Interpretation of the Interaction Between FIFRA and CWA

The EPA has yet to clarify its stance with regard to the interaction between FIFRA and the CWA. Following the Ninth Circuit’s decision in Talent, the EPA Office of Enforcement and Compliance Assurance issued a memorandum stating that “civil enforcement under the Clean Water Act (CWA) for any direct application of pesticides to waters of the United States would be a low enforcement priority provided certain conditions intended to ensure appropriate protection of human health and the environment were met.”\textsuperscript{120} In March of 2002, the EPA reaffirmed this position toward enforcement, citing the need for additional time to determine the appropriate way to resolve the issue: “[t]his will allow EPA additional time to determine how to best address CWA and FIFRA requirements for those other direct pesticide applications to waters of the United States and ensure that vital pesticide application activities such as disease vector and invasive species control are not disrupted.”\textsuperscript{121}

On October 10, 2002, the House Subcommittee on Water Resources and the Environment held a hearing on West Nile Virus, focusing on mosquito control and the CWA.\textsuperscript{122} Benjamin Grumbles

\textsuperscript{115} See supra Part I for a discussion of the controversy. Should a case arise, however, disputing the use of a biopesticide, it is possible that the pesticide would fall within the meaning of “biological material.”

\textsuperscript{116} Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982).

\textsuperscript{117} Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).


\textsuperscript{119} Hudson River Fisherman's Ass'n v. City of New York, 751 F. Supp. 1088 (S.D.N.Y. 1990), aff'd, 940 F.2d 649 (2d Cir. 1991).


\textsuperscript{121} Id.

\textsuperscript{122} Hearing on West Nile Virus, supra note 30.
offered testimony regarding the EPA's stance on the growing controversy over the interaction between FIFRA and the CWA. Although stressing that the EPA believed that neither protection of public health nor protection of the environment must be sacrificed for effective mosquito control programs, Grumbles acknowledged that the Agency had not yet determined how the "statutes sit together" on the issue of permitting pesticide usage. Although the EPA, in an amicus brief requested by the Second Circuit's in Altman, addressed the permitting issue and suggested that if certain criteria were met a permit was not necessary, the Agency did not intend for these suggestions to be exhaustive. The EPA believed that "there are instances where a Clean Water Act permit is, in fact, not required in terms of the direct application of pesticide." In summing up his remarks, Grumbles offered an explanation for the legal uncertainty: "EPA is really not in the mosquito control business. Our statutory mission isn't related to that." Under FIFRA, said Grumbles, the EPA approves pesticide usage based on risk-benefit tests that indicate the products are "safe and effective," whereas the CWA is aimed at the protection of water quality. The EPA is "not in a position to say that Clean Water Act regulatory requirements, or potential regulatory requirements, have created barriers or problems" for pesticide application.

III. A FOUR-STEP ANALYSIS FOR DETERMINING WHETHER A PESTICIDE IS A POLLUTANT

Considering the EPA's interpretation of the relative purposes of FIFRA and the CWA, as well the relevant case law, it is possible that in certain cases failure to obtain a NPDES permit may violate the CWA. In its amicus brief to the Second Circuit in Altman, the EPA suggested that courts consider the following factors when determining

123. Id.
124. Id.
125. Id. See supra notes 78–95 and accompanying text for a discussion of Altman. See infra Part III for a discussion of the guidelines the U.S. EPA offered in the amicus brief to the Second Circuit in Altman.
126. Id.
127. Id.
128. Id.
129. Id.
whether pesticide application without a NPDES permit violates the CWA:

1. Is the pesticide a chemical pesticide?
2. Is the pesticide an aquatic pesticide?
3. Is the pesticide applied for the intended purpose of providing public benefits, such as the protection of public health?
4. Is the pesticide applied in compliance with all applicable federal, state, and local legal requirements, including those that arise under FIFRA?131

If a pesticide application meets all the criteria, the EPA asserted that it should not be subjected to the CWA permitting requirement.132 In singling out these factors, the EPA sought to create an exception to the permitting requirements for chemical wastes under NPDES for pesticides that "serve[] an intended, lawful purpose," while still upholding the CWA's overall purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters."133

Using the Altman fact situation, this Part will apply the EPA's suggested factors for determining whether the town's pesticide application requires a NPDES permit.

A. Is the Pesticide a Chemical Pesticide?

In Altman, all the pesticides used by the Town of Amherst were chemical pesticides.134 For this reason, the EPA limited the scope of its amicus brief to consideration of situations where chemical pesticides may be excepted from the CWA definition of a pollutant (as a "chemical waste").135

131. Id.
132. Id.
133. Id. (citing 33 U.S.C. § 1251(a) (2000)).
134. Id. The active ingredients in these chemical pesticides are malathion, resmethrin, and permethrin. Id.
135. Id. Although the EPA limited its discussion to the possibility of exempting chemical pesticides from permitting requirements, the rationale for exemption could easily be applied to biopesticides. "Biopesticides are certain types of pesticides derived from such natural materials as animals, plants, bacteria, and certain minerals," and are usually less toxic than chemical pesticides. U.S. EPA, What are Biopesticides?, http://www.epa.gov/pesticides/biopesticides/whatarebiopesticides.htm (last updated Oct. 14, 2003). Biopesticides are effective in low doses, break down easily, and are generally limited in their effects on organisms other than the target. Id. If the biopesticide were to meet the remaining criteria articulated by the EPA, it would certainly be as effective as the chemical pesticide (if not more so) in "maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2000).
B. Is the Pesticide an Aquatic Pesticide?

Having established that the pesticide is a chemical pesticide, the EPA next suggested that the court consider whether the pesticide in question is an aquatic pesticide. Aquatic pesticides are "produced and labeled specifically for aquatic applications." When properly applied they are less likely to adversely effect the integrity of the waters they are placed in.

None of the pesticides used by Amherst were aquatic pesticides. All the pesticide labels included language indicating that they were toxic to fish and that their application to water should be avoided. The Malathion label, for example, reads: "This pesticide is toxic to fish, aquatic invertebrates, and aquatic life stages of amphibians. For terrestrial uses, do not apply directly to water, or to areas where surface water is present or to intertidal areas below the mean high water mark." Since these pesticides are toxic to aquatic life, application to water could cause potentially serious adverse effects, negatively impacting the integrity of those waters. Therefore, the town's pesticide application does not satisfy this criterion for exemption.

C. Is the Pesticide Applied for the Intended Purpose of Providing Public Benefits?

Under the third prong of the analysis, the EPA suggested that pesticides applied to navigable water for the protection of public health should be exempted from NPDES permitting requirements; as an example of a valid public health purpose, the EPA pointed to pesticide applications "undertaken for the predominant purpose of protection of public water supplies." Conversely, pesticides applied to...
water inadvertently, or for disposal purposes, would not satisfy this prong.\textsuperscript{142}

Most significant to \textit{Altman} is the EPA's assertion that inadvertent application of pesticides to waters of the United States will not satisfy this prong of the analysis. Discovery is still proceeding on the issue of whether pesticides were deliberately or incidentally applied to wetlands.

If the pesticides were applied to waters inadvertently, according to the EPA, they were not applied for a valid public health purpose. Although many pesticide labels direct applicators to avoid causing spray drift, the EPA has recognized that drift is nearly impossible to avoid.\textsuperscript{143} Therefore, the Agency has interpreted drift avoidance statements to mean that:

applicators and other responsible parties must use all available application practices designed to prevent drift that will otherwise occur. In making their decisions about pesticide applications prudent and responsible applicators must consider all factors, including wind speed, direction, and other weather conditions; application equipment; the proximity of people and sensitive areas; and product label directions.\textsuperscript{144}

Regardless of this general interpretation, the EPA suggested that pesticide drift should not be exempted from permitting requirements. Since the pesticides drifted and deposited onto water unintentionally, the pesticide cannot be viewed as being applied to the water for the intended purpose of providing public benefits.

If the Town deliberately applied the pesticides to the wetland areas, an argument could be made that the Town's pesticide application was, overall, for the public health purpose of stopping the spread of the West Nile Virus. However, this argument does not hold up very well. The EPA has approved pesticides specifically for usage in aquatic environments—pesticides that are much more effective and less likely to cause adverse impacts. By applying inappropriate terrestrial pesticides, instead of those specifically designed for use in aquatic environments, the Town endangered, rather than protected, the public health.

\textsuperscript{142} Id.


\textsuperscript{144} Id.
D. Is the Pesticide in Compliance with all Applicable Legal Requirements?

Finally, the EPA suggested that courts consider whether the pesticide usage complied with all applicable federal, state, and local laws.145 "Compliance with applicable legal requirements ensures that the pesticide at issue serves an intended, lawful purpose."146

Before the district court, the Town of Amherst offered several documents as evidence of its compliance with legal requirements.147 First, the Town submitted a permit, issued by the New York State Department of Environmental Conservation ("NYDEC"), authorizing "an annual application of pesticides to control 'nuisance and vector mosquitoes' in certain New York State regulated wetlands."148 The Town also submitted a letter from the Army Corps of Engineers, which stated that the Corps did not require a permit for pesticide application.149 With regard to NPDES permits, the Town offered a letter from the EPA stating that "there is no specific policy under the NPDES program" on the issuing of permits for pesticide activities, and that Region 2 (the EPA region Amherst is located in) has never issued such permits.150 Finally, the Town offered the affidavit of the Deputy Town Attorney, who had spoken with the Regional Water Engineer about permitting requirements.151 The engineer "stated that the [NYDEC had] never issued a separate permit under the NPDES, and that any such permit would be unnecessary and duplicative of the permit already issued to the Town of Amherst by the [NYDEC]."152

Until discovery is completed for the issue of whether Amherst deliberately or unintentionally applied pesticides to the water, it will be unclear as to whether Amherst complied with FIFRA. FIFRA requires all pesticides to be applied according to the specifications included in the pesticide label; failure to do so is considered a viola-
tion of the law. The pesticide labels for Malathion, Permethrin, and Resmethrin specify that they should not be applied to water. If discovery reveals that the Town of Amherst deliberately applied pesticides to the wetlands, it will have violated FIFRA. However, if the deposition occurred inadvertently, through pesticide drift, FIFRA may not have been violated. If the Town took all proper precautions to avoid drift, given EPA’s recognition that drift is nearly impossible to avoid, the Town’s actions would be in compliance with FIFRA.

Because Amherst’s pesticide application does not meet all four of the EPA’s criteria, the Town would have to obtain a permit to apply pesticides in this manner. Unfortunately, reaching the conclusion that a CWA permit is required does not offer much relief for either the citizen groups seeking to protect the environment or the communities applying these pesticides. Communities will have to undergo a long, and expensive, process to obtain NPDES permits—permits specifying acceptable discharge limits that the EPA has yet to determine. Citizen groups will not necessarily achieve protection of the environment because either pesticide applications will be exempted from the permitting requirements and the pesticides will deposit in and pollute waters without regulation, or the applications will be subject to permitting requirements and pesticide deposition will still occur, only to a more limited extent.

IV. EMPLOYING AN INNOVATIVE STAKEHOLDER APPROACH

While the EPA’s proposal does resolve the question of whether pesticide applicators must obtain a CWA permit, as seen by the Altman scenario, the proposal really does not resolve citizen concerns for environmental impact, as presented in Altman and No Spray I and II, with regard to pesticide drift and other unintentional pesticide applications.

Over the past few years, the EPA has experimented with several innovative approaches to bridging regulatory gaps. In particular, the approaches taken in Project XLC and Community-Based Environmental Protection (“CBEP”) would be especially helpful in this situation.

154. See supra notes 139–40 and accompanying text.
A. Project XLC

Project XLC, which stands for eXcellence and Leadership for Communities, is an EPA program "designed to test environmental management actions that deliver better or more cost-effective environmental and public health protection."

By focusing on the needs of a specific geographic area, such as a city or mosquito abatement district, the EPA is able to elicit participation from "local governments;... neighborhood and community organizations; empowerment zones and enterprise communities; community development corporations; and other local entities, both public and private."

Sponsors, which can be drawn from any of these groups, submit a proposal for EPA approval and then work together with the EPA to develop an agreement between the sponsors and the EPA to solve the community's environmental problem. As a result of Project XLC collaboration with communities, the EPA has revised rules and regulations, achieved greater enforcement and compliance assurance, and encouraged greater stakeholder participation in environmental decision-making.

B. Community-Based Environmental Protection

Community-Based Environmental Protection ("CBEP") is a "place-based" environmental protection scheme. Recognizing that traditional, media-specific "command and control" approaches, exemplified through most environmental statutes, cannot adequately address the complex nature of most pollution, CBEP "emphasizes collaborative, holistic environmental decision making tailored to meet the needs of specific communities in their efforts to address the remaining environmental challenges." CBEP is not intended to replace current regulatory authority; instead, "[a] CBEP approach takes advantage of and builds upon EPA's existing media-specific, statutory..."
programs." By bringing together multiple stakeholders, "CBEP brings those organizations together, to pool resources to achieve common goals," and also "helps build a sense of stewardship and community infrastructure for environmental problem solving."

The collaborative processes utilized in both Project XLC and CBEP are ideal for bridging the FIFRA and CWA gap. After examining the problems posed by pesticide application, the EPA determined that a CWA permit was only called for under certain circumstances where a pesticide is deliberately applied to water. Unfortunately, while this may resolve the CWA permitting issue, it does not resolve citizen concerns about the potential environmental impacts of pesticide deposition in our nation's waters from pesticide drift and other unintentional applications.

By bringing together mosquito abatement districts, public health officials, and community organizations to develop innovative approaches to address these concerns, the EPA can address the gap between these two regulatory schemes through rulemaking and guidance without the need for statutory amendments that take time to implement, and ultimately may not even solve the problem. Pooling the knowledge and resources of these varied groups will ensure that the resulting agreements balance the need for effective mosquito control as well as the need for maximum protection for our nation's waters.

CONCLUSION

Applying the EPA's criteria for determining whether a pesticide application requires a NPDES permit, it appears that the Town of Amherst's activities were in violation of the CWA. This conclusion makes sense. The Town of Amherst used chemical pesticides, toxic to aquatic organisms, in a wetlands area. Either deliberately or inadvertently (by not taking proper precautions for spray drift), the pesticides were deposited in navigable waters of the United States without a NPDES permit.

Although FIFRA and the CWA have co-existed for decades, it took a nationwide public health crisis to reveal the potential gap between adhering to the specifications of a pesticide label and the permitting requirements of the CWA. As cases of West Nile Virus
multiplied, public health officials turned to widespread pesticide spraying in an effort to control mosquito populations. Concerned citizens feared that pesticides were damaging water quality and turned to the courts for an answer. A split between the Ninth Circuit in Talent and the Second Circuit in No Spray and Altman, revealed the complexity of this issue. The EPA, in response, began to look at possible ways to reconcile the statutes. The four criteria that the EPA offered for consideration in its amicus brief to the Second Circuit in Altman are a good start. However, important questions are left unresolved; in particular, how pesticide drift should be addressed. By entering into a dialogue with various stakeholders such as mosquito control districts, public health officials, and community organizations, the EPA could assist these groups in developing innovative strategies to address this problem. The EPA could then quickly implement the strategies through rulemaking to ensure that responses to any future outbreaks requiring pesticide usage are handled in a way that protects public health, as well as our nation's waters.