

# FINAL BILL REPORT

## 2SHB 2867

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Synopsis as Enacted

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

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

**House Committee on Agriculture & Ecology**

**House Committee on Appropriations**

**Senate Committee on Environment, Energy & Water**

**Senate Committee on Ways & Means**

### **Background:**

#### Federal and State Discharge Permits

The federal Clean Water Act (CWA) establishes the National Pollution Discharge Elimination System (NPDES) permit system to regulate wastewater discharges from point sources to surface waters. The NPDES permits are required for anyone who discharges wastewater to surface waters or who has a significant potential to impact surface waters.

Washington's Department of Ecology (DOE) has been delegated authority by the United States Environmental Protection Agency (EPA) to administer NPDES permits. The DOE also administers state discharge permits. A wastewater discharge permit places limits on the quantity and concentrations of contaminants that may be discharged and may require wastewater treatment or impose operating or other conditions. The DOE issues both individual permits (covering single, specific activities or facilities) and general permits (covering a category of similar dischargers) in the state and NPDES permit programs.

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

#### Aquatic Pesticides

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) regulates pesticide use, sales, and labeling. The FIFRA requires that all pesticides and herbicides sold in the United States be registered with the EPA. The EPA has authority under FIFRA to

approve the label under which the product is marketed. The EPA also has authority for enforcement under FIFRA.

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

#### Headwaters, Inc. v. Talent Irrigation District

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

#### Department of Ecology Permit Development

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

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

#### **Summary:**

A maximum National Discharge Elimination Permit System (NPDES) permit fee of \$300 is established until June 30, 2003, for any individual or general permits developed solely as a result of the Ninth Circuit's decision in *Talent*. These permits may be required only and as long as the Ninth Circuit's interpretation of *Talent* is not overturned or modified

by future court rulings, administrative rule making, clarification of scope by the United States Environmental Protection Agency, or legislative action.

Technical revisions eliminate provisions related to expired requirements.

**Votes on Final Passage:**

House 94 0  
Senate 47 0 (Senate amended)  
House (House refused to concur)  
Senate 47 0 (Senate amended)  
House 97 0 (House concurred)

**Effective:** April 4, 2002