



# **History and Current Regulation of Aquatic Herbicides in Oregon**

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# Overview

- Background
  - FIFRA vs. Clean Water Act
  - National Pollutant Discharge Elimination System Permit Program
- Is a National Pollutant Discharge Elimination System permit required?
- Talent Irrigation District
- Next steps



# Background

- Are aquatic pesticides applied directly into waters of the U.S. (surface waters) “pollutants”?
- Are pesticides applied directly over or into waters of the U.S. during an aerial application “pollutants”?
- Are the by-products or residuals of these pesticides “pollutants”?
- Does the Clean Water Act apply to FIFRA regulated pesticides?



# FIFRA v. Clean Water Act

- FIFRA
  - Pesticide must be registered.
  - Label instructions must be followed.
- State requirements for pesticide registration, applicator licensing, and pesticide use reporting
- Clean Water Act (CWA)
  - National Pollutant Discharge Elimination System (NPDES) permit required for “point source discharge of pollutants” to waters of U.S.
  - Citizen suit provision



# NPDES Permit Program

- Permit required for point source discharge of pollutants to waters of the United States
- “*Point source discharge*” = hose used to apply aquatic pesticide
- “*Pollutant*” = residual pesticide or byproducts left in the water after application?
- “*Waters of the US*” = surface waters, including irrigation canals and ponds if they exchange water with natural systems



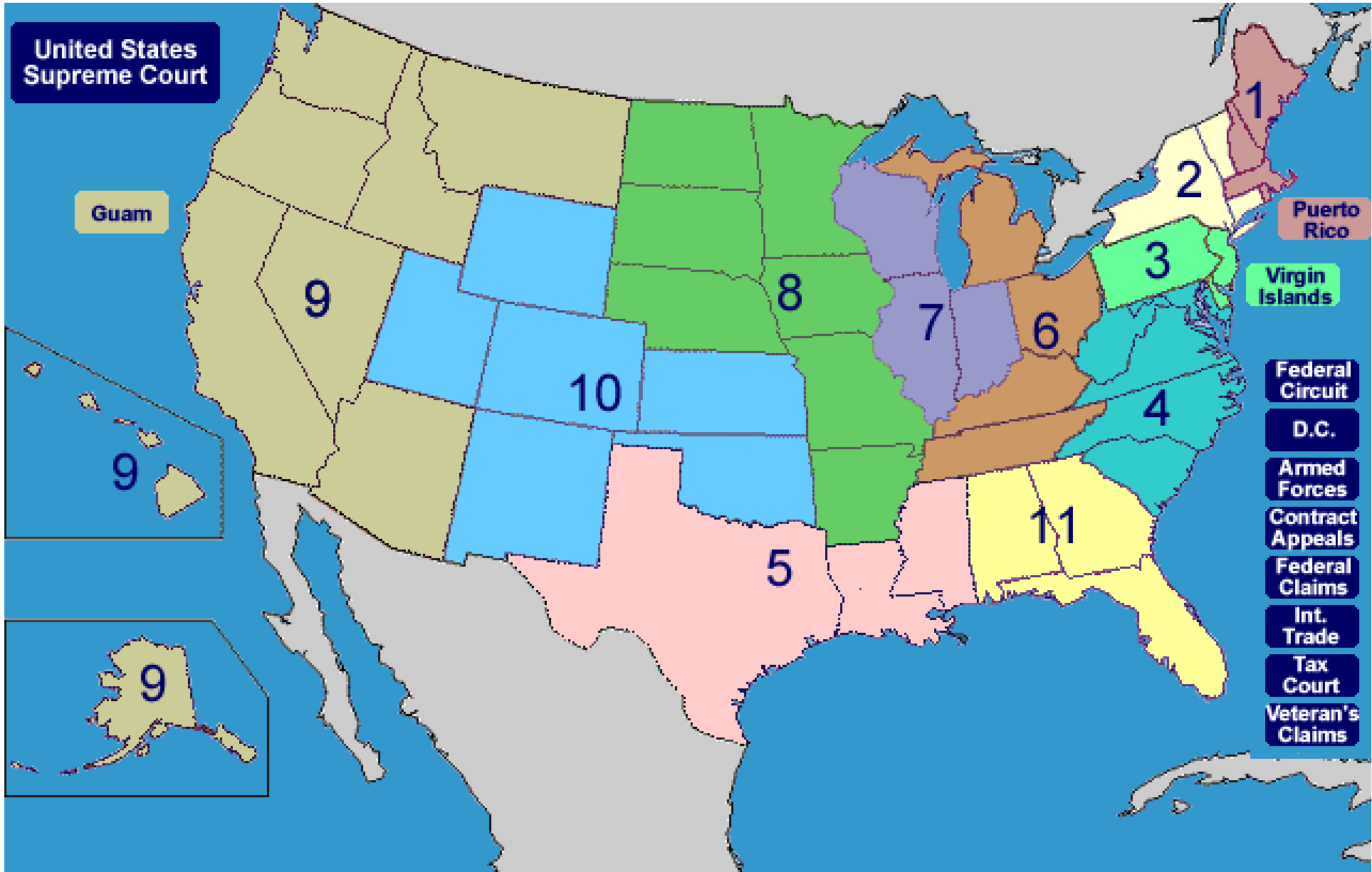
# Typical NPDES permit

- Discharge limitations, required management practices, monitoring requirements, reporting requirements, etc.
- Issued for no more than five years
- 35-day public comment period (federal requirement is 30)
- Permit application cost approx. \$10,000 and \$2,500 annual fee (\$20,000 for 5 years)



# Is an NPDES permit required?

- Ninth Circuit Court says “YES”
  - Aquatic pesticide application of acrolein (Magnacide H) into Talent Irrigation District canal. (*Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 2001)
  - Aerial application of Btk for Tussock Moth over U.S. Forest Service land and directly over and into waters of the U.S. (*League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 2002)
- Second Circuit Court says “MAYBE”
  - Aerial and ground spraying of the pesticides malathion, sumithrin (Anvil), and resmethrin (Scourge) over waters of the U.S. to kill mosquitoes. (*Altman v. Town of Amherst*, 47 Fed. Appx 62 67, 2002)
- Ninth Circuit Court says “NO”
  - Antimycin applied to lake to eliminate non-native fish species. (*Fairhurst v. Hagneer*, 422 F.3d 1150, 2005)



**United States Supreme Court**

**Guam**

**Puerto Rico**

**Virgin Islands**

**Federal Circuit**

**D.C.**

**Armed Forces**

**Contract Appeals**

**Federal Claims**

**Int. Trade**

**Tax Court**

**Veteran's Claims**

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# Is a NPDES permit required?

- EPA November 27, 2006 rule (71 FR 68483) says “NO” – An NPDES permit is not required when:
  - (1) The pesticide is applied directly to waters of the U.S. to control pests present in water; and
  - (2) The application of the pesticide is made to control pests that are over, including near, waters of the U.S.
- But rule is being challenged by various groups in different circuit courts...



# Talent Irrigation District (TID)

- Located in Jackson County in the Rogue River Basin
- 16,309 acres irrigated
- 141 miles of delivery canal (~ 15% lined or enclosed in culvert or pipe; 113 miles of laterals (~ 70% piped)
- 2001 using Magnacide H (acrolein)
- Since the Ninth Circuit Court decision TID maintains their system without the use of aquatic pesticides













# What happened?

- TID's treated water release from irrigation canal and caused fish kill in Bear Creek in mid-1980 and 1996 .
- Headwaters, Inc. and Oregon Natural Resources Council filed citizen suit under the Clean Water Act in US District Court.
  - TID illegally discharged pollutants into waters of the United States by applying Magnacide H (acrolein) without first obtaining a NPDES permit.



# Next steps

- Consistent with EPA rule, DEQ is not requiring NPDES permits for aquatic pesticide applications or aerial applications directly over or into waters of the U.S.
  - 10 irrigation districts with NPDES permits to apply aquatic pesticides [copper sulfate or chelate, acrolein (Magnacide H), xylene (Aquatic Weed Killer)]
  - 2 NPDES permits for aerial application of Btk for gypsy moth
- Wait for results of challenges to EPA rule...