

Calendar No. 284

114TH CONGRESS }
1st Session }

SENATE

{ REPORT
{ 114-160

SENSIBLE ENVIRONMENTAL PROTECTION ACT OF 2015

OCTOBER 29, 2015.—Ordered to be printed

Mr. INHOFE, from the Committee on Environment and Public Works, submitted the following

R E P O R T

[to accompany S. 1500]

together with

MINORITY VIEWS

[Including cost estimate of the Congressional Budget Office]

The Committee on Environment and Public Works, to which was referred the bill (S. 1500) to clarify Congressional intent regarding the regulation of the use of pesticides in or near navigable waters, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

GENERAL STATEMENT AND BACKGROUND

FIFRA

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) governs the registration, sale, and use of pesticide products within the United States. 7 U.S.C. 136 et seq.

Section 2(u) of FIFRA defines pesticides broadly as any substance used to kill, repel or control pests, to regulate plants, or to stabilize nitrogen. EPA is directed to restrict the use of pesticides as necessary to prevent unreasonable adverse effects on people and the environment and regulate the sale and use of pesticides in the United States through registration and labeling.

Originally enacted in 1947, Congress substantially amended FIFRA in 1972. The legislative history of the 1972 amendments makes it clear that Congress intended FIFRA to be the tool for EPA to protect the human health and environment, including

interstate and navigable waters, from adverse effects of pesticide use:

The Congress hereby finds that pesticides are valuable to our Nation's agricultural production and to the protection of man and the environment from insects, rodents, weeds, and other forms of life which may be pests; but it is essential to the public health and welfare that they be regulated closely to prevent adverse effects on human life and the environment, *including pollution of interstate and navigable waters*; . . . and that regulation by the Administrator and cooperation by the States and other jurisdictions as contemplated by the Act are appropriate to prevent and eliminate the burdens upon interstate and foreign commerce, to effectively regulate such commerce, and to protect the public health and welfare and the environment. (Emphasis added). H.R. Rep. No. 92-511, 92d Cong., 2d Sess., 13-14 (1971).

At a February 16, 2011, joint hearing held by Subcommittee on Nutrition and Horticulture of the House Agriculture Committee and the Subcommittee on Water Resources and Environment of the House Transportation and Infrastructure Committee, Dr. Steven Bradbury, Director of the EPA Office of Pesticide Programs, testified that FIFRA fully protects water resources:

The regulatory restrictions imposed by EPA under FIFRA directly control the amount of pesticide available for transport to surface waters, either by reducing the absolute amount of pesticide applied, or by changing application conditions to make transport of applied pesticide less likely. *In sum, EPA uses its full regulatory authority under FIFRA to ensure that pesticides do not cause unreasonable adverse effects on human health or the environment, including our nation's water resources.*

Clean Water Act

Section 301 of the Federal Water Pollution Control Act (Clean Water Act or CWA) prohibits the discharge of a pollutant into navigable waters from a point source without a permit. 33 U.S.C. 1311(a). Consistent with the legislative history of FIFRA, for over 30 years, the EPA did not interpret this section to require a discharge permit for pesticide use when the pesticide is used in a manner consistent with its FIFRA label. However, in 2001, the U.S. Court of Appeals for the Ninth Circuit held in *Headwaters, Inc. v. Talent Irrigation District* that the application of herbicides to control aquatic weeds that were choking an irrigation canal violated the CWA under the circumstances before the court (which involved a spill, not FIFRA-compliant use). 243 F.3d 526 (9th Cir. 2001). In 2002, the Ninth Circuit held that aerial pesticide spraying by the Forest Service to control a predicted outbreak of the Douglas Fir Tussock Moth was regulated by the CWA. The court reached this conclusion even though the spraying complied with FIFRA because the court did not address the question of whether the pesticides were pollutants and instead erroneously assumed that the parties agreed they were pollutants. *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002).

In response to the regulatory uncertainty created by these decisions, in 2006 EPA promulgated a rule to codify its long-held position that FIFRA-compliant pesticide use is not the discharge of a pollutant. 71 Fed. Reg. 68,483 (Nov. 27, 2006). Like EPA's long-standing policy, this rule relied on compliance with FIFRA to protect the human health and the environment and determined that properly used pesticides are products, not wastes. Various environmental groups sued to overturn this rule.

In January 2009, in *National Cotton Council v. EPA*, 553 F.3d 927 (6th Cir. 2009), the Sixth Circuit vacated EPA's 2006 rule holding that the CWA definition of "discharge of a pollutant" could include the use of pesticides if any residue remains after use, even though the pesticide is a product and not a waste at the time of discharge. This novel decision is not consistent with decisions in the D.C. Circuit that hold that the CWA does not regulate sources of pollutants. See *NRDC v. EPA*, 859 F.2d 156, 169 *et seq.* (D.C. Cir. 1988); *American Iron and Steel Inst. v. EPA*, 155 F.3d 979, 996 (D.C. Cir. 1997).

Unfortunately, EPA chose not to appeal or seek a rehearing of this decision, despite requests to do so by Tom Vilsack, Secretary of Agriculture, and by the Chairman and Ranking Member of the Senate Agriculture Committee, Tom Harkin and Saxby Chambliss. Secretary Vilsack's March 6, 2009 letter to EPA Administrator Lisa Jackson noted:

The court's adverse decision will have profound implications for American farmers. The panel's ruling effectively broadens the potential application of the CWA to reach agricultural activities that the EPA has never regulated under the provisions of the CWA. By broadening the Act's reach, the court burdens American agriculture with a newly minted NPDES permit requirement for the application of all FIFRA-compliant biological pesticides whenever those pesticides might find their way into waters of the United States, and for all FIFRA-compliant chemical pesticides whenever the residues of those pesticides find their way into the waters of the United States.

Senator Harkin's and Senator Chambliss' April 3, 2009 letter echoed this concern.

Industry groups sought a rehearing and Supreme Court review of the *National Cotton Council* decision, but without EPA's support, those requests were denied. As a result, farmers, foresters, mosquito control districts, and other landowners were required to obtain CWA permits to continue to use pesticides to protect our food supply from pests and to control vectors for diseases like West Nile Virus. EPA estimates that there are 365,000 pesticide applicators that now need permits. 76 Fed. Reg. 58,806-07 (Sept. 22, 2011).

To address this issue, on October 31, 2011 EPA issued a pesticide general permit, which is applicable in states where EPA is the permitting authority (Idaho, New Mexico, New Hampshire, Massachusetts, and D.C.), as well as in U.S. territories, some parts of Indian Country and some federal facilities. Using EPA's permit as a model, states also have issued pesticide general permits. These permits do not change how pesticides are applied. EPA and states continue to rely on FIFRA requirements to protect human health and

the environment. Instead, these permits add paperwork burdens. Further, record-keeping and reporting burdens create legal vulnerabilities associated with paperwork violations.

The duplicative and unnecessary regulation caused by the *National Cotton Council* decision has real world consequences. In an August 4, 2015, letter to the Environment and Public Works Committee, the American Mosquito Control Association said:

Currently, mosquito control programs are vulnerable to lawsuits where fines may be up to \$35,000 per day for activities that do not involve harm to the environment, as is the standard under FIFRA, but rather simple paperwork violations of the Clean Water Act (CWA). In order to attempt to comply with this potential liability, these government agencies must divert scarce resources to CWA monitoring. In some cases, some smaller applicators have simply chosen not to engage in vector control activities.

As a result, “the regulatory burdens are potentially depriving the general public of the economic and health benefits of mosquito control.”

An August 4, 2015, letter to the Committee from nearly one hundred agricultural companies and organizations echoes this concern:

Compliance with the NPDES water permit also imposes duplicative resource burdens on thousands of small business and farms, as well as the municipal, county, state and federal agencies responsible for protecting natural resources and public health. Further, and most menacing, the permit exposes all pesticide users—regardless of permit eligibility—to the liability of CWA-based citizen law suits.

OBJECTIVES OF THE LEGISLATION

The objective of S.1500 is to eliminate duplicative and unnecessary CWA regulation of pesticide applications that are already regulated at the federal level under FIFRA.

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE: the “Sensible Environmental Protection Act of 2015.”

SEC. 2. USE OF AUTHORIZED PESTICIDES; DISCHARGES OF PESTICIDES; REPORT.

(a) **USE OF AUTHORIZED PESTICIDES.**—Subsection (a) amends section 3(f) of FIFRA (7 U.S.C. 136a(f)) by adding at the end a new paragraph (5). Paragraph (5) prohibits EPA or a state from requiring a CWA permit for a discharge from a point source into navigable waters of a pesticide registered under FIFRA, or the residue of such a pesticide, resulting from the application of such pesticide, except as provided in section 402(s) of the Federal Water Pollution Control Act (CWA).

(b) **DISCHARGE OF PESTICIDES.**—Subsection (b) amends section 402 of the CWA to add new subsection (s). Subsection (s) creates a CWA permit exemption for the discharge from a point source into navigable waters of a pesticide registered under FIFRA, or the residue of such a pesticide, resulting from the application of such pesticide, except in certain circumstances.

The circumstances where pesticide use requires a CWA permit are (1) discharges resulting from the use of pesticides in violation of FIFRA, (2) CWA regulated storm water discharges, (3) discharges of manufacturing or industrial effluent, (4) discharges of treatment works effluent, and (5) discharges incidental to the normal operation of a vessel.

(c) REPORT.—Subsection (c) requires EPA (in consultation with the Secretary of Agriculture) to submit a report within 1 year to the Senate Environment and Public Works Committee, Senate Committee on Agriculture as well as the House Committee on Agriculture and the House Committee on Transportation and Infrastructure, with analyses and recommendations.

LEGISLATIVE HISTORY

- In the 111th Congress, H.R. 1749 and S. 1269 were introduced to clarify that CWA permits are not required for the use of pesticides regulated under FIFRA. Related bills included S. 3735, H.R. 6087, and H.R. 6273.

- In the 112th Congress, the House passed H.R. 872, intended to address this issue. Related bills included S. 3605 and S. 718.

- In the 113th Congress, H.R. 935 passed the House by a vote of 267–161. Similar language was included in the House-passed farm bill. However, the enacted farm bill did not include the House provision regulation of addressing pesticide use. Related bills included S. 175 and S. 802.

- On August 5, 2015 the Senate Committee on Environment and Public Works held a business meeting to consider S. 1500 (along with a number of other measures). S. 1500 was ordered to be reported (without amendment) favorably to the full Senate.

HEARINGS

No committee hearings were held on S. 1500.

ROLLCALL VOTES

This bill was ordered favorably reported by voice vote.

REGULATORY IMPACT STATEMENT

In compliance with section 11(b) of rule XXVI of the Standing Rules of the Senate, the committee finds that S. 1500 does not create any additional regulatory burdens.

MANDATES ASSESSMENT

In compliance with the Unfunded Mandates Reform Act (UMRA) of 1995 (Public Law 104–4), the committee notes that the Congressional Budget Office found that “S. 1500 contains no intergovernmental or private-sector mandates as defined in the UMRA and would impose no costs on state, local, or tribal governments.”

COST OF LEGISLATION

Section 403 of the Congressional Budget and Impoundment Control Act requires that a statement of the cost of the reported bill, prepared by the Congressional Budget Office, be included in the report. That statement follows:

AUGUST 20, 2015.

Hon. JIM INHOFE,
Chairman, Committee on Environment and Public Works,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1500, the Sensible Environmental Protection Act of 2015.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Marin Burnett.

Sincerely,

KEITH HALL.

Enclosure.

S. 1500—Sensible Environmental Protection Act of 2015

S. 1500 would prohibit the Environmental Protection Agency (EPA) and states authorized to issue permits under the National Pollutant Discharge Elimination System (NPDES) from requiring a permit for some discharges of pesticides. Specifically, public and private entities would no longer need to obtain an NPDES permit for certain discharges of pesticides if their use is authorized under the Federal Insecticide, Fungicide, and Rodenticide Act, or in cases where the discharge is regulated as a stormwater, municipal, or industrial discharge under the Clean Water Act. The bill also would require EPA to submit a report to the Congress on the status of water quality protection and improvement.

Based on information from EPA about the cost of preparing the report, CBO estimates that implementing this legislation would not have a significant cost. Any administrative savings to EPA that might result from issuing fewer permits would be negligible because EPA has delegated the authority to issue most NPDES permits to states.

Pay-as-you-go procedures do not apply to S. 1500 because enacting the bill would not affect direct spending or revenues.

S. 1500 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

On March 25, 2015, CBO transmitted a cost estimate for H.R. 897, the Reducing Regulatory Burdens Act of 2015, as ordered reported by the House Committee on Agriculture on March 19, 2015. S. 1500 and H.R. 897 are similar; and the estimated budgetary effects are the same.

The CBO staff contact for this estimate is Marin Burnett. This estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

MINORITY VIEWS

Passing laws that protect the lives and livelihoods of the American people is one of the most important activities that Congress undertakes. The Clean Water Act (CWA) is a law that prevents the uncontrolled pollution of the streams, rivers, and lakes where our children swim and that provide drinking water to millions of Americans. S. 1500 rolls back protection of our waters from pesticide pollution by eliminating Clean Water Act coverage and relying solely on the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to regulate the use of pesticides.

Both the CWA and FIFRA are necessary to provide important protections for the nation's waters and are not duplicative. FIFRA focuses primarily on labeling pesticides while the CWA requires water quality monitoring, reporting on pesticide use, and implementation of best practices to minimize pesticide pollution of our rivers, lakes, and streams.

The EPA has determined that over 1,800 waterbodies, such as streams and lakes, are damaged because of pesticide use. Due to limited monitoring, the actual number of polluted waterbodies may be higher. In addition, the 2006 National Water-Quality Assessment (NAWQA) program of the USGS found at least one pesticide detected in water from all streams tested throughout the country. Pesticide compounds were detected throughout most of the year in streams located in agriculture (97 percent of samples), urban (97 percent of samples), and mixed land-use (94 percent of samples) watersheds. USGS also found samples containing banned pesticides such as DDT in sediments and fish tissue. Finding these residual pesticides still present in so many watersheds indicates the long-term impact these pesticides have in the natural environment.

Pesticide contamination of rivers and streams has also been confirmed by state water pollution control agencies. According to EPA's National Summary of State Information, States report that approximately 16,819 miles of rivers and streams, 1,766 square miles of bays and estuaries, and 260,342 acres of lakes are currently impaired or threatened by pesticides—meaning that the particular waterbody fails to meet (or is threatened for) a particular use, such as a source of drinking water, fish, shellfish, and wildlife propagation, or recreation. EPA has also indicated that the number of State waterbodies currently impaired by pesticides may not reflect the actual number of impaired waters because states do not test or regularly monitor for a significant number of common pesticides.

The potential for human exposure to pesticides through drinking water or other contact with water is an area of significant concern. Depending on the type of pesticide, an array of health implications can arise including: skin and eye irritation, nervous system impacts, impacts on adolescent development of children, hormone or

endocrine disruption, or cancer. As noted above, the presence of pesticides in so many of the nation's waters increases the likelihood of physical contact or consumption of contaminated waters. There are many instances where the pesticide levels exceeded human health benchmark.

On October 31, 2011, the EPA issued the Pesticide General Permit (PGP) under the CWA. The permit recognizes the important role of the CWA in restoring and maintaining the integrity of local water quality and the role FIFRA plays in uniformly labeling pesticides and indicating approved uses and restrictions. The fact that pesticide application has generally been governed by FIFRA for decades and yet so many of the nation's waters have detectable levels of pesticides indicates that FIFRA alone does not adequately protect water bodies from pesticide pollution. The CWA provides critical tools for protecting water quality.

The PGP establishes a streamlined application and approval process for individuals that intend to apply pesticides into Waters of the United States. Below is a summary of the streamlined features of the PGP that ensure a basic level of water quality protection:

- Pesticide applicators must develop a Pesticide Discharge Management Plan that describes how the pesticide will be used, pesticide use monitoring plans, record keeping and reporting requirements.
- Operators that discharge pesticides over large areas must analyze efficient and effective ways to minimize pesticide discharges and evaluate pest management options, including alternatives to pesticides, considering cost effectiveness, water quality impacts and other factors.
- EPA's permit generally requires certain activities to be conducted either annually or prior to each application (such as assessing the levels of pesticides necessary to control the target pest) to ensure an appropriate amount of pesticide is applied.
- Operators must submit annual pesticide reports. These reports can be used to design future water quality sampling efforts to ensure water quality is maintained.

These are not burdensome requirements. They simply ensure responsible pesticide use that protects water quality. In addition, the PGP includes emergency procedures to allow for spraying of pesticides to address a pest emergency that could affect public health. In such emergencies, pesticide applicators do not have to receive approval before applying a pesticide.

One final concern with S. 1500 involves the failure to follow regular Committee procedure. A bill with far reaching impacts related to protection of human health and safety should have followed regular order and procedure and received an appropriate legislative hearing. Legislative hearings are an important part of the legislative process—allowing for public discourse about the pros and cons of proposed legislation and potential improvements to the legislation. Unfortunately, S.1500 did not undergo this important public review under regular order and instead was immediately brought up for a Committee vote. This is completely inappropriate for a bill with such significant public health consequences and strong opposition on the Committee.

For the substantive concerns with the legislation, and the procedural failures, we oppose S. 1500.

BARBARA BOXER.
BENJAMIN CARDIN.
BERNARD SANDERS.
SHELDON WHITEHOUSE.
JEFF MERKLEY.
KRISTEN GILLIBRAND.
CORY BOOKER.
EDWARD MARKEY.

CHANGES IN EXISTING LAW

In compliance with section 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows: Existing law proposed to be omitted is enclosed in [black brackets], new matter is printed in *italic*, existing law in which no change is proposed is shown in roman:

* * * * *

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT

* * * * *

SECTION 1. [7 U.S.C. prec. 121] SHORT TITLE AND TABLE OF CONTENTS.

(a) SHORT TITLE.—

* * * * *

SEC. 3. [7 U.S.C. 136a] REGISTRATION OF PESTICIDES.

(a) REQUIREMENT OF REGISTRATION.—Except as provided by this Act, no person in any State may distribute or sell to any person any pesticide that is not registered under this Act. To the extent necessary to prevent unreasonable adverse effects on the environment, the Administrator may by regulation limit the distribution, sale, or use in any State of any pesticide that is not registered under this Act and that is not the subject of an experimental use permit under section 5 or an emergency exemption under section 18.

(b) EXEMPTIONS.—A pesticide which is not registered with the Administrator may be transferred if—

- (1) the transfer is from one registered establishment to another registered establishment operated by the same producer solely for packaging at the second establishment or for use as a constituent part of another pesticide produced at the second establishment; or
- (2) the transfer is pursuant to and in accordance with the requirements of an experimental use permit.

(c) PROCEDURE FOR REGISTRATION.—

* * * * *

(f) MISCELLANEOUS.—

(1) EFFECT OF CHANGE OF LABELING OR FORMULATION.—If the labeling or formulation for a pesticide is changed, the registration shall be amended to reflect such change if the Administrator determines that the change will not violate any provision of this Act.

(2) REGISTRATION NOT A DEFENSE.—In no event shall registration of an article be construed as a defense for the commission of any offense under this Act. As long as no cancellation proceedings are in effect registration of a pesticide shall be prima facie evidence that the pesticide, its labeling and packaging comply with the registration provisions of the Act.

(3) AUTHORITY TO CONSULT OTHER FEDERAL AGENCIES.—In connection with consideration of any registration or application

for registration under this section, the Administrator may consult with any other Federal agency.

(4) MIXTURES OF NITROGEN STABILIZERS AND FERTILIZER PRODUCTS.—Any mixture or other combination of—

(A) 1 or more nitrogen stabilizers registered under this Act; and

(B) 1 or more fertilizer products, shall not be subject to the provisions of this section or sections 4, 5, 7, 15, and 17(a)(2) if the mixture or other combination is accompanied by the labeling required under this Act for the nitrogen stabilizer contained in the mixture or other combination, the mixture or combination is mixed or combined in accordance with such labeling, and the mixture or combination does not contain any active ingredient other than the nitrogen stabilizer.

(5) USE OF AUTHORIZED PESTICIDES.—*Except as provided in section 402(s) of the Federal Water Pollution Control Act (33 U.S.C. 1342), the Administrator or a State shall not require a permit under that Act for a discharge from a point source into navigable waters of—*

(A) a pesticide authorized for sale, distribution, or use under this Act; or

(B) the residue of the pesticide, resulting from the application of the pesticide.

* * * * *

Federal Water Pollution Control Act

* * * * *

SEC. 101. (a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—

* * * * *

SEC. 402. (a)(1) Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

* * * * *

(r) DISCHARGES INCIDENTAL TO THE NORMAL OPERATION OF RECREATIONAL VESSELS.—No permit shall be required under this Act by the Administrator (or a State, in the case of a permit program approved under subsection (b)) for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

(s) DISCHARGES OF PESTICIDES.—

(1) NO PERMIT REQUIREMENT.—*Except as provided in paragraph (2), a permit shall not be required by the Administrator or a State under this Act for a discharge from a point source into navigable waters of—*

(A) *a pesticide authorized for sale, distribution, or use under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 et seq.); or*

(B) *the residue of the pesticide, resulting from the application of the pesticide.*

(2) EXCEPTIONS.—*Paragraph (1) shall not apply to the following discharges of a pesticide or pesticide residue:*

(A) *A discharge resulting from the application of a pesticide in violation of a provision of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 et seq.) relevant to protecting water quality if—*

(i) *the discharge would not have occurred without the violation; or*

(ii) *the amount of pesticide or pesticide residue in the discharge is greater than would have occurred without the violation.*

(B) *Stormwater discharges subject to regulation under subsection (p).*

(C) *The following discharges subject to regulation under this section:*

(i) *Manufacturing or industrial effluent.*

(ii) *Treatment works effluent.*

(iii) *Discharges incidental to the normal operation of a vessel, including a discharge resulting from ballasting operations or vessel biofouling prevention.*