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# League of Wilderness Defenders v. Forsgren, 309 F.3d 1181 (9th Cir. 2002)

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In May 1996, FERC issued an annual license to Edison for the continued operation of Project 1933. FERC would renew this annual license automatically every year until it issued a new long-term license. Trout sought to vacate this annual license until Edison received state water quality certification. Trout argued that the conflicting provisions of the FPA and the CWA could only be "harmonized" by issuing annual licenses when the state either granted or waived water quality certification.

FERC held, and the court confirmed, that the issuance of an annual license is an administrative or nondiscretionary act, requiring FERC to authorize continued project operation under the terms and conditions of the original license. Therefore, annual licensing is not a licensing action that triggers the requirements of CWA. Furthermore, the court looked at congressional intent of the CWA and stated that Congress did not intend to restrict FERC's authority to prevent the closure of a licensed project pending relicensing. Instead, the FPA and the CWA function together because no new project license or license amendment can issue without compliance with the state water quality certification requirement of the CWA.

*Erika Delaney Lew*

**League of Wilderness Defenders v. Forsgren, 309 F.3d 1181 (9th Cir. 2002)** (holding pesticides sprayed from a plane constitute a point source pollutant necessitating a National Pollution Discharge Elimination System permit, and requiring an analysis of pesticide drift to supplement the Environmental Impact Statement).

The League of Wilderness Defenders and other environmental groups ("League") brought suit in the United States District Court for the District of Oregon seeking an injunction preventing the United States Forest Service ("USFS") from continuing to spray insecticide to kill the Douglas Fir Tussock Moth ("moth"). The League claimed that the USFS required a National Pollution Discharge Elimination System ("NPDES") permit and revised Environmental Impact Statement ("EIS") for further spraying. The district court granted summary judgment to the USFS on both issues. The League appealed to the United States Court of Appeals for the Ninth Circuit. The court reversed and remanded the case to the district court, enjoining the USFS from further spraying until it obtained an NPDES permit and revised its EIS to consider the impact of pesticide drift.

The USFS initiated pesticide sprays in response to early warning system predictions that a moth outbreak in 2002-2003 would result in substantial defoliation. However, drift of the aerial pesticide used possesses many potentially dangerous side effects including the possibility of harming beneficial species, insect food supplies for fish, and possible harm to birds and plants.

The League appealed three issues: (1) whether pesticides sprayed from a plane constituted a point source pollutant, requiring an NPDES permit; (2) whether administrative regulations and agency correspondence containing interpretations of regulations exempted USFS spraying from the NPDES requirement; and (3) whether the EIS should consider the environmental impacts of pesticide drift.

The court first addressed whether the pesticides sprayed from a plane constituted a point-source pollutant under the Clean Water Act ("CWA"). Under the CWA, discharge of a point source pollutant requires an NPDES permit. Nonpoint source pollutants arise from various dispersed activities whereas the statute clearly defines point source pollutants. The court determined that the pesticide discharge fell within the statutory definition of a point source pollutant since pesticides constitute pollutants under the statute, and because the spray arose from a "discrete conveyance," discharged by a "floating craft."

Next, the court responded to USFS' allegation that regulations issued by the Environmental Protection Agency ("EPA") specifically exempted silvicultural pest control from the requirement of obtaining an NPDES permit. The court held that because the statute itself clearly defined point-source pollutants, the administrative regulations could not exempt silvicultural pest control since this would contravene congressional intent. The court also found that the spraying could not constitute a nonpoint source pollutant because the statutory language, "natural runoff," modified the list of exempted activities. Since no natural runoff caused the pesticide spray, the court found it could not fit within the interpretation of a nonpoint source pollutant. The court also discarded USFS's argument that specified point source pollutants in the EPA regulation meant that silvicultural pest control could not constitute a point source pollutant. The court found that such specification only prevented removing the four specified point sources, but did not exclude other point sources such as pesticide spray.

The court held that informal correspondence from the EPA failed to exempt USFS from the NPDES permit requirement. The documents included one line in a guidance manual and two short letters, which the court found lacked sufficient analysis to constitute an exemption. In addition, the court held that while the EPA may define point sources when reasonable room to interpret them exists, the EPA may not do so when such an interpretation contravenes the will of Congress. Because the informal correspondence lacked analysis and contravened the intent of Congress, it failed to exempt USFS from the NPDES permit requirement.

The final issue the court addressed involved the EIS required for spraying. The League challenged the EIS, claiming that it lacked analysis of the potential environmental impact of pesticide drift. The court agreed, finding that the EIS totally failed to address the issue of

pesticide drift, and also failed to sufficiently analyze potential mitigation measures.

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## ELEVENTH CIRCUIT

**McAbee v. City of Fort Payne, 318 F.3d 1248 (11th Cir. 2003)** (holding that the limitation on actions provision of the Clean Water Act may preclude a citizen suit only if the state laws under which the state is bringing or has brought the enforcement action contain public participation provisions that are roughly comparable to the analogous Clean Water Act provisions).

Kim McAbee commenced a citizen suit under the Clean Water Act ("CWA") against the City of Fort Payne, Alabama ("City") for violation of their state issued National Pollutant Discharge Elimination System Permit ("NPDES"). The United States District Court for the Northern District of Alabama denied the City's motion for summary judgment, holding that the public participation provisions of the Alabama Environmental Management Act and the Alabama Water Pollution Control Act were not comparable to the CWA provisions, and did not preclude McAbee from bringing a citizen suit. The United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the district court, holding the statutes were not comparable as a matter of law.

McAbee alleged that the City violated its NPDES issued by the State of Alabama. At the time McAbee filed suit, the City was already operating under an enforcement order issued by the Alabama Department of Environmental Management for a number of previous permit violations. The final order provided for a monetary penalty to be assessed against the City and ordered the City to provide notice of the violations and penalties in the newspaper. The City's news article stated the name of the plant and the penalties imposed, but did not provide notice that citizens wishing to appeal the penalties and findings stated in the enforcement order had only fifteen days to raise such appeals.

The "Limitation on Actions" provision in the CWA precludes citizens from bringing citizen suits for CWA violations provided the state is diligently prosecuting an action or has issued a final order under state law comparable to the analogous CWA provisions. Therefore, the issue on appeal was whether the district court erred in holding that the Alabama statutes were not comparable to the CWA provisions. The court rejected the City's argument that the statutes need only be comparable as a whole, and held that each provision in the state law should be "roughly comparable" to the equivalent CWA provision. Applying the test of rough comparability, the appellate