

# PESTICIDES AND FARMERS: LIFE AFTER NATIONAL COTTON COUNCIL OF AMERICA v. EPA

## I. INTRODUCTION

Farmers currently benefit from exemptions in numerous environmental laws.<sup>1</sup> However, Rachel Carson did not exempt farmers from her poetic assault against pesticides<sup>2</sup>—all pesticides have consequences regardless of the applicator’s choice of livelihood.<sup>3</sup> She apparently did not see a reason to exempt the farmer who sprays his crops with harmful pesticides. Costs associated with environmental harms are often ignored when assessing the benefit of pesticides.<sup>4</sup> Furthermore, farmers and farm workers are at a very high risk of pesticide poisoning and serious illness because they directly handle seventy to eighty percent of all pesticides

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<sup>1</sup> See, e.g., 33 U.S.C. § 1342(l)(1) (2006) (exempting from CWA “discharges composed entirely of return flows from irrigated agriculture”); 33 U.S.C. § 1362(14) (2006) (exempting from CWA definition of point source explicitly “agricultural stormwater discharges and return flows from irrigated agriculture”); 33 U.S.C. § 1344(f)(1)(A) (2006) (exempting normal farming activities from dredge-and-fill permit program for wetlands protection; *but see* 33 U.S.C. § 1344(f)(2) (2006) (narrowing the exemption via a recapture provision). See also, e.g., 42 U.S.C. § 9601(22)(D) (2006) (exempting the normal application of fertilizer from CERCLA’s definition of release); 42 U.S.C. § 9603(e) (2006) (exempting pesticides registered under FIFRA from reporting requirements for released substances under CERCLA); 40 C.F.R. § 262.70 (2009) (exempting empty pesticide containers from RCRA as long as they are triple rinsed and disposed of in a manner consistent with label instructions). See generally J.B. Ruhl, *Farms, Their Environmental Harms, And Environmental Law*, 27 *ECOLOGY L.Q.* 263 (2000) (describing the lack of environmental regulation of harms caused by farms and proposing a framework for addressing the problem).

<sup>2</sup> RACHEL CARSON, *SILENT SPRING* (1962).

<sup>3</sup> *Id.* at 6 (“[C]hemicals sprayed on croplands or forests or gardens lie long in soil, entering into living organisms, passing from one another in a chain of poisoning and death.”).

<sup>4</sup> David Pimentel et al., *Assessment of Environmental and Economic Impacts of Pesticide Use*, in *THE PESTICIDE QUESTION: ENVIRONMENT, ECONOMICS, & ETHICS* 47, 47 (David Pimentel & Hugh Lehman eds., 1993) (“Most benefits of pesticides are based only on direct crop returns.”). “Although farmers spend about \$4 billion/year for pesticides, little of the pollution costs that result are borne by them or the pesticide chemical companies. Rather, most of the costs are borne off-site by public illnesses and environmental destruction.” *Id.* at 71.

used.<sup>5</sup> So while farmers think they are prospering from exemptions, they are actually suffering,<sup>6</sup> and they are not suffering alone.<sup>7</sup> They are suffering along with their families, especially their children, their community, and their environment.<sup>8</sup>

Agricultural practices directly affect our water quality because most pesticides applied to crops eventually end up in groundwater and surface water.<sup>9</sup> Conventional agriculture relies heavily on synthetic pesticides.<sup>10</sup> After application, the pesticides “seep down into the ground and contaminate the groundwater.”<sup>11</sup> Pesticides also infiltrate aquatic ecosystems such as streams and lakes, which cause direct and indirect fish kills.<sup>12</sup> After applications, the pesticides “run off the surface of the fields during a rainstorm and pollute creeks, rivers, and even the ocean downstream.”<sup>13</sup> Yet, “[a]dverse environmental and health effects often do not directly affect the farmer’s decision to apply pesticides.”<sup>14</sup> As one author recognized,

To acknowledge that farms pollute and degrade the environment should neither indict farming as a way of life nor denigrate the ideals farmers hold . . . The plain truth is that farms pollute ground water, surface water, air, and soils; they destroy open space and wildlife habitat; they erode soils and contribute to sedimentation of lakes and rivers; they deplete water resources; and they often simply smell bad. These effects are and always have been consequences of farming in general.<sup>15</sup>

In *National Cotton Council of America v. E.P.A.*, 553 F.3d 927 (6th Cir. 2009), the Sixth Circuit held that permits are required for all biologi-

<sup>5</sup> *Id.* at 50.

<sup>6</sup> See, e.g., Jules Pretty et al., *Pesticides in World Agriculture: Causes, Consequences and Alternative Courses*, in *BUGS IN THE SYSTEM: REDESIGNING THE PESTICIDE INDUSTRY FOR SUSTAINABLE AGRICULTURE* 17, 29–30 (William Vorley & Dennis Keeney eds., 1998) (describing health impacts of pesticides on farmers and farm workers).

<sup>7</sup> See *infra* Part III.B.

<sup>8</sup> *Id.*

<sup>9</sup> Pimentel et al., *supra* note 4, at 64 (According to estimates, about half of United States’ groundwater and well water “is or has the potential to be contaminated.”). See also Pretty et al., *supra* note 6, at 29 (“The US-EPA estimates that between 50,000 and three million people may be drinking water contaminated with herbicides above EPA standards.”).

<sup>10</sup> LESLIE A. DURAM, *GOOD GROWING: WHY ORGANIC FARMING WORKS* 8 (2005).

<sup>11</sup> *Id.*

<sup>12</sup> Pimentel et al., *supra* note 4, at 65.

<sup>13</sup> DURAM, *supra* note 10, at 8.

<sup>14</sup> Craig Osteen, *Pesticide Use Trends and Issues in the United States*, in *THE PESTICIDE QUESTION: ENVIRONMENT, ECONOMICS, & ETHICS* 307, 332 (David Pimentel & Hugh Lehman eds., 1993).

<sup>15</sup> Ruhl, *supra* note 1, at 266.

cal pesticide applications and chemical pesticide applications that leave a residue in water when such applications are made in or over, including near, waters of the United States.<sup>16</sup> According to a lead attorney in the case, “The decision today is a victory for clean water, and for fish and wildlife.”<sup>17</sup> He also stated “this decision is another in a long line of rebukes to the Bush administration policies that overstepped their statutory authority and to the chemical manufacturers who peddle their poisons without concern to the effect on human health and the environment.”<sup>18</sup> Much to the displeasure of agricultural groups, the United States Supreme Court recently decided not to review the circuit court decision.<sup>19</sup> The circuit court decision will stand as is. This Comment will discuss the series of decisions and the Environmental Protection Agency (“EPA”) Final Rule which led to the Sixth Circuit decision vacating the EPA’s Final Rule. It will also discuss the case itself, including the parties’ arguments, the court’s reasoning, and the case’s subsequent history. Finally, this Comment will discuss the general impact of this decision on farmers by evaluating the potential negative and positive consequences of the court’s decision.

## II. IS A PESTICIDE A POLLUTANT?

### A. *The Clean Water Act and the Federal Insecticide, Fungicide, and Rodenticide Act*

The objective of the Clean Water Act (“CWA”) is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>20</sup> The CWA prohibits the addition of a pollutant from a point source into navigable waters without a National Pollutant Discharge

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<sup>16</sup> Nat’l Cotton Council of Am. v. EPA, 553 F.3d 927, 940 (6th Cir. 2009).

<sup>17</sup> Press Release, W. Envtl. Law Ctr., Conservationists Win Decision Protecting Local Water Supplies, Fisheries & Wildlife; Bush Rule Exempting Pesticide Application from Clean Water Act Protections Vacated (Jan. 7, 2009), available at <http://westernlaw.org/article/conservationists-win-decision-protecting-local-water-supplies-fisheries-wildlife-bush-rule-e>.

<sup>18</sup> *Id.*

<sup>19</sup> See Gabriel Nelson, *Supreme Court Denies 3 High-Profile Environmental Cases*, N.Y. TIMES, Feb. 23, 2010, available at <http://www.nytimes.com/gwire/2010/02/23/23greenwire-supreme-court-denies-3-high-profile-environmen-26153.html> (discussing Supreme Court’s denial of certiorari); Jacqui Fatka, *Supreme Court won’t review pesticide case*, FEEDSTUFFS, Feb. 22, 2010, <http://www.feedstuffs.com/ME2/dirmod.asp?sid=F4D1A9DFCD974EAD8CD5205E15C1CB42&nm=Breaking+News&type=news&mod=News&mid=A3D60400B4204079A76C4B1B129CB433&tier=3&nid=529D2B3E464344DA8AA0E55962B4220> (same).

<sup>20</sup> 33 U.S.C. § 1251(a) (2006).

Elimination System (“NPDES”) permit.<sup>21</sup> “Pollutant” is statutorily defined to include “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.”<sup>22</sup> This list is not exhaustive and “pollutant” should be interpreted broadly.<sup>23</sup> A point source is defined as “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.”<sup>24</sup>

The Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”) is unlike other statutes because individuals are not required to obtain a permit for the use of pesticides; but rather, it provides a framework for regulating pesticides.<sup>25</sup> FIFRA requires “registration” for all pesticides sold or distributed in the U.S.<sup>26</sup> The EPA may only register a pesticide if, among other things, the pesticide “will perform its intended function without unreasonable adverse effects on the environment,” and if “in accordance with widespread and commonly recognized practice, it will not generally cause unreasonable adverse effects on the environment.”<sup>27</sup> In determining whether a pesticide causes unreasonable adverse effects, “the economic, social, and environmental costs and benefits of the use of any pesticide” should be taken into account.<sup>28</sup> It is unlawful to use any pesticide in a manner inconsistent with its labeling.<sup>29</sup>

### B. A Series of Decisions

In 2001, the Ninth Circuit held that the application of pesticide to water requires a NPDES permit even though the pesticide had an EPA-approved label under FIFRA.<sup>30</sup> In 1998, Headwaters, Inc. and Oregon National Resources Council Action brought a citizen suit under the Clean Water Act against the Talent Irrigation District (“TID”).<sup>31</sup> The complaint alleged that TID had violated the Clean Water Act by discharging Mag-nacide H, an aquatic herbicide, into and through its canals, without ob-

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<sup>21</sup> 33 U.S.C. §§ 1311(a), 1342 (2006).

<sup>22</sup> 33 U.S.C. § 1362(6) (2006).

<sup>23</sup> *Rapanos v. United States*, 547 U.S. 715, 724 (2006).

<sup>24</sup> 33 U.S.C. § 1362(14) (2006).

<sup>25</sup> 7 U.S.C. § 136 et seq. (2006).

<sup>26</sup> 7 U.S.C. § 136a(a) (2006).

<sup>27</sup> 7 U.S.C. §§ 136a(c)(5)(C), 136a(c)(5)(D) (2006).

<sup>28</sup> 7 U.S.C. § 136(bb) (2006).

<sup>29</sup> 7 U.S.C. §§ 136j(a)(2)(G), 136(ee) (2006).

<sup>30</sup> *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 534 (9th Cir. 2001).

<sup>31</sup> *Id.* at 528–29.

taining a NPDES permit.<sup>32</sup> The district court granted summary judgment in favor of TID.<sup>33</sup> The court held that the canals were “waters of the United States” under the CWA, and that acrolein, the active chemical ingredient in Magnacide H, was a “pollutant.”<sup>34</sup> Nevertheless, the court concluded that a permit was not required because the EPA-approved FIFRA label did not require the user to acquire a permit.<sup>35</sup> The Ninth Circuit reversed this decision.<sup>36</sup> TID maintained that it did not need a permit because the label did not mention any permit requirement and “the label was approved by the EPA” under FIFRA.<sup>37</sup> One argument was that the pesticide was not chemical waste under the definition of pollutant; it was a commercial product put into the water to carry out a commercial purpose, namely “the clearing of weeds.”<sup>38</sup> However, not every molecule of the pesticide was carrying out that commercial purpose.<sup>39</sup>

The Ninth Circuit disagreed with TID, concluding “that the approved label did not obviate the need to obtain a permit.”<sup>40</sup> The court described the active ingredient in Magnacide H (acrolein) as “a toxic chemical that is lethal to fish at a concentration at and below the level required to kill weeds in the irrigation canals, and which takes at least several days to break down into a nontoxic state.”<sup>41</sup> The court stated:

Although it would seem absurd to conclude that a toxic chemical directly poured into water is not a pollutant, we need not decide that issue because we agree with the district court that the residual acrolein left in the water after its application qualifies as a chemical waste product and thus as a ‘pollutant’ under the CWA.<sup>42</sup>

In 2002, the Second Circuit highlighted the need for the EPA to interpret the interaction between FIFRA and the CWA.<sup>43</sup> In 1998, residents of the town of Amherst brought a citizen suit seeking declaratory and injunctive relief against the town for violations of the CWA.<sup>44</sup> The citizens alleged Amherst violated the CWA by discharging pollutants into federal wetlands without a NPDES permit when it applied pesticides to

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<sup>32</sup> *Id.* at 529.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 534.

<sup>37</sup> *Id.* at 530.

<sup>38</sup> *Id.* at 532.

<sup>39</sup> *Id.* at 533.

<sup>40</sup> *Id.* at 528.

<sup>41</sup> *Id.* at 532.

<sup>42</sup> *Id.* at 532–33.

<sup>43</sup> *Altman v. Town of Amherst*, N.Y., 47 F. App'x 62, 67 (2d Cir. 2002).

<sup>44</sup> *Id.* at 63.

wetlands for the purpose of controlling mosquitoes.<sup>45</sup> Amherst filed a motion to dismiss, claiming they were not required to obtain a NPDES permit and that pesticides applied for beneficial, useful purposes were not considered pollutants under the CWA.<sup>46</sup> The district court granted Amherst's motion to dismiss holding that "spray drift from a pesticide used for its intended purpose is [not] a chemical waste within the meaning of the Clean Water Act," that the pesticide program was "more appropriately regulated under FIFRA," and that a NPDES permit was not required.<sup>47</sup>

The Second Circuit vacated the judgment and remanded with instructions.<sup>48</sup> The court concluded that:

[u]ntil the EPA articulates a clear interpretation of current law—among other things, whether properly used pesticides released into or over waters of the United States can trigger the requirement for NPDES permits . . . —the question of whether properly used pesticides can become pollutants that violate the CWA will remain open.<sup>49</sup>

The court called for a response from the EPA: "Participation by the EPA in this litigation in any way that permits articulation of the EPA's interpretation of the law in this situation would be of great assistance to the courts."<sup>50</sup>

In 2002, the Ninth Circuit held that the aerial application of insecticides to control pests over national forest land, where some insecticide inevitably discharged into waters, constituted a point source discharge requiring a NPDES permit.<sup>51</sup> The United States Forest Service began an annual aerial insecticide spraying program over 628,000 acres of national forest lands in Washington and Oregon to control a predicted outbreak of Douglas Fir Tussock Moths, which kill Douglas Fir trees.<sup>52</sup> League of Wilderness and seven other environmental groups filed suit in district court challenging the spraying program because the Forest Service failed to obtain a NPDES permit for the aerial spraying.<sup>53</sup> The district court

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 63–64.

<sup>47</sup> *Id.* at 65.

<sup>48</sup> *Id.* at 68.

<sup>49</sup> *Id.* at 67.

<sup>50</sup> *Id.*

<sup>51</sup> *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1190 (9th Cir. 2002).

<sup>52</sup> *Id.* at 1182.

<sup>53</sup> *Id.*

granted summary judgment in favor of the Forest Service.<sup>54</sup> The environmental groups appealed.<sup>55</sup>

The Ninth Circuit reversed, with instructions to the district court “to enter an injunction prohibiting the Forest Service from further spraying until it acquires an NPDES permit and completes a revised EIS.”<sup>56</sup> The court described some harmful side effects associated with the aerial spraying program: “Insecticide will drift outside . . . [the target area] . . . and may kill beneficial species, including butterflies. Because aircraft conducting the spraying discharge insecticides directly above streams, stoneflies and other aquatic insects may be affected, reducing food supplies for salmon and other fish. The spraying could also adversely affect birds and plants.”<sup>57</sup> The parties “[did] not dispute that the insecticides . . . [met] the definition of ‘pollutant.’”<sup>58</sup> Further, the Ninth Circuit did not analyze whether the insecticides qualified as a “pollutant” under the CWA. Instead, the court assumed the insecticides met the definition.<sup>59</sup>

In 2005, the Ninth Circuit considered whether pesticides directly and intentionally applied to water bodies in accordance with the requirements of FIFRA were “chemical wastes,” and thus CWA “pollutants” that require a NPDES permit.<sup>60</sup> Jeff Hagener, director of the Montana Department of Fish, Wildlife, and Parks, initiated a program to reintroduce a threatened fish species which included a plan to remove the non-native fish.<sup>61</sup> The program called for the application of the pesticide antimycin into the water for short periods of time over the course of several years before reintroducing the threatened fish species.<sup>62</sup> William Fairhurst filed a citizen suit alleging that Hagener had failed to obtain the required NPDES permit to apply the pesticide.<sup>63</sup> The district court granted Hagener’s motion for summary judgment.<sup>64</sup>

The Ninth Circuit held that a “chemical pesticide applied intentionally, in accordance with a FIFRA label, and with no residue or unintended effect is not ‘waste’ and thus not a ‘pollutant’ for the purposes of the Clean Water Act.”<sup>65</sup> The court concluded that “[b]ecause Hagener’s ap-

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1182–83.

<sup>56</sup> *Id.* at 1183.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1184 n.2.

<sup>59</sup> *Id.* at 1185.

<sup>60</sup> *Fairhurst v. Hagener*, 422 F.3d 1146, 1148–49 (9th Cir. 2005).

<sup>61</sup> *Id.* at 1147.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1148.

<sup>65</sup> *Id.* at 1152.

plication of antimycin to Cherry Creek was intentional, FIFRA-compliant, and without residue or unintended effect, the discharged chemical was not a ‘pollutant’ and Hagener was not required to obtain a NPDES permit.”<sup>66</sup> The court distinguished this case from *Headwaters v. Talent Irrigation*, 243 F.3d 526, 534 (9th Cir. 2001), because in that case, the pesticide remained in the water after it performed its intended beneficial function and “[h]ere the parties do not assert that there was residual chemical left in the water after the antimycin had performed its intended purpose.”<sup>67</sup> After application in this case, “‘the antimycin dissipated rapidly’ and left no residue.”<sup>68</sup>

### C. The EPA’s Response

The EPA did not answer the *Altman* court’s 2002 call for response until four years later. “For nearly thirty years prior to the adoption of the Final Rule, pesticide labels issued under the FIFRA were required to contain a notice stating that the pesticide could not be ‘discharge[d] into lakes, streams, ponds, or public waters unless in accordance with an NPDES permit.’”<sup>69</sup> Even when FIFRA’s labeling requirements were amended, those labeling requirements continued to include “a notice about the necessity of obtaining an NPDES permit” for pesticides.<sup>70</sup> Then, in 2006, the EPA issued a final rule stating that a NPDES permit is not required to apply FIFRA pesticides to or around water if: (1) applying pesticides directly to water to control pests; or (2) applying pesticides to control pests that are present over or near water, where a portion of the pesticides will unavoidably be deposited to the water to target the pests.<sup>71</sup>

### D. The case of National Cotton Council of America v. EPA<sup>72</sup>

In 2009, the Sixth Circuit vacated the EPA’s Final Rule and held that permits are required for all biological pesticide applications and chemical pesticide applications that leave a residue in water when such applications are made in or over, including near, waters of the U.S.<sup>73</sup> Two

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<sup>66</sup> *Id.* According to a founder of environmental law, William H. Rodgers, Jr., this decision was “ridiculous; is it still not a ‘pollutant’ if they accidentally drop this product in a ‘good’ stream on the way to a ‘bad’ lake?” 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 4.10, at 182 n.2 (Supp. Summer 2010).

<sup>67</sup> *Fairhurst*, 422 F.3d at 1149.

<sup>68</sup> *Id.*

<sup>69</sup> *Nat’l Cotton Council of Am. v. EPA*, 553 F.3d 927, 931 (6th Cir. 2009).

<sup>70</sup> *Id.*

<sup>71</sup> 40 C.F.R. § 122.3(h) (2009); 71 Fed. Reg. 68,483, 68,485–486 (Nov. 27, 2006).

<sup>72</sup> *Nat’l Cotton Council*, 553 F.3d 927.

<sup>73</sup> *Id.* at 940.



groups of petitioners, environmental interest groups and industry interest groups, opposed the EPA's Final Rule.<sup>74</sup> Petitions for review of the Final Rule were filed in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits by the petitioners, ultimately becoming consolidated in the Sixth Circuit.<sup>75</sup> The environmental interest groups argued that: (1) the EPA's final rule excluding pesticides from the definition of pollutant exceeds the EPA's interpretative authority under CWA; (2) "the EPA exceeded its authority under CWA when it determined that, while pesticides are discharged by point sources, the residue of these pesticides is nonetheless a 'nonpoint source pollutant;'" and (3) "the EPA may not exempt FIFRA-compliant applications of pesticides from the requirements" of the CWA.<sup>76</sup> The industry interest groups also argued that the EPA's Final Rule exceeded the EPA's interpretative authority.<sup>77</sup> They contended that the Final Rule was "arbitrary and capricious because it treat[ed] pesticides applied in violation of the FIFRA as pollutants, while it treat[ed] the very same pesticides used in compliance with the FIFRA as non-pollutants."<sup>78</sup> According to the industry groups, "whether something constitutes a pollutant should not hinge upon compliance with the FIFRA."<sup>79</sup>

The EPA argued that the terms of the CWA were ambiguous, and the Final Rule a reasonable construction of the CWA entitled to deference.<sup>80</sup> The EPA reasoned that pesticides generally, applied under FIFRA labeling requirements, are not pollutants.<sup>81</sup> However, the EPA conceded that pesticide residue is a pollutant under the CWA because it is a waste of the pesticide application.<sup>82</sup> Nonetheless, the EPA contended "that pesticide residue is not subject to the NPDES permitting program because 'at the time of discharge . . . the material . . . must be both a pollutant, and from a point source.'"<sup>83</sup> By the time it becomes a pollutant it is no longer emanating from a "point source."<sup>84</sup>

The court first considered whether the CWA unambiguously included pesticides within the definition of "pollutant" and concluded that the plain language of "chemical waste" and "biological materials" unambi-

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<sup>74</sup> *Id.* at 929.

<sup>75</sup> *Id.* at 932.

<sup>76</sup> *Id.* at 934.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 932.

<sup>82</sup> *Id.* at 935.

<sup>83</sup> *Id.* at 932.

<sup>84</sup> *Id.*

guously did so.<sup>85</sup> The court determined that the CWA definition of “chemical waste” included “‘discarded’ chemicals, ‘superfluous’ chemicals, or ‘refuse or excess’ chemicals.”<sup>86</sup> Thus, the court found “so long as the chemical pesticide ‘is intentionally applied to the water [to perform a particular useful purpose] and leaves no excess portions after performing its intended purpose[ ] it is not a ‘chemical waste,’ and does not require a NPDES permit.”<sup>87</sup> However, “[i]f . . . a chemical pesticide is known to have lasting effects beyond the pesticide’s intended object, then its use must be regulated under the Clean Water Act.”<sup>88</sup> Looking at the common meaning of “biological material,” the court also determined that biological pesticides qualify as a biological material and must be regulated under the CWA when “discharged into water.”<sup>89</sup> In this way, biological and chemical pesticides are treated differently.<sup>90</sup>

The court next considered whether chemical pesticide excess and residue were added to the water by point sources.<sup>91</sup> The EPA argued that excess and residue pesticides did not require NPDES permits because at the moment of discharge, they were strictly pesticides and not excess or residue pesticides.<sup>92</sup> The court rejected this argument because no authority existed for this assertion and “[i]njecting a temporal requirement . . . is not only unsupported by the Act, but it is also contrary to the purpose of the permitting program, which is ‘to prevent harmful discharges into the Nation’s waters.’”<sup>93</sup> It followed that, “[i]f the EPA’s interpretation were allowed to stand, discharges that are innocuous at the time they are made but extremely harmful at a later point would not be subject to the permitting program.”<sup>94</sup>

Finally, the court vacated the Final Rule concluding that it was not a reasonable interpretation of the CWA.<sup>95</sup> The court did not analyze the relationship between the CWA and FIFRA.<sup>96</sup>

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<sup>85</sup> *Id.* at 935–36.

<sup>86</sup> *Id.* at 936.

<sup>87</sup> *Id.* (quoting *Fairhurst v. Hagener*, 422 F.3d 1146, 1149 (9th Cir. 2005) (citation omitted)).

<sup>88</sup> *Id.* at 937.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 938.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 938–39.

<sup>93</sup> *Id.* at 939.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 940.

<sup>96</sup> *Id.*

*E. Aftermath*

The EPA did not appeal the decision and was granted a requested two-year stay to make adjustments to its regulations.<sup>97</sup> According to the EPA website:

EPA plans, before the ruling takes effect (April 9, 2011), to issue a final general NPDES permit for covered pesticide applications, to assist authorized states to develop their NPDES permits, and to provide outreach and education to the regulated community. EPA will work closely with state water permitting programs, the regulated community and environmental organizations in developing a general permit that is protective of the environment and public health.<sup>98</sup>

The Office of Water, Office of Pesticide Programs, Office of General Counsel, Regional EPA offices, State regulatory agencies, and others are working to develop general permits “for at least four different aquatic pesticide uses.”<sup>99</sup> The EPA’s NPDES general permits will be implemented in Alaska, Idaho, Massachusetts, New Hampshire, and New Mexico, most territories, tribal lands and certain federal facilities.<sup>100</sup> However, forty-five states will be required to develop their own NPDES permits.<sup>101</sup> The states’ permits must, at the very least, “incorporate the EPA general permits’ requirements.”<sup>102</sup>

A petition for certiorari to the United States Supreme Court was filed by the National Cotton Council of America and other agricultural groups as well as industry groups, which included the American Farm Bureau Federation.<sup>103</sup> The petitioners sought reversal of the Sixth Circuit’s decision.<sup>104</sup> According to Jay Hardwick, the National Cotton Council of

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<sup>97</sup> *Final Rule on Aquatic Pesticides*, U.S. E.P.A., <http://cfpub.epa.gov/npdes/pesticides/aquaticpesticides.cfm> (last updated June 3, 2010). The pesticide industry petitioned for rehearing but was denied. Press Release, W. Envtl. Law Ctr., Conservationists’ Win Upheld in *Nat’l Cotton Council v. EPA* (Aug. 3, 2009), available at <http://www.westernlaw.org/article/conservationists'-win-upheld-nat'-l-cotton-council-v-epa>.

<sup>98</sup> U.S. E.P.A., *supra* note 97.

<sup>99</sup> *NCC v. EPA and EPA’s NPDES General Permits for Pesticides*, FAR WEST AGRIBUSINESS ASS’N (Dec. 15, 2009), <http://www.fwaa.org/> (follow “Regulatory Issues” hyperlink; then follow “NPDES” hyperlink).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> News Release, Nat’l Cotton Council of Am., *Petition Filed in Court’s Clean Water Ruling* (November 3, 2009), available at <http://www.cotton.org/news/releases/2009/clnwater.cfm>; Mateusz Perkowski, *Industry Appeals EPA’s Power*, CAPITAL PRESS, Nov. 7, 2009, <http://www.capitalpress.info/content/mp-pesticide-appeal>.

<sup>104</sup> News Release, *supra* note 103; Perkowski, *supra* note 103.

America Chairman, “[t]he Sixth Circuit reversed over 30 years of precedent by using an unorthodox rationale that substituted its reasoning for the EPA’s informed decision-making.”<sup>105</sup> Although “[t]he statistics are not attractive for any case to be heard,” according to Jay Vroom, the head of CropLife America, “this one has the features and merits that will allow it to at least rise to a higher probability of consideration.”<sup>106</sup> He said that the decision affected the entire country and “the decision could be interpreted as applying to other useful substances that leave residues, such as fertilizers, de-icing chemicals and fire retardants.”<sup>107</sup>

The Supreme Court denied certiorari and will not hear this case.<sup>108</sup> As expected, environmentalists applaud the decision.<sup>109</sup> Unsurprisingly, agriculture groups criticized the decision for “creat[ing] redundant bureaucracy and hamper[ing] agricultural production by forcing farmers to decide between not applying pesticides and risking legal and enforcement actions for discharging without a permit.”<sup>110</sup> CropLife America said it would “pursue additional avenues to contain” the Sixth Circuit’s ruling and would continue working “to ensure that the critical needs of agriculture are best preserved.”<sup>111</sup> The EPA has until April 2011 to adjust its regulations to comply with the Sixth Circuit decision.<sup>112</sup>

### III. IMPLICATIONS

After *National Cotton Council of America v. E.P.A.*, farmers and other applicators of pesticides must obtain NPDES permits for all biological pesticide applications and chemical pesticide applications that leave a

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<sup>105</sup> News Release, *supra* note 103.

<sup>106</sup> Perkowski, *supra* note 103.

<sup>107</sup> *Id.*

<sup>108</sup> See Nelson, *supra* note 19 (discussing Supreme Court’s denial of certiorari); Fatka, *supra* note 19 (same).

<sup>109</sup> A staff attorney for the National Environmental Law Center said, “We’re obviously ecstatic, and we think the Supreme Court made the right call.” Nelson, *supra* note 19. The attorney also commented: “Industry has really been trying to play this as unique in history as an unparalleled expansion of regulatory power, but if you look at the history of the Clean Water Act, a lot of industrial sectors have already been regulated and EPA has been slapped down for trying to exempt other sectors.” *Id.*

<sup>110</sup> *Id.* The president of the American Farm Bureau Federation made a statement after hearing about the decision: “All farmers know they must use chemicals properly. They also know the label on each chemical they use is the law of the land . . . Going through redundant bureaucratic red tape for a duplicate permit to apply a safe product is preposterous. That kind of regulatory overkill will not improve food safety or the environment.” *Id.*

<sup>111</sup> Fatka, *supra* note 19.

<sup>112</sup> U.S. E.P.A., *supra* note 97.

residue in water when such applications are made in or over, including near, waters of the United States.<sup>113</sup> In theory, not all pesticide applications require a permit. However, in practice, most pesticides do leave a residue and will require a permit. According to EPA estimates, the Sixth Circuit decision “affects approximately 365,000 pesticide applicators that perform 5.6 million pesticide applications annually.”<sup>114</sup>

#### A. *Perceived Problems Anticipated*

This case will have widespread impact across the United States, affecting farmers, farm workers, federal and state agencies, environmental groups, the pesticide industry, and the public at large. Perceived problems can be grouped into two main categories: costs<sup>115</sup> and implementation.

The costs of NPDES permits may be unreasonable for small-scale farmers.<sup>116</sup> NPDES permit fees “are established on a state-by-state basis” and can be significantly high.<sup>117</sup> The fees are used to pay for processing applications, conducting inspections, analyzing laboratory samples and other operating costs.<sup>118</sup> The range of fees throughout the state is highly varied.<sup>119</sup> Fees also “vary depending on the type and extent of the activity to be undertaken.”<sup>120</sup> For example, NPDES permits fees can range

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<sup>113</sup> Nat'l Cotton Council of Am. v. EPA, 553 F.3d 927, 940 (6th Cir. 2009).

<sup>114</sup> U.S. E.P.A., *supra* note 97.

<sup>115</sup> People seemed to be very concerned about the costs of NPDES permits but unconcerned about the amount of money spent developing new pesticides which pollute our waters. “If we would divert to constructive research even a small fraction of the money spent each year on the development of ever more toxic sprays, we could find ways to use less dangerous materials and to keep poisons out of our waterways. When will the public become sufficiently aware of the facts to demand such action?” CARSON, *supra* note 2, at 152.

<sup>116</sup> See Ruhl, *supra* note 1, at 331 (“Increased environmental regulation of farms may reduce the economic viability of farms by raising costs, contributing to further concentration of the industry. Given the economic climate of the farm industry, this may be disastrous.”).

<sup>117</sup> Meghan Rhatigan, Note, *Legislation Overlap: Should the Clean Water Act or the Federal Insecticide, Fungicide and Rodenticide Act Prevail when Pesticides end up in U.S. Waters?*, 79 NOTRE DAME L. REV. 2183, 2205 (2004).

<sup>118</sup> *Id.* at 2205 n.195. See, e.g., Pretty et al., *supra* note 6, at 33 (estimating that from 1970 to 1995, the pesticide industry, food industry, and farmers spent \$10 billion on compliance, residue testing, and the like because of pesticide regulation); Pimentel et al., *supra* note 4, at 69 (estimating that the state and federal government spend \$1 million annually to train and register pesticide applicators and that the EPA spends \$40 million annually to register and reregister pesticides).

<sup>119</sup> Rhatigan, *supra* note 117, at 2205 n.197.

<sup>120</sup> *Id.* at 2205.

from \$150 to \$17,926 in Colorado; \$400 to \$34,300 in Indiana; and \$250 to \$1,192,000 in Wisconsin.<sup>121</sup> The state gets to choose how to structure its permitting program and how substantial a burden the fee will be.<sup>122</sup> Furthermore, NPDES permitting fees are often collected annually, rather than a onetime fee, which increases the burden on farmers.<sup>123</sup>

As the cost of farming increases as a direct result of the need to obtain NPDES permits, someone must absorb the permitting fee. Farmers may choose to pass this cost along to the consumer, but this might be particularly harmful for small-scale farmers who already have trouble selling their products to support themselves and their families.<sup>124</sup> With falling incomes and rising debts, these farmers are already struggling.<sup>125</sup>

However, there are alternatives to alleviate the cost of a NPDES permit. One option is to stop using pesticides altogether. "Good farmers know . . . that nature can be an economic ally. Natural fertility is cheaper, often in the short run, always in the long run, than purchased fertility."<sup>126</sup> Organic farming has significant benefits for the environment and also for farmers and their families.<sup>127</sup> To get certified under the USDA organic certification program and to be able to label as organic, crops and livestock must be produced and handled without the use of synthetic substances (except those specifically listed).<sup>128</sup> Pests may be controlled through physical or mechanical methods, such as augmentation or introduction of predators and parasites, development of habitat for natural enemies, and nonsynthetic lures or traps.<sup>129</sup> Weed control meth-

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<sup>121</sup> *Id.* at 2205 n.197.

<sup>122</sup> *Id.* at 2205.

<sup>123</sup> *Id.*

<sup>124</sup> See Ruhl, *supra* note 1, at 330 ("Today many farms are crashing economically as commodity prices plummet below costs of production throughout the industry.").

<sup>125</sup> See JERRY BUCKLAND, *PLOUGHING UP THE FARM: NEOLIBERALISM, MODERN TECHNOLOGY AND THE STATE OF THE WORLD'S FARMERS* 14 (2004) (referring to the falling incomes and rising debt of farmers in the industrial world). See also Wendell Berry, *Conservationist and Agrarian* (2002), in *BRINGING IT TO THE TABLE: ON FARMING AND FOOD* 67, 74 (2009) ("Good farmers today may market products of high quality and perform well all the services I have listed, and *still* be unable to afford health insurance, and *still* find themselves mercilessly caricatured in the public media as rural simpletons, hicks, or rednecks.").

<sup>126</sup> Berry, *supra* note 125, at 75.

<sup>127</sup> See DURAM, *supra* note 10, at 5 ("A recent study shows that children who eat organic food have significantly lower levels of pesticide in their urine."); see, e.g., ROD DREHER, *CRUNCHY CONS* 87 (2006) ("Kathy O'Brien told me she knows a farmer whose land was so toxic from overuse of chemicals that his family was getting sick. 'His soil was ruined, and his family's health was being ruined. That's what motivated him to get back to a natural farm.'").

<sup>128</sup> 7 C.F.R. § 205.105(a) (2009).

<sup>129</sup> 7 C.F.R. § 205.206(b) (2009).

ods include mulching, mowing, livestock grazing, hand and mechanical weeding, burning, and plastic mulches as long as it is removed from the field at the end of the growing season.<sup>130</sup> Consumer demand for organic food is increasing due to “nutritional superiority, food safety, fresher taste, and environmental concern.”<sup>131</sup>

If organic farming is not a plausible option for farmers dependent on pesticides,<sup>132</sup> a second option is reducing the amount of pesticides used. This would reduce the amount that needs to be purchased and therefore money budgeted for pesticides can be used to cover the costs of the permit. Integrated pest management (“IPM”) may help lower the amount spent on pesticides and the amount of actual pesticides used. IPM integrates a variety of pest management techniques to maximize non-chemical techniques and reduce the problems associated with chemical pesticides.<sup>133</sup> Key components of IPM include: using “economic thresholds to guide spraying decisions,” using pesticides in ways that are least damaging to beneficial bio-control organisms, maximizing “host-plant resistance to pests,” and using cultural controls.<sup>134</sup> Using economic thresholds can reduce pesticide use by twenty to thirty percent at least.<sup>135</sup> Pesticide use in the United States costs about \$4.1 billion per year.<sup>136</sup> Reducing pesticide use even a small amount will free up some money that can be used to obtain the required NPDES permit.

Another problem associated with the financial cost to farmers is that there is a possibility of a double fine for pesticide pollution.<sup>137</sup> There are both civil and criminal penalties for not complying with the CWA, which can include fines and/or imprisonment.<sup>138</sup> Pesticide users are also subject

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<sup>130</sup> 7 C.F.R. § 205.206(c) (2009).

<sup>131</sup> DURAM, *supra* note 10, at 6–7.

<sup>132</sup> See, e.g., David Dent, *Overview of Agrobiologicals and Alternatives to Synthetic Pesticides*, in PESTICIDE DETOX: TOWARDS A MORE SUSTAINABLE AGRICULTURE 70, 71 (Jules Pretty ed., 2005) (“Chemical pesticides have been popular because they have suited the needs of farmers, industry and policy-makers as an efficient means of pest control helping to maintain productivity of high-input intensive cropping systems. Their use became institutionalized and farmers themselves became increasingly dependent on this single strategy.”).

<sup>133</sup> HELMUT F. VAN EMDEN & DAVID B. PEAKALL, *BEYOND SILENT SPRING* 70 (1996).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 71. Economic thresholds are defined as “the density at which control measures should be determined to prevent an increasing pest population from reaching economic injury level.” *Id.*

<sup>136</sup> Pimentel et al., *supra* note 4, at 47 (“In the United States approximately 500,000 tons of 600 different types of pesticides are used annually at a cost of \$4.1 billion [including application costs].”).

<sup>137</sup> See 33 U.S.C. § 1319 (2006); 7 U.S.C. § 1361 (2006).

<sup>138</sup> 33 U.S.C. § 1319 (2006).

to civil and/or criminal fines if they violate FIFRA.<sup>139</sup> Unlawful acts under FIFRA include distributing or selling: unregistered, canceled, and suspended pesticides; registered pesticides whose composition is different than that disclosed during registration; and registered pesticides that are adulterated or misbranded.<sup>140</sup> It is also unlawful to “detach, alter, deface, or destroy” any FIFRA labeling and to fail to comply with recordkeeping, reporting and inspection requirements.<sup>141</sup> However, a double fine is not necessarily a bad thing. It may prove to be a greater and more effective deterrent to noncompliance.

Besides financial consequences, the second category of potential problems associated with the Sixth Circuit’s decision is that of implementation. First, the farm industry, which is huge and complex, will add a substantial amount of permit applications to the workload of the EPA and state agencies now that NPDES permits are required for most pesticide applications:

Farms are unlike most industries in their number (about 1.9 million to be more precise), their distribution throughout the nation, and their diversity. Given these characteristics, adopting the model of federally-designed, nationally-uniform, technology-based performance and emission standards would be difficult without vastly increased budgets for farm-by-farm permitting, monitoring, and enforcement. Regulating the farming industry is thus a daunting prospect. EPA has observed that “[l]arge a regulated community can make it impossible to implement and enforce requirements.”<sup>142</sup>

Some argue that this decision is especially problematic because “[g]overnmental pesticide offices are ill-equipped to handle a deluge of permit applications during these dire economic times and near-universal state governmental personnel and funding cutbacks.”<sup>143</sup> This argument was raised in a brief written by the Industry Intervenors in support of the Final Rule.<sup>144</sup> The Intervenors claimed, “EPA has struggled with a backlog in its NPDES permitting process such that many permits are delayed

<sup>139</sup> 7 U.S.C. § 136i (2006).

<sup>140</sup> 7 U.S.C. § 136j(a)(1) (2006).

<sup>141</sup> 7 U.S.C. § 136j(a)(2) (2006).

<sup>142</sup> Ruhl, *supra* note 1, at 329 (citation omitted).

<sup>143</sup> Stewart D. Fried & Gary H. Baise, *NCC v. EPA: NPDES permits likely needed for routine application of pesticides*, SOUTHWEST FARM PRESS, Apr. 2, 2009, <http://southwestfarmpress.com/management/ncc-v-epa-npdes-permits-likely-needed-routine-application-pesticides>.

<sup>144</sup> Brief of Intervenor-Respondents at 54, *Nat’l Cotton Council of Am. v. EPA*, 553 F.3d 927 (6th Cir. 2009) (Nos. 06-4630, 07-3180-3187, 07-3191, 07-3236), 2007 WL 5117922 (“EPA and the States are simply not equipped to handle the tremendous increase in permit applications that would occur if pesticide use were subjected to the individual permitting process.”)



due to a lack of manpower and or funding to review them. As of 2005, EPA determined that it had a backlog of 1,120 major permits and 9,386 individual minor permits.<sup>145</sup> The Intervenor implied that this backlog arose because “EPA’s procedural requirements for issuing individual NPDES permits specify a process of application, agency review, public participation, final decision, and appeal that typically takes months, at best, to complete.”<sup>146</sup> However, the EPA is not intending to issue individual permits but rather a general permit, which will be more efficient.<sup>147</sup> When the EPA or a state “identifies a category of discharges that share similar characteristics and similar discharge control methods,” general permitting is appropriate.<sup>148</sup> “[G]eneral permits establish broadly applicable permit conditions appropriate for an entire category of sources, so that eligible sources within the category may submit a ‘notice of intent’ . . . to quickly obtain coverage under the general permit, rather than applying for individual permit coverage.”<sup>149</sup> In fact, state permitting agencies have already devised NPDES permit systems utilizing general permits that satisfy the CWA and FIFRA.<sup>150</sup>

A second issue regarding implementation is that farmers and other pesticide users may likely still be confused as to when a NPDES permit is needed. This will require informing farmers of the new requirements and assisting them when necessary. The EPA already plans “to provide outreach and education to the regulated community.”<sup>151</sup> Although there may be some initial problems associated with the decision, these problems can be solved.

### *B. Positive Effects Outweigh the Negative*

The Sixth Circuit decision “represents a significant victory for environmental groups seeking tighter regulation of agricultural production in

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<sup>145</sup> *Id.* at 54–55.

<sup>146</sup> *Id.* at 53. The Brief describes in detail the permitting application process.

<sup>147</sup> U.S. E.P.A., *supra* note 97.

<sup>148</sup> *See* Brief of Intervenor-Respondents, *supra* note 144, at 57; 40 C.F.R. § 122.28(a)(2) (2009).

<sup>149</sup> Brief of Intervenor-Respondents, *supra* note 144, at 57. *See* 40 C.F.R. § 122.28(a), (b)(2) (2009).

<sup>150</sup> *See, e.g.*, Opening Brief of Environmental Petitioners at 58–60, Nat’l Cotton Council of Am. v. EPA, 553 F.3d 927 (6th Cir. 2009) (Nos. 06-4630), 2007 WL 5117920 (describing general permits issued by the State of California and the State of Washington covering aquatic pesticide discharges).

<sup>151</sup> U.S. E.P.A., *supra* note 97.

the United States.”<sup>152</sup> Waterkeeper Alliance Legal Director Scott Edwards said,

Time and again during these past eight years EPA has walked into federal courts and tried to defend absolutely indefensible rules like the one vacated today. And time and again they’ve been sent back to the drawing board to rewrite these unlawful rules. Hopefully, EPA’s days of pandering to industry and other polluters and wasting taxpayers’ dollars in illegal rulemaking are drawing to a welcome close.<sup>153</sup>

This outcome was essential for the protection of the environment and the public.

First, pesticides are too dangerous to be exempted from the CWA. More than 865 registered active ingredients make up thousands of pesticides, 350 of which are commonly used on our food and in our homes.<sup>154</sup> Pesticides enter our water supply from nonpoint source pollution of farms.<sup>155</sup> United States Geological Survey research has revealed that “‘pesticides are widespread. At least one pesticide was detected in more than 95 percent of stream samples’ and in over ‘60 percent of shallow wells sampled in agricultural areas.’”<sup>156</sup> Furthermore, “two-thirds of stream samples collected in agricultural areas contained 5 or more pesticides, and more than one-quarter of the samples contained 10 or more. Groundwater contained fewer pesticides; about 30 percent of the wells sampled contained 2 or more.”<sup>157</sup>

Pesticides cause acute and chronic health problems including: pesticide poisoning, cancer, neurological problems, developmental delays, reproductive disorders, and endocrine disruption.<sup>158</sup> Farmers should be particularly concerned about the harms of pesticides because “[t]he incidence of cancer among farmers is greater than the population as a whole.”<sup>159</sup> Additionally, children of farmers are exposed to vast levels of pesticides.<sup>160</sup> Farmers often seek help for acute poisonings, but they

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<sup>152</sup> Fried & Baise, *supra* note 143. William H. Rodgers, Jr. deems the case “an important win for [attorney] Charles Tebbutt.” 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 4.10, at 181 n.1 (Supp. Summer 2010).

<sup>153</sup> Press Release, *supra* note 17.

<sup>154</sup> DURAM, *supra* note 10, at 18.

<sup>155</sup> *See id.* at 25 (“Pollution is geographically widespread, as chemicals from any local farm flow into a nearby stream, which flows into a river, which flows into a reservoir, which provides drinking water for the region. and outlets into another river which, after thousands of miles, dumps into a bay and the ocean.”).

<sup>156</sup> *Id.* at 25–26.

<sup>157</sup> *Id.* at 26.

<sup>158</sup> *Id.* at 19.

<sup>159</sup> *Id.* at 20.

<sup>160</sup> *Id.* at 21.

should also be concerned about chronic problems because increased levels of banned pesticides are showing up in blood samples of farm families.<sup>161</sup> Based on research from the early nineties, and using the conservative estimate of two million dollars for one human life, human poisonings and related illnesses in the United States total about \$787 million each year.<sup>162</sup> That estimate is now dated. Pesticides also harm domestic animals,<sup>163</sup> honeybees and wild bees,<sup>164</sup> fish,<sup>165</sup> wild birds and mammals,<sup>166</sup> and microorganisms.<sup>167</sup> The Sixth Circuit's decision has opened up the possibility of a potential decrease in nonpoint source water pollution from farms and a cleaner water supply, which may alleviate some environmental, ethical, and health concerns. It may also lead farmers to less chemically-dependent means of eliminating pests.<sup>168</sup>

Second, FIFRA compliance should never be allowed to satisfy the requirements of the CWA because FIFRA fails to protect the environment and the public against the harms of pesticides. There are too many problems with FIFRA. Registration does not necessarily mean the pesticide is safe. For example, the EPA has discretionary authority under FIFRA to register products in certain situations even though certain data necessary to make a decision on registration have not been generated.<sup>169</sup> This so-called "conditional registration" can be used for pesticides with a composition and proposed use that is "identical or substantially similar to any currently registered pesticide," for additional uses of already registered pesticides, and for pesticides with new active ingredients.<sup>170</sup>

In addition, labeling is the only risk reduction measure on pesticide use.<sup>171</sup> FIFRA is different because a permit is not required.<sup>172</sup> Permits are usually site-specific with use-specific limits, conditions, or instructions

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<sup>161</sup> *Id.*

<sup>162</sup> Pimentel et al., *supra* note 4, at 50.

<sup>163</sup> *See id.* at 50–54 (discussing domestic animal poisoning and noting it is often undiagnosed and unreported).

<sup>164</sup> *See id.* at 58–60 (discussing the importance of bees and the reduced pollination that has occurred as a result of pesticides).

<sup>165</sup> *See id.* at 65–66 (discussing the effect of pesticides on fishery losses).

<sup>166</sup> *See id.* at 66–68 (discussing underestimates of losses due to difficulty in finding the animals and lack of reporting).

<sup>167</sup> *See id.* at 68–69 (discussing the effect pesticides have once they enter the soil).

<sup>168</sup> *See supra* nn.126–36 and accompanying text (discussing organic farming and IPM).

<sup>169</sup> *See* 7 U.S.C. § 136a (c)(7) (2006) (describing conditional registration).

<sup>170</sup> *Id.*

<sup>171</sup> *See* 40 C.F.R. § 156.10 (2009) (detailing labeling requirements).

<sup>172</sup> *See* *Headwaters Inc. v. Talent Irrigation*, 243 F.3d 526, 531 (9th Cir. 2001) ("FIFRA establishes a nationally uniform labeling system to regulate pesticide use, but does not establish a system for granting permits for individual applications of herbicides.").

as opposed to a national label as FIFRA utilizes.<sup>173</sup> Permitting lets the agency know that an individual is doing something so that the agency can enforce the permit and monitor the site, whereas under FIFRA no one knows who is spraying what pesticide, when, or where.<sup>174</sup> Instead, all registered pesticides must bear a label which should include an ingredient statement, hazard and precautionary statements, and directions for use.<sup>175</sup> “[S]o long as the label instructions are followed, the applicator is properly certified and the applicator follows worker safety and record-keeping requirements, FIFRA imposes no direct restrictions or requirements on farms.”<sup>176</sup> Even with efficient and complete labeling, compliance with the labeling is never guaranteed, especially if the label is not even read.

Finally, FIFRA allows no private right of action; thus, citizen suits are unavailable via FIFRA.<sup>177</sup> After the first citizen-suit provision in the Clean Air Act Amendments of 1970,

[e]ach of the subsequent major federal environmental regulatory statutes similarly included a citizen-enforcement provision, with the exception of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Thus, citizens now may enforce important parts of the federal environmental regulatory schemes governing air quality, water quality, solid and hazardous waste disposal, contaminated-site cleanup, drinking water, community right to know, toxics, and protection of endangered species.<sup>178</sup>

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<sup>173</sup> *See id.* (“FIFRA’s labels are the same nationwide, and so the statute does not and cannot consider local environmental conditions. By contrast, the NPDES program under the CWA does just that.”).

<sup>174</sup> *See id.* (“The application of [an herbicide] in [water] . . . even if done in compliance with the label, may have effects that depend on local environmental conditions and that will not be duplicated in other areas. The label’s general rules for applying the herbicide must be observed under FIFRA, but where the herbicide will enter waters of the United States, FIFRA provides no method for analyzing the local impact and regulating the discharge from a particular point source. The NPDES permit requirement under the CWA thus provides the local monitoring that FIFRA does not.”).

<sup>175</sup> 40 C.F.R. § 156.10(a) (2009).

<sup>176</sup> Ruhl, *supra* note 1, at 311.

<sup>177</sup> *See, e.g., Fiedler v. Clark*, 714 F.2d 77, 79 (9th Cir. 1983) (“The legislative history confirms that Congress did not intend to create a private right of action under FIFRA. Congress considered and explicitly rejected amendments that would have authorized citizen suits, including suits against the EPA Administrator for failure to perform nondiscretionary duties or for failure to investigate and prosecute violations.”).

<sup>178</sup> Karl S. Coplan, *Citizen Suits*, in ENVIRONMENTAL LITIGATION: LAW AND STRATEGY 321, 321 (Cary R. Perlman ed., 2009). *See generally* 42 U.S.C. § 7604 (2006) (providing for citizen suit under CAA); 33 U.S.C. § 1365(a) (2006) (providing same under CWA); 42 U.S.C. § 6972 (2006) (providing same under RCRA); 42 U.S.C. § 9659 (2006) (providing same under CERCLA); 42 U.S.C. § 300j-8 (2006) (providing same under Safe Drinking Water Act); 42 U.S.C. § 11046(a)(1) (2006) (providing same under Emergency

Citizen suits are powerful enforcement tools that protect private individuals.<sup>179</sup> Individual citizens can bring statutory violators to court to force compliance with regulatory standards.<sup>180</sup> This mechanism serves as a check on government enforcement agencies. In most cases, state agricultural commissioners are in charge of enforcement after the EPA delegates the task to the states through cooperative agreements.<sup>181</sup> Although the EPA maintains oversight duties, delegation “effectively results in growers or growers’ peers regulating growers’ use of pesticides.”<sup>182</sup> Regulation is minimal at best and “[i]t does not matter if the laws are on the books if no one is enforcing them.”<sup>183</sup> Without the availability of citizen suits, individuals cannot protect themselves against violations of FIFRA even if government agencies are not enforcing the provisions. If citizen suits were available, citizens would be able to seek injunctive relief or damages, as is generally the case in other citizen enforcement provisions.<sup>184</sup> Individuals need a means of protecting themselves from the harms of pesticides that are on the market because of FIFRA registration.

FIFRA itself fails to protect the public and the environment. “Regulation of pesticides [under FIFRA] does not strategically address the prevalence of agricultural pesticide use, nor does it minimize the use of pesticides.”<sup>185</sup> The Sixth Circuit’s decision requiring farmers to obtain NPDES permits to apply pesticides (in most situations) may actually lead to an increase in public confidence in agencies. There is a national trend toward a rise in environmental values among Americans.<sup>186</sup> This trend has been heavily influenced by the media’s coverage of pesticide harms and it has “heightened public awareness of ecological concerns.”<sup>187</sup> Accordingly, “[t]he major environmental and public health problems associated with pesticides are in large measure responsible for the loss of

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Planning & Community Right to Know Act); 15 U.S.C. § 2619 (2006) (providing same under TSCA); and 16 U.S.C. § 1540(g) (2006) (providing same under ESA).

<sup>179</sup> See Coplan, *supra* note 178, at 321 (“Citizen-enforcement powers were seen both as a means of full enforcement as well as a goal to effective governmental enforcement of the regulatory scheme.”).

<sup>180</sup> *Id.*

<sup>181</sup> Shannon Adair Tool, Comment, *Farmworkers and FIFRA: Laboring under the Cloud*, 31 Sw. U. L. REV. 93, 112 (2001).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 102.

<sup>184</sup> Coplan, *supra* note 178, at 345–46. Damages are not paid to the plaintiffs; they are paid to the U.S. Treasury. *Id.* at 346.

<sup>185</sup> Tool, *supra* note 181, at 101.

<sup>186</sup> Pimentel et al., *supra* note 4, at 71.

<sup>187</sup> *Id.*

public confidence in state and federal regulatory agencies as well as in institutions that conduct agricultural research.”<sup>188</sup> Therefore, if the EPA continues its plan to implement the Sixth Circuit’s decision and to require farmers to obtain permits, the agency will be taking a step to remedy its failures to protect the public against the harms of pesticides in the past. The public may perceive the EPA’s execution of the court’s decision as an acceptance of part of the blame for the pesticide pollution problem.

#### IV. CONCLUSION

While environmental laws have a reputation for carving out numerous exceptions for agriculture, this case will now require some farmers to get NPDES permits. This is a positive step toward remedying the failure of environmental laws to hold the agricultural industry accountable for its harms to the environment. “When combined, the active and passive safe harbors farms enjoy in most environmental laws amount to an ‘anti-law’ that finds no rational basis given the magnitude of harms farms cause.”<sup>189</sup> The Sixth Circuit has begun the process of reducing these safe harbors. “[Nonpoint source agricultural pollution] is beset by many of the features of the tragedy of the commons where temperance is not worth the effort for the individual and where the accumulation of individual choices is environmentally unacceptable.”<sup>190</sup> Farmers must now be held accountable for their individual choices to destroy the environment by using pesticides.

HEATHER MARIE MCCARTHY RADCLIFFE

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<sup>188</sup> *Id.*

<sup>189</sup> Ruhl, *supra* note 1, at 263.

<sup>190</sup> 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 4.9, at 142 (1986).