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Legislation Overlap: Should the Clean Water Act of the Federal Insecticide, Fungicide and Rodenticide Act Prevail When Pesticides End up in U.S. Waters

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LEGISLATION OVERLAP: SHOULD THE CLEAN WATER ACT OR THE FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT PREVAIL WHEN PESTICIDES END UP IN U.S. WATERS?

*Meghan Rhatigan**

INTRODUCTION

Legislation concerning environmental protection and regulation of activities that impact the environment has substantially increased since the 1960s.[1] These laws cover subjects ranging from the maintenance of domestic air quality[2] to the preservation of U.S. wildlife diversity.[3] Within this spectrum of protection, Congress passed substantive amendments to the Clean Water Act (CWA) and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Although the two statutes' principle objectives differ, potential overlap still exists. This overlap between the statutes has created some confusion as to which should prevail when there is a conflict. Such conflicts can arise when pesticides are applied to combat an insect or pest problem and the result of the application is incidental contamination of U.S. waterways.

This Note will explore the relationship of these two statutes and will argue that FIFRA should be the governing law in cases where pesticides are directed into U.S. waters as a subsidiary effect of a pest control program. The discussion will focus on a pivotal case, *League of*

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1 *See* Mitchell F. Crusto, *Green Business: Should We Revoke Corporate Charters for Environmental Violations*, 34 ENVTL. L. REP. 10162, 10181 (2004) (noting how a "flood of federal environmental legislation" followed the creation of the Environmental Protection Agency in 1970).

2 *See* Air Pollution Prevention and Control Act, 42 U.S.C. §§ 7401–7671 (2000).

3 *See* Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2000).

Wilderness Defenders v. Forsgren,[4] and guidance issued by the Environmental Protection Agency (EPA).[5] Both authorities deal with the overlap of these two statutes but reach contrary conclusions. Part I will examine the two relevant statutes in greater detail. Part II will examine the *Forsgren* case in detail, and Part III will look closely at the EPA guidance. Part IV will examine other court decisions and the works of an organization called the Aquatic Pesticide Coalition that have dealt with similar concerns. Finally, Part V will outline the argument that the EPA guidance should prevail over the decision in *Forsgren*.

I. THE CLEAN WATER ACT AND THE FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT

A. *The Clean Water Act*

The Water Pollution Prevention and Control Act, commonly known as the Clean Water Act (CWA), was originally enacted in 1948.[6] Since then, the Act has undergone some substantive amendments, including those passed in 1972,[7] but its goal has remained the same. Its stated objective was, and continues to be, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[8] The Act focuses, inter alia, on the discharge of pollutants into waters of the United States and identifies the elimination of pollution discharges into U.S. waters as a national goal, and the prohibition of "toxic pollutants in toxic amounts" as a national policy.[9] The CWA establishes national effluent standards[10] to regulate the discharge of all pollutants into the waters of the United States and it creates exceptions for individual discharges under certain circumstances.[11] The EPA or an authorized state agency regulates individual exceptions

4 309 F.3d 1181 (9th Cir. 2002).

5 Interim Statement and Guidance on Application of Pesticides to Waters of the United States in Compliance with FIFRA, 68 Fed. Reg. 48,385 (Aug. 13, 2003) [hereinafter EPA Interim Statement].

6 Act of June 30, 1948, ch. 758, 62 Stat. 1155 (codified as amended at 33 U.S.C. §§ 1251–1387 (2000)).

7 *See* No Spray Coalition Inc. v. City of New York, No. 00 CIV. 5395 (JSM), 2000 WL 1401458, at *2 (S.D.N.Y. Sept. 25, 2000) (noting that the 1972 amendments created "the broad regulatory framework that exists today").

8 33 U.S.C. § 1251(a) (2000); Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 531 (9th Cir. 2001); GEORGE C. COGGINS & ROBERT L. GLICKSMAN, 2 PUBLIC NATURAL RESOURCES LAW § 11A:2 (2003).

9 33 U.S.C. §1251(a).

10 *See id.* §§ 1312(a), 1374.

11 *See id.* §§ 1312(b)(2), 1344.

through the disbursement of National Pollutant Discharge Elimination System (NPDES) permits.[12] In granting these permits, the authorizing agency will consider local environmental conditions[13] and will grant the permit only if the discharge's prospective effect on the water quality in the area is not too extensive.

A comprehensive understanding of the CWA requires examination of several important definitional components. Under the Act, "waters" refers to all navigable waters of the United States.[14] The Act defines a "pollutant" as "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."[15] The CWA also distinguishes between "nonpoint" and "point" sources of pollution. Nonpoint sources of pollution arise from "many dispersed activities over large areas."[16] The pollution is "not traceable to any single discrete source" and is therefore "difficult to regulate through individual permits."[17] An example of pollution from a nonpoint source is the residue left by cars on roadways.[18] Alternatively, point source pollution is

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.[19]

Point source pollution is easier to regulate because its cause is often easier to identify. Identifying the cause makes it possible to punish the culprit and this deterrent effect ultimately serves the purpose of improving water quality. Because of the close relationship between a point source discharge and its cause, the CWA mandates that point source polluters obtain permits for such discharges.[20]

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12 *See id.* § 1344(e); *see also* League of Wilderness Defenders v. Forsgren, 309 F.3d 1181, 1184 (9th Cir. 2002) (discussing NPDES permitting and when such permits are required).

13 *See Headwaters*, 243 F.3d at 530.

14 *See* 33 U.S.C. § 1362(7).

15 *Id.* § 1362(6).

16 *See League of Wilderness Defenders*, 309 F.3d at 1184.

17 *Id.*

18 *See id.*

19 33 U.S.C. § 1362(14).

20 *See id.* § 1312(b)(2).

B. *The Federal Insecticide, Fungicide and Rodenticide Act*

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) was originally enacted in 1947[21] but underwent significant amendments in 1972, around the same time the Congress considered the CWA amendments.[22] The purpose of FIFRA was to protect both the environment and human health from potential harm caused by pesticides.[23]

Under FIFRA, the EPA is charged to consider the effects of pesticides on the environment by determining, among other things, whether a pesticide "will perform its intended function without unreasonable adverse effects on the environment," and whether "when used in accordance with widespread and commonly recognized practice [the pesticide] will not generally cause unreasonable adverse effects on the environment."[24]

To help achieve these objectives, the statute regulates the use and sales of pesticides.[25] Additionally, FIFRA has established a nationally uniform pesticide labeling system.[26] Under this system, a label indicates that the pesticide has received government approval for specified uses.[27]

C. *The Overlap of the CWA and FIFRA*

Given the scope of coverage of the CWA and FIFRA, there is potential for overlap between the statutes. A possible conflict arises when FIFRA-approved pesticides are applied in and around U.S. waters, thus potentially invoking the jurisdiction of the CWA. Should

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21 Federal Insecticide, Fungicide and Rodenticide Act, ch. 125, 61 Stat. 163 (1947) (codified as amended at 7 U.S.C. §§ 136–136y (2000)).

22 *See* No Spray Coalition, Inc. v. City of New York, No. 00 CIV. 5395 (JSM), 2000 WL 1401458, at *2 (S.D.N.Y. Sept. 25, 2000) (noting that substantive amendments to the CWA and FIFRA, which created the "broad regulatory framework that exists today," were enacted within three days of each other).

23 Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 531 (9th Cir. 2001).

24 EPA Interim Statement, *supra* note 5, 68 Fed. Reg. at 48,387 (citing 7 U.S.C. § 136a(c)(5) (2000)); *see also Headwaters, Inc.*, 243 F.3d at 530:

> The EPA then registers the herbicide if it determines that its composition is such as to warrant the proposed claims for it, that its labeling complies with FIFRA requirements, that it will perform its intended function without unreasonable adverse effects on the environment, and, when used in accordance with widespread practice, that it will not generally cause unreasonable adverse effects on the environment.

Id. (quoting Andrus v. AgrEvo USA Co., 178 F.3d 395, 398 (5th Cir. 1999)).

25 *See* 7 U.S.C. § 136a(a) (2000); *Headwaters*, 243 F.3d at 530.

26 *See* 7 U.S.C. § 136a(c)(9).

27 *See id.* § 136a(d).

such pesticides be considered "pollutants," making them fall within the ambit of the CWA, or should their FIFRA approval protect them from such a classification? This potential conflict raises the question of whether a pesticide that has been applied in compliance with FIFRA should be subject to regulation and the corresponding permit requirements under the CWA. The unresolved question has left many interested groups, from environmentalists to farmers, confused and uncertain about whether their actions violate federal law.

II. *League of Wilderness Defenders v. Forsgren*

A. *The Facts of the Case*

In *League of Wilderness Defenders v. Forsgren*,[28] the plaintiffs, interested environmental groups, filed suit against the U.S. Forest Service, claiming that the Forest Service's Douglas Fir Tussock Moth (DFTM) program violated the CWA.[29] More specifically, the plaintiffs claimed that the Forest Service failed to apply for a NPDES permit[30] and that the Environmental Impact Statement for the project was inadequate.[31]

The Forest Service's program was aimed at reducing the likelihood of a predicted outbreak of the Tussock Moth, a pest that wreaks havoc on trees.[32] In its larval stage, the moth eats the needles of live Douglas Fir and true fir trees, thereby inhibiting their viability.[33] The moth is a formidable threat to Douglas Fir trees, as was proved in the 1970s when the moth defoliated 700,000 acres of trees in Oregon, Washington, and Idaho.[34] During that outbreak, there was total mortality in about 17,270 acres and 75% mortality in around 62,070 acres.[35] After this severe devastation, the Forest Service developed an early warning system.[36]

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28 163 F. Supp. 2d 1222 (D. Or. 2001).

29 *See id.* at 1230–31.

30 *See* League of Wilderness Defenders v. Forsgren, 309 F.3d 1181, 1182 (9th Cir. 2002); *League of Wilderness Defenders*, 163 F. Supp. 2d at 1230; *see also supra* note 12 and accompanying text (discussing NPDES permitting requirements).

31 *See League of Wilderness Defenders*, 309 F.3d at 1182; *League of Wilderness Defenders*, 163 F. Supp. 2d at 1230. This second claim is not significant for the purposes of this Note and, thus, will not be further discussed.

32 *See League of Wilderness Defenders*, 163 F. Supp. 2d at 1230, 1231.

33 *Id.* at 1231.

34 *See id.*

35 *Id.*

36 *See id.*

Outbreaks of the Tussock Moth are cyclical, "with populations increasing to epidemic levels every 7 to 13 years."[37] The Forest Service can monitor trends in the population of moths, thereby predicting the next outbreak.[38] The outbreaks tend to last for two to four years, varying in severity.[39] The window for combating these creatures with pesticides is limited and spraying is only effective in the second year of the outbreak, between mid-June and mid-July.[40] Because of the early warning system and careful monitoring of the Tussock Moth population, the Forest Service predicted a substantial outbreak in 2000–2002, which could potentially last until 2004.[41] The Forest Service expected this outbreak to affect 4.2 million acres of forest land.[42]

There are at least two ways to control a DFTM outbreak.[43] One alternative is to use B.t.k., a bacterium occurring naturally in the soil that kills only moths and butterflies.[44] A second alternative is a chemical called TM-BioControl.[45] TM-BioControl is a "viral insecticide that contains only the natural DFTM virus and ground-up insect parts (infected caterpillars), [which are] mixed primarily with water, molasses, a sunscreen, and a sticker."[46] TM-BioControl kills only DFTM and two other species of moths.[47]

The Forest Service did not want to stop the defoliation entirely.[48] Defoliation by moths is a natural process that reduces overstock in the forest and creates stand openings.[49] But, the Forest Service did need to prevent "unacceptable harm to fish and wildlife habitat or to areas where people live and work."[50] After considering the pros and cons of the various alternatives, the Forest Service decided to use the TM-BioControl measure.[51]

The Forest Service thought that TM-BioControl would protect specific areas of concern from defoliation.[52] "Areas of concern" are

37 *Id.*
38 *See id.*
39 *See id.*
40 *See id.*
41 *See id.*
42 *See id.* at 1232.
43 *See id.* at 1231.
44 *Id.* at 1231–32.
45 *Id.*
46 *Id.* at 1232.
47 *Id.*
48 *See id.*
49 *Id.*
50 *Id.*
51 *See id.* at 1233.
52 *See id.*

locations "where DFTM defoliation would change or jeopardize vegetative conditions in threatened and endangered species habitat, health and safety areas, campgrounds, or scenic viewsheds, or where the [Forest Service] had made a substantial investment such as a seed orchard."[53] Along with choosing this alternative, the Forest Service identified ways to mitigate the program's impact on the areas affected.[54]

Local environmental groups resisted the proposed actions of the Forest Service.[55] The groups were afraid that the program would result in drift outside of the targeted area and might impact other species in the area, such as butterflies and salmon.[56] The environmentalists' administrative appeals imposed an automatic stay of implementation, but in November 1999, the Forest Service asked for emergency exemption from the stay.[57] The Deputy Chief of the Forest Service granted the exemption, and the Forest Service sprayed 39,392 acres in June and July 2000.[58] Still unsatisfied, environmental groups presented their claim to the District Court of Oregon.[59]

B. The District Court's Decision

After hearing the facts of the case, the district court found no merit in the environmental groups' claims and awarded summary judgment to the Forest Service.[60] The court reasoned that the agency had discretion to rely on studies of its choice.[61] The holding recognized that the "[p]laintiffs do not dispute that federal and state regulatory agencies have historically not applied the CWA's permit requirements to the release of pesticides into U.S. waters via atmos-

53 *Id.*

54 *See id.* (referring to specific limitations on TM-BioControl's area of application, the creation of buffer zones, and the implementation of monitoring programs).

55 *See id.* at 1230. The environmental groups alleged, inter alia, that the proposed action constituted a discharge of "pollutants into the waters of the United States without a permit" and thus violated the CWA. *Id.*

56 *See* League of Wilderness Defenders v. Forsgren, 309 F.3d 1181, 1183 (9th Cir. 2002).

57 *See League of Wilderness Defenders*, 163 F. Supp. 2d at 1234. The Forest Service feared that delay from the administrative appeals would cause the agency to miss the limited window of time during which a spraying program is an effective means to avoid a Tussock Moth outbreak, so the agency sought the emergency exemption. *See id.* at 1231, 1234, 1241–42.

58 *Id.* at 1234.

59 *See id.* at 1230.

60 *See id.* at 1243, 1268 (holding that the plaintiffs had failed to state a claim under the CWA).

61 *See id.* at 1236.

pheric spraying."[62] The plaintiffs argued that the plain language of the CWA's definition of "point source" demonstrated that the defendant's unpermitted discharge of TM-BioControl violated the CWA, but the court found this argument unpersuasive.[63] The defendants argued that the water was never the target of the spraying,[64] not all sources of water pollution are point sources subject to NPDES requirements, and that their activities fell under the silvicultural exemption of the CWA, and thus did not require a NPDES permit.[65] This silvicultural exemption excludes certain activities from NPDES permitting requirements.[66] The Forest Service argued that the exemption defined silvicultural pest activities as nonpoint sources of pollution and excluded them from NPDES permit requirements.[67] The court found the defendants' argument more convincing and concluded that the activities undertaken by the Forest Service did in fact fall under the silvicultural exemption because such activities could be classified within the category of fire and pest control. The court accordingly granted the defendants' motion for summary judgment on the CWA violation claim.[68]

C. *The Ninth Circuit Court's Decision*

The environmental groups appealed the district court's decision and the claim reached the Ninth Circuit Court of Appeals' docket.[69] On appeal, the court overturned the lower court's decision and held that the Forest Service's activities amounted to point source pollution

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62 *Id.* at 1241.

63 *See id.* at 1241–43.

64 *Id.* at 1242.

65 *See id.*

66 *See* League of Wilderness Defenders v. Forsgren, 309 F.3d 1181, 1185 (9th Cir. 2002):

> *Silvicultural point source* means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities, which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff.

Id. (quoting 40 C.F.R. § 122.27 (2003)).

67 *See League of Wilderness Defenders*, 163 F. Supp. 2d at 1242, 1243.

68 *See id.* at 1243.

69 *League of Wilderness Defenders*, 309 F.3d at 1181.

and thus required an NPDES permit.[70] Without such a permit, the Forest Service was acting in violation of the CWA. The court reasoned that the pesticides applied to combat the DFTM were pollutants, a fact that was undisputed by the parties to this case,[71] and such pollutants were directly sprayed into the water.[72]

The appellate court did not find the Forest Service's exemption argument persuasive and could not agree with the defendants that the aerial spraying of the pesticides should be excluded from NPDES permitting requirements.[73] The court noted that the Forest Service relied on an EPA regulation, two informal letters, and a guidance document in making its exemption argument, all of which the court deemed insufficient to warrant an exclusion.[74] The court further held that the silvicultural exemption, which included fire and pest control activities, applied only to the natural run-off that resulted from the activities listed.[75] The appeals court reasoned that the exemption relied on the basic distinction between point and nonpoint sources of pollution. In keeping with another court's decision,[76] the Ninth Circuit concluded that pollutants discharged from a plane were point source discharges, rendering inapplicable the silvicultural activity exemption.[77] Thus, the appeals court held that the application of pesticides from a plane without a NPDES permit, that resulted in incidental water contamination, amounted to a CWA violation.[78]

III. Guidance Issued by the EPA to Address the Apparent Conflict Between the CWA and FIFRA

In a 2003 memorandum, the EPA issued an Interim Statement that delineated the agency's viewpoint as to the CWA's applicability when FIFRA-approved pesticides are applied to U.S. waters.[79] In issuing this guidance, the EPA declared that such pesticides are not pollu-

70 *See id.* at 1183, 1192–93.

71 *See id.* at 1184 n.2 (citing to the definition of "pollutant" under 33 U.S.C. § 1362(6) (1972)).

72 *Id.* at 1185.

73 *See id.*

74 *See id.*

75 *Id.* at 1186.

76 *See id.* at 1185 n.4 (citing Romero-Barcelo v. Brown, 478 F. Supp. 646, 664 (D.P.R. 1979), in which the court held that the "'release or firing of ordnance from aircraft into the navigable waters of [Puerto Rico]' was a point source discharge requiring an NPDES permit").

77 *See id.* at 1185.

78 *See id.* at 1190.

79 *See* EPA Interim Statement, *supra* note 5, 68 Fed. Reg. at 48,385.

tants and, by doing so, took a position directly contrary to that chosen by the Ninth Circuit in *Forsgren.*

The EPA issued the guidance

> in response to a statement by the U.S. Court of Appeals for the Second Circuit in *Altman v. Town of Amherst*[80] that highlighted the need for EPA to articulate a clear interpretation of whether [NPDES] permits under . . . the CWA are required for applications of pesticides that comply with relevant requirements of FIFRA.[81]

Although the guidance did not describe the agency's final position on the matter, the statement declared that pesticides applied in compliance with FIFRA requirements are not subject to NDPES permitting.[82]

The EPA reasoned that there are two situations under which application of pesticides to U.S. waters does not constitute discharge of a pollutant: (1) application of pesticides "directly to waters of the United States" to control pests, such as the larvae of mosquitoes or aquatic weeds, and (2) application of pesticides to control pests that are "present over waters of the United States that results in a portion of the pesticide being deposited to waters of the United States."[83] To illustrate this second situation, the EPA used the example of pesticides being aerially applied to forest canopy, an example remarkably similar to the facts of *Forsgren.*[84] Use of this example further shows the direct contradiction between the EPA's position and that of the Ninth Circuit. The EPA acknowledged that "[m]any of the pesticide applications covered by this memorandum are applied either to address public health concerns such as controlling mosquitos or to address natural resource needs such as controlling non-native species or plant matter growth that upsets a sustainable ecosystem."[85]

In the Interim Statement, the EPA considered previous court decisions, including the decision in *Headwaters, Inc v. Talent Irrigation District.*[86] In that case, the Ninth Circuit held that herbicide users were required to obtain a NPDES permit.[87] The EPA had filed an amicus brief in that case which noted that "compliance with FIFRA

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80 *See* discussion *infra* notes 131–43 and accompanying text.

81 *See* EPA Interim Statement, *supra* note 5, 68 Fed. Reg. at 48,387.

82 *See id.* It is worth noting that the EPA did acknowledge that states and Indian tribes may impose additional regulation of pesticides to address water quality issues. *See id.*

83 *Id.* at 48,385.

84 *See id.*

85 *Id.* at 48,387.

86 243 F.3d 526 (9th Cir. 2001); *see* discussion *infra* notes 112–30 and accompanying text.

87 EPA Interim Statement, *supra* note 5, 68 Fed. Reg. at 48,387.

did not necessarily mean compliance with the [CWA]."[88] Although this brief probably played a role in the court's decision, such reliance may have been misplaced because the brief "did not address the question of how pesticide application is regulated under the [CWA] or the circumstances in which pesticides are 'pollutants' under the CWA."[89] In its interim statement, the EPA recognized that the *Headwaters* decision led to confusion among public health authorities, natural resource managers, and others who rely on pesticides.[90] Many of those who deal with pesticides on a day-to-day basis were concerned because they could not tell if they had a legal obligation to get a NPDES permit when applying pesticides approved under FIFRA.[91]

This uncertainty caused the Second Circuit to remand the *Altman* case for further consideration and gave the EPA incentive to issue this guidance.[92] In concluding that the CWA does not require NPDES permits for a pesticide applied according to relevant FIFRA requirements, the EPA explained that this interpretation is consistent with the circumstances before the Ninth Circuit in *Headwaters* and with the amicus brief filed by the federal government in the *Altman* case.[93]

The EPA conducted a step-by-step analysis to explain how it reached its conclusion:

> Under FIFRA, [the] EPA is charged to consider the effects of pesticides on the environment by determining, among other things, whether a pesticide "will perform its intended function without unreasonable adverse effects on the environment," and whether "when used in accordance with widespread and commonly recognized practice [the pesticide] will not generally cause unreasonable adverse effects on the environment."[94]

The EPA guidance dictates that "[t]he application of a pesticide to waters of the U.S. would require an NPDES permit only if it constitutes the 'discharge of a pollutant' within the meaning of the Clean Water Act."[95] The EPA concluded that pesticides applied consistently with FIFRA do not fall within any of the terms of section 1362(6) of the CWA, which defines the term "pollutant."[96] The EPA paid special

88 *Id.* at 48,387 n.1.

89 *Id.*

90 *Id.* at 48,387.

91 *Id.*

92 *See* Altman v. Town of Amherst, 47 Fed. Appx. 62, 67 (2d Cir. 2002); EPA Interim Statement, *supra* note 5, 68 Fed. Reg. at 48,387.

93 EPA Interim Statement, *supra* note 5, 68 Fed. Reg. at 48,387.

94 *Id.* (quoting 7 U.S.C. § 136a(c)(5) (2000)).

95 *Id.*

96 *See id.*

attention to whether such pesticides could be characterized as "chemical wastes" or "biological materials" but determined that such classifications were not applicable.[97] The agency reasoned that pesticides are not waste and therefore cannot be considered "chemical wastes."[98] The EPA looked to definitions of "waste" but found that waste was an inapposite term.[99] "Waste" connotes material that has no use.[100] Pesticides, however, are useful.[101] "[T]hey are EPA-evaluated products designed, purchased and applied to perform their intended purpose of controlling target organisms in the environment."[102] Such pesticides could be considered waste if they were found in storm water and were no longer performing a useful function.[103]

The EPA conducted a similar analysis to determine whether pesticides could be characterized as "biological materials."[104] Again, the EPA concluded that such a classification was not deserved.[105] The agency reasoned that Congress did not intend to include all things with biological components in this category.[106] If the legislators had intended such a result, then even activities such as fishing with bait would require a permit.[107] The EPA further reasoned that it would be absurd to treat biological pesticides as pollutants when chemical pesticides are not so treated. Disparate treatment of chemical and biological pesticides is not warranted because biological pesticides would tend to have fewer adverse effects on the environment than chemical pesticides.[108] Additionally, case law suggests that Congress intended for this category to include only waste material of human or industrial processes.[109]

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97 *See id.* at 48,387–88.

98 *See id.* at 48,388.

99 *See id.*

100 *See id.*

101 *See id.*

102 *Id.*

103 *See id.* at 48,388 n.4.

104 *Id.* at 48,388.

105 *See id.*

106 *See id.*

107 *See id.* at 48,388 n.5.

108 *See id.* at 48,388.

109 *See id.* (citing Ass'n to Protect Hammersley, Eld & Totten Inlets v. Taylor Res., 299 F.3d 1007, 1016 (9th Cir. 2002)). *Association to Protect Hammersley* held that "biological materials" were limited to waste from human processes, and as such, the mussel shells and feces did not fall within this category of pollutant because those materials resulted purely from the biological processes of the mussels. *Hammersley*, 299 F.3d at 1016; *see* COGGINS & GLICKSMAN, *supra* note 8.

"Under EPA's interpretation, whether a pesticide is a pollutant under the CWA turns on the manner in which it [is] used, *i.e.*, whether its use complies with all relevant requirements of FIFRA."[110] This interpretation seeks to harmonize the CWA and FIFRA, and allows individuals who deal with pesticides to do so with certainty, knowing that if they act in compliance with FIFRA, they will not have to deal with permitting requirements under the CWA.[111]

IV. Lower Courts Left with Little Guidance—Confusion and Unrest Ensues

Forsgren is not the only case dealing with the overlap of FIFRA and the CWA. In hearing other cases, the Ninth Circuit and other courts have had the opportunity to wrestle with the complicated issues presented by the overlap of these two statutes. The results have varied, and the courts do not seem to agree on the proper way to handle such concerns.

A. Headwaters, Inc. v. Talent Irrigation District

Headwaters, Inc. v. Talent Irrigation District is another Ninth Circuit case.[112] In that case, environmental groups brought a suit against the irrigation district claiming that the irrigation district violated the CWA by failing to obtain a NPDES permit to apply herbicide to irrigation canals.[113] The irrigation district applied the herbicide, MAGNACIDE H, to canals to control the growth of weeds and vegetation.[114] MAGNACIDE H is an approved herbicide under FIFRA, yet it needs to be used carefully because it is toxic to fish.[115] As such, its appropriate uses have been designated.[116] The district court found in favor of

110 EPA Interim Statement, *supra* note 5, 68 Fed. Reg. at 48,388.

111 *See id.*

112 243 F.3d 526 (9th Cir. 2001).

113 *Id.* at 528.

114 *Id.*

115 *See id.* MAGNACIDE H is registered under FIFRA and bears an EPA-approved label. This label warns about the potential lethal effects of the chemical but does not state that a NPDES permit is required for its use. *See id.* at 529; Kathy S. Hamel, *The Impact of the Talent Irrigation District Court Decision on Aquatic Pesticide Regulation in Washington State*, Aquaphyte Online, Winter 2001, *at* http://aquat1.ifas.ufl.edu/aq-w01-5.html.

116 *See* Baker Petrolite Corp., MAGNACIDE H Herbicide Application and Safety Manual app. D, at 25 (2001), *available at* http://www.epa.gov/oppfead1/endanger/effects/magnacide-safety-manual.pdf (showing the MAGNACIDE H government-approved label).

the defendants, holding that the herbicide's FIFRA approval obviated the need to obtain a permit.[117]

Recognizing the overlap of FIFRA and the CWA in this case, the appeals court sought to determine whether the FIFRA label should control whether a permit is required under the CWA.[118] The Ninth Circuit sought "'to give effect to each [statute] if [it could] do so while preserving their sense and purpose. When two statutes are capable of coexistence, it is the duty of the courts . . . to regard each as effective.'"[119] The court considered the purposes and goals of the two statutes[120] and heavily relied on an amicus brief filed by the EPA in the case.[121] The Ninth Circuit recognized that the opinion of the agency is entitled to some deference.[122] The court emphasized the fact that the CWA did consider local environmental conditions while FIFRA did not.[123] The Ninth Circuit held that the "herbicide's compliance with [FIFRA] registration and labeling requirements did not absolve the district from its obligation to obtain [a] NPDES per-

117 *Headwaters*, 243 F.3d at 529.

118 *Id.* at 528.

119 *Id.* at 530–31 (quoting Res. Inv., Inc. v. U.S. Army Corps of Eng'rs, 151 F.3d 1162, 1165 (9th Cir. 1998)).

120 *See id.* at 529; *id.* at 532 ("'FIFRA registration is a cost-benefit analysis that no unreasonable risk exists to man or the environment taking into account the economic, social and environmental costs and benefits of the use of any pesticide.'") (quoting Save Our Ecosystems v. Clark, 747 F.2d 1240, 1248 (9th Cir. 1984)); *id.* ("In contrast, the granting of a NPDES permit under the CWA is not based on cost-benefit analysis, but rather on determination that discharge of pollutant satisfies the EPA's effluent limitations, imposed to protect water quality.") (citing 33 U.S.C. § 1342(a) (2000)); *supra* note 88 and accompanying text.

121 *See Headwaters*, 243 F.3d at 531:

> In approving the registration of th[e] pesticide, EPA concluded that the overall economic benefits of allowing the use of the product outweigh adverse environmental effects. EPA did not analyze, was not required to analyze, and could not feasibly have analyzed, whether, or under what conditions, the product could be discharged from a point source into particular public water bodies in compliance with the CWA. In approving the registration of [MAGNACIDE] H, EPA did not warrant that a user's compliance with the pesticide label instructions would satisfy all other federal environmental laws. Indeed, EPA approves pesticides under FIFRA with the knowledge that pesticides containing pollutants may be discharged from point sources into navigable waters only pursuant to a properly issued CWA permit.

Id. (quoting Amicus Curiae Brief of the United States at 12, Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001) (No. 99-35373)).

122 *Id.* at 531.

123 *See id.* at 530.

mit."[124] The court reasoned that even if MAGNACIDE H is used in compliance with the FIFRA label, it "may have effects that depend on local environmental conditions."[125] Based on this reasoning, the court decided that "FIFRA does not preempt [the] entire field of pesticide regulation, but instead leaves room for local ordinances requiring [a] permit before pesticide use."[126]

The defendants in the *Headwaters* case also argued that MAGNACIDE H was not a chemical waste and therefore not within the definition of "pollutant"[127] under the CWA.[128] They maintained that MAGNACIDE H was a chemical, but not waste.[129] The Ninth Circuit implied that the position of the district court was ridiculous but refused to decide the issue, finding that, at the very least, the residue left after the application of the chemical qualified as chemical waste.[130] Thus, the residue could be considered a pollutant.

B. Altman v. Town of Amherst

The Second Circuit has also had the opportunity to hear a case dealing with the overlap of FIFRA and the CWA. In *Altman v. Town of Amherst,*[131] the town residents claimed that the town violated the CWA by spraying for mosquitoes in wetland areas without a NPDES permit.[132] The defendants argued that the pesticides were being used for a beneficial and useful purpose and, therefore, should not be considered pollutants.[133] The plaintiffs challenged that contention with the support of several cases.[134] The district court concluded that "'pesti-

124 *Id.* at 527. The position taken by the court is not unsupported. *See id.* at 532 ("[A] label's failure to include the possible need for a NPDES permit 'does not relieve a producer or user of such products from the requirements of the Clean Water Act.'") (quoting U.S. Envtl. Prot. Agency, Pesticide Regulation Notice 95-1 (May 1, 1995)).

125 *Id.* at 531.

126 *Id.* (citing Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 614 (1991)).

127 *See supra* note 15 and accompanying text.

128 *See Headwaters,* 243 F.3d at 532.

129 *See id.*

130 *Id.* at 532–33 (citing Hudson River Fishermen's Ass'n v. City of New York, 751 F. Supp. 1088, 1101–02 (S.D.N.Y. 1990), *aff'd,* 940 F.2d 649 (2d Cir. 1991)).

131 47 Fed. Appx. 62 (2d Cir. 2002).

132 *Id.* at 63; Altman v. Town of Amherst, 190 F. Supp. 2d 467, 467 (W.D.N.Y. 2001).

133 *See Altman,* 47 Fed. Appx. at 64; *Altman,* 190 F. Supp. 2d at 468.

134 *See Altman,* 47 Fed. Appx. at 64–65 (citing *Headwaters,* 243 F.3d at 526; United States v. Schallom, 998 F.2d 196 (4th Cir. 1993); Hudson River Fishermen's Ass'n v. City of New York, 751 F. Supp. 1088 (S.D.N.Y. 1990), *aff'd,* 940 F.2d 649 (2d Cir. 1991)).

cides, when used for their intended purpose, do not constitute a 'pollutant' for purposes of the . . . [CWA,] and are more appropriately regulated under [FIFRA].'"[135] In *Altman*, the EPA submitted a letter for the town admitting that the agency had no specific policy on the pesticide question, and noted that the EPA had never issued a NPDES permit for such activities in the past, nor had it sought to compel states to do so.[136] The district court concluded that the defendants' pesticide program is more appropriately regulated under FIFRA, noting that court research "'has uncovered no reported cases in which the use of pesticides, in the manner for which they were intended, were found to be 'pollutants' requiring a NPDES . . . permit under the Clean Water Act.'"[137]

On appeal, the plaintiffs maintained that FIFRA does not preempt or foreclose the permit requirements of the CWA and claimed that the defendants' deliberate, good faith application of pesticides for their intended use does not render them something other than a "pollutant" within the meaning of the CWA.[138] The Second Circuit held that the district court had acted on an incomplete record,[139] and had unnecessarily curtailed the plaintiffs' discovery.[140] As such, the court of appeals remanded the case so that adequate discovery could take place.[141] The Second Circuit also noted 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.[142]

The court made an express plea to the EPA and said that "articulation of the EPA's interpretation of the law in this situation would be of great assistance to the courts."[143]

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135 *Altman*, 47 Fed. Appx. at 63 (quoting *Altman*, 190 F. Supp. 2d at 471); *see also Altman*, 190 F. Supp. 2d at 470 (asserting that "spray drift from a pesticide used for its intended purpose is [not] a chemical waste within the meaning of the Clean Water Act").

136 *See Altman*, 47 Fed. Appx. at 64–65; *Altman*, 190 F. Supp. 2d at 468–69.

137 *Altman*, 190 F. Supp. 2d at 470.

138 *Altman*, 47 Fed. Appx. at 66.

139 *Id.*

140 *Id.*

141 *See id.*

142 *Id.* at 67.

143 *Id.* The EPA responded to this plea with the guidance they issued. *See supra* notes 79–81 and accompanying text.

C. No Spray Coalition, Inc. v. City of New York

There have been a series of cases brought by environmental groups challenging the City of New York's use of pesticides to combat the mosquito population. Such groups have claimed CWA violations on the theory that the spray finds its way into the waters around the city.

1. *No Spray Coalition, Inc. v. City of New York*—Round One

The first of these cases was *No Spray Coalition, Inc. v. City of New York*.[144] Like many other cities across the country, New York attempted to reduce the mosquito population in response to the concern over the West Nile Virus.[145] Although the city contended that the spraying program was in the best interests of preserving the public health, the plaintiffs argued that it posed "a substantial danger to human health and to the environment."[146] The district court held that the most applicable statute to the case was FIFRA.[147]

The court determined that under FIFRA a pesticide can only be registered if it will perform its intended function without unreasonable adverse effects on the environment and, when used in accordance with widespread and commonly recognized practice, it will not generally cause unreasonable adverse effects on the environment.[148] In this case, the products used by the city were approved by the EPA for aerial and ground spraying.[149] The court concluded that the plaintiffs' attempts to use alleged violations of FIFRA—a statute which does not have a provision for civil redress[150]—as violations of the CWA—a statute that does allow private citizens to allege violations[151]—"stretche[d] the language of the [CWA] beyond its reasonable meaning and result[ed] in a conflict with the apparent purpose of Congress to leave the regulation of the use of pesticides to the EPA and the Attorney General under FIFRA."[152] The court noted that drift "is the natural consequence of the use of pesticides for the very purpose for

144 No. 00 CIV. 5395 (JSM), 2000 WL 1401458 (S.D.N.Y. Sept. 25, 2000).

145 *See id.* at *1.

146 *Id.*

147 *Id.*

148 *See id.*

149 *Id.*

150 *See id.* at *2–3.

151 *Id.* at *2.

152 *Id.* (paraphrasing the holding of the Tenth Circuit's decision in *Chemical Weapons Working Group, Inc. v. Department of the Army*, 111 F.3d 1485 (10th Cir. 1997), in declining to construe provisions of the CWA in the broad manner proposed by the plaintiffs while noting that the plaintiff's interpretation of the CWA was inconsistent

which they were approved by the EPA"[153] and, because of the broad meaning of "waters" under the CWA, "any approved use of the pesticide, other than in a desert, [would] inevitably result in a drift of the spray into navigable waters."[154]

The district court gave credence to the fact that amdendments to FIFRA and the CWA were enacted within three days of one another in 1972.[155]

> The fact that these two regulatory schemes were before Congress at the same time establishes beyond doubt that when Congress made a deliberate decision not to provide a private right of action under FIFRA, it did not intend to permit private parties to circumvent that decision through an action under the Clean Water Act.[156]

The court reasoned that Congress dictated the appropriate remedies in the statutes and the court should be wary of reading additional remedies into them.[157] The court noted that use of a pesticide beyond its well intended use may result in a CWA violation, but here, the pesticide use was within the category of approved uses.[158] As such, the court concluded that "Congress intended to leave it to the EPA and the Attorney General to determine whether there has been compliance with the technical requirements of the label."[159]

The district court found for the City of New York.[160] The court held that the cases the plaintiffs relied upon were insufficient because they all involved direct discharges into navigable waters.[161] The program contested in this case purposefully attempted to avoid spraying

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with congressional intent, would lead to irrational results, and would create a conflict between the CWA and FIFRA).

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 *See id.* at *3 (citing Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981)).

158 *See id.* The court noted that violations would be possible if the pesticides were used beyond their intended uses. For instance, if a pilot of a plane that had been spraying insecticides dumped what remained in the tank into a nearby river, his actions could be a violation. *See id.*

159 *Id.*

160 *See id.* at *4.

161 *See id.* at *3. The court noted further that the trucks in this case were discharging the spray into the air and not into the water. *Id.* The court reasoned that Congress could not have meant to cover this incidental drift. *Id.* "The fact that a pollutant might ultimately end up in navigable waters as it courses through the environment does not make its use a violation of the [CWA]." *Id.* If that were the case, then "every emission of smoke, exhaust fumes, or pesticides in New York City" would come under the purview of the CWA. *Id.*

into the water. The court said it would leave the question of direct spray to another day, as well as the question of whether pesticides used in an approved way can constitute waste.[162]

2. *No Spray Coalition, Inc. v. City of New York*—Round Two

The plaintiffs of the first case appealed the district court's decision to the Second Circuit.[163] In this appeal, the plaintiffs claimed, inter alia, that the spraying of pesticides at issue constituted a "'disposal' of 'solid waste' in a manner that rendered it 'discarded material' causing 'imminent and substantial endangerment' to people."[164] The court held that the district court had not abused its discretion and found that material "is not discarded until after it has served its intended purpose."[165] The Second Circuit also concluded that the plaintiffs were trying to stretch statutory language that did permit private rights of action[166] to cover conduct that is more aptly covered by FIFRA.[167]

3. *No Spray Coalition, Inc. v. City of New York*—Round Three

No Spray Coalition initiated another suit against the City of New York in 2002.[168] Once again, the environmental group sought to enjoin the city's mosquito spraying program designed to combat the West Nile Virus.[169] The court in the first *No Spray Coalition* case[170] said it left the question whether direct spray into the water could amount to a CWA violation to another day.[171] In this case, the court was forced to address that very issue. The insecticides being used in this *No Spray Coalition* case had labels that said they were to be used in

162 *Id.* at *4.

163 No Spray Coalition, Inc. v. City of New York, 252 F.3d 148 (2d Cir. 2001).

164 *Id.* at 149.

165 *Id.* at 150 (citing Connecticut Coastal Fisherman's Ass'n v. Remington Arms Co., 989 F.2d 1305, 1316 (2d Cir. 1993); *see also Fed Court Denies Injunction in N.Y. Insecticide Case*, 18 No. 12 Andrews Toxic Chem. Litig. Rep. 9 (2000) (discussing the holding in *No Spray Coalition*).

166 *See No Spray Coalition*, 252 F.3d at 150. In this *No Spray Coalition*, the environmental group brought an action under the Resource Conservation Recovery Act (RCWA). *Id.* at 149. The RCWA also has a citizen suit provision, like the CWA. *See* 42 U.S.C. §§ 6872(a)(1)(A)–(B) (2000).

167 *No Spray Coalition*, 252 F.3d at 149.

168 No Spray Coalition, Inc. v. City of New York, No. 00 CIV. 5395 (JSM), 2002 WL 31682387 (S.D.N.Y. Nov. 26, 2002).

169 *Id.* at *1.

170 *See* No Spray Coalition, Inc. v. City of New York, No. 00 CIV. 5395 (JSM), 2000 WL 1401458 (S.D.N.Y. Sept. 25, 2000); discussion *supra* notes 144–62.

171 *See No Spray Coalition*, 2000 WL 1401458 at *4.

"residential and recreational areas where adult mosquitoes are present . . . surrounding parks, woodlands, swamps, [and] marshes."[172] Because the labels said these insecticides were approved for swamps and marshes, the court concluded that the EPA clearly anticipated their use over protected waters.[173] The court held that a minor amount of "spraying of insecticides directly over the rivers, bays, sound, and ocean surrounding New York City as part of the prevention program" did not violate the CWA.[174]

4. *No Spray Coalition, Inc. v. City of New York*—Round Four

Unsatisfied with the results from the district court, No Spray Coalition subsequently appealed to the Second Circuit.[175] In reviewing the record before it, the Second Circuit concluded that a citizen suit brought under the CWA and based on the application of a FIFRA-regulated chemical could proceed even if the pesticide application at issue was performed in compliance with FIFRA.[176] The court disagreed with the interpretation by the district court and insisted that Congress intended the CWA's citizen suit provision to operate independently of FIFRA and that it should not be necessary for an alleged violation of the CWA to also constitute a FIFRA violation.[177] In commenting on the district court's attempt to address the question of whether FIFRA-approved pesticides could violate the CWA, the Second Circuit concluded that the lower court had failed to answer this question.[178] As such, the Second Circuit vacated and remanded the case back to the district court.[179]

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172 No Spray Coalition, Inc. v. City of New York, No. 00 CIV. 5395 (JSM), 2002 WL 31682387, at *1 (S.D.N.Y. Nov. 26, 2002).

173 *Id.* at *2.

174 *Id.* at *1.

175 No Spray Coalition, Inc. v. City of New York, 351 F.3d 602 (2d Cir. 2003).

176 *See id.* at 603.

177 *See id.* at 605. The Second Circuit disagreed with the district court's view that the CWA's citizen suit provision "becomes inoperative where the alleged violation of CWA lies in the use of pesticides covered by FIFRA in a manner that is not a substantial violation of FIFRA." *Id.* at 606.

178 *See id.* at 606.

179 *Id.*

D. *The Development of the Aquatic Pesticide Coalition*

Further evidence of the uncertainty felt surrounding the *Forsgren* decision is the creation of the Aquatic Pesticide Coalition (APC).[180] The APC was formed by a group of concerned pesticide users, a group that included agricultural producers, irrigation district managers, aquatic pesticide manufacturers, mosquito control interests, and companies in the lake management industry.[181] Its members claim that the group was formed in response to the *Forsgren* decision, which, according to the APC, paralyzed necessary plant management operations in the western United States.[182] The APC argues the impact of requiring NPDES permits might actually have the "perverse effect of impairing water quality through the negative consequences of aquatic invasive plant infestations."[183] Because of the *Forsgren* decision, some groups have stopped treatments that they used to engage in, resulting in some significant costs. For instance, because it was uncertain whether an NPDES permit would be required,[184] the town of Stow, Massachusetts decided to halt major aquatic plant control treatment in its Lake Boon, making the lake less suitable for swimming and other recreational activities. Additionally, oyster growers in Washington chose not to treat their beds as they normally would after they were threatened with a third-party lawsuit because they did not have a NPDES permit.[185] As a result of the lack of treatment, the oyster growers lost some of their beds.[186] Such costs would not have to be incurred if pesticide and herbicide users knew, with certainty, that NPDES permits were not required.

V. THE EPA REACHED THE CORRECT DECISION AND *FORSGREN* SHOULD BE OVERRULED

As the cases above indicate, the law on the overlap of the CWA and FIFRA is far from settled. Because of this uncertainty, some authority must clearly articulate the state of the law. Whether such gui-

180 *See* Karen L. Werner, *Pesticides: FIFRA Amendment Could be Option to Address Clean Water Act Permit Issues*, 88 Daily Rep. for Executives (BNA), at A30 (May 7, 2003); Hamel, *supra* note 115.

181 *See* Hamel, *supra* note 115.

182 *Id.*

183 *Id.*

184 SePro, *Clean Water Act NPDES Permits for Aquatic Pesticide Use—The "Talent" Case*, 2 eCURRENTS 2 (June 2002), *at* http://www.sepro.com/aquatics/e-currents/ecurrents_june_2002.htm.

185 *See* Hamel, *supra* note 115.

186 *See id.*

dance comes from the Supreme Court, Congress, or the EPA,[187] there needs to be some affirmative action taken to ensure that the users of pesticides know whether they need to obtain NPDES permits before applying their pesticides. The action taken must effectively overrule the *Forsgren* decision and confirm that NPDES permits are not required for pesticides applied in compliance with FIFRA.

A. The Costs Associated with NPDES Permits

The *Forsgren* decision has created an unacceptable degree of uncertainty for those who use pesticides and for those who regulate the use of pesticides. An affirmative stance needs to be taken to address this uncertainty, and because of the costs associated with NPDES permitting, that stance should be to effectively overturn the *Forsgren* holding.

Pesticides are needed to combat all sorts of threats to human health and safety.[188] The broad implications of the *Forsgren* decision could affect activities ranging from disease prevention to forest fire prevention.[189] Many of these activities are often time-sensitive and should not be subject to delay due to the need of obtaining a NPDES permit to avoid CWA violations. "Emergencies with pests may prompt the need to spray to prevent public health problems," and as Stephan Johnson, the EPA's Assistant Administrator for Prevention, Pesticides, and Toxics, said "[t]he last thing I want is for those uses to be stopped because an NPDES permit must be obtained."[190] As it is, when deciding whether to register a pesticide under FIFRA, the EPA goes to great lengths to consider potential adverse effects on the aquatic environment.[191] Any use restrictions will be noted on the label.[192] Thus, pesticides used in compliance with their FIFRA registration should not be subject to violations of the CWA. The time lost during the application process and negotiation phase could be substantial, not to mention the financial impact of NPDES permitting.

NPDES permits are issued for and tailored to unique circumstances, so the process of applying for one can involve extensive negotiation between the issuing agency and the individual or group

187 *See* Werner, *supra* note 178 (noting that the three options available to address this issue are an appeal of *Forsgren* to the Supreme Court, a legislative fix, or an EPA rulemaking).

188 *See* Pat Phibbs, *Pesticides: EPA to Soon Issue Interim Guidance on Water Act Permits for Aquatic Use*, 119 Daily Rep. for Executives (BNA), at A35 (June 20, 2003).

189 *See id.*

190 *Id.*

191 *Id.*

192 *Id.*

seeking the permit. The permit will have to identify the specific area to be covered by the permit, delineate all of the activities that will be covered, specify discharge limitations and monitoring requirements, and list reporting and recordkeeping requirements.[193] If any changes need to be made to these specifications, it is likely that this negotiation phase would have to be repeated, and there is no guarantee that the issuing agency will approve such changes.[194] Such negotiations take time and money and are an unnecessary burden for those who are using pesticides in compliance with FIFRA.

The actual fees associated with NPDES permitting are established on a state-by-state basis and can be quite substantial.[195] "It is very clear . . . that there is a very large range of NPDES permit fees between the states."[196] In general, the fees will vary depending on the type and extent of the activity to be undertaken.[197] The state can structure its permitting program so that it could either be a "minor cost of doing business [or] a major impediment [to] doing business in the state."[198] The bottom line, however, is that NPDES permits are not free.[199] To make matters worse, such fees are generally not incurred only once.[200] Many states impose NPDES permitting fees on an annual basis.[201] Additionally, a permitee usually has no guarantee

193 *See* WASH. STATE DEP'T OF ECOLOGY, AQUATIC MOSQUITO CONTROL NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM WASTE DISCHARGE GENERAL PERMIT 2 (2002), *available at* http://www.ecy.wa.gov/programs/wq/pesticides/final_pesticide_permits/mosquito/mosquito_permit_april10.pdf.

194 Additionally, the permit will have to be renewed, and possibly renegotiated, at the end of its period. Some states require the reapplication process to begin as early as six to nine months before expiration. *See* RUSSELL J. HARDING, AN ANALYSIS OF STATES WATER DISCHARGE FEES AND THEIR RELEVANCE TO MICHIGAN BUSINESSES 3 (2003), *available at* http://www.michamber.com/chamnews/WaterFeesRec.pdf; WASH. STATE DEP'T OF ECOLOGY, *supra* note 193, at 16.

195 The fees need to cover everything from the costs of processing the applications and conducting inspections to ensure compliance to the costs of laboratory analysis of samples and overhead. *See* WASH. STATE DEP'T OF ECOLOGY, WASTEWATER/STORMWATER DISCHARGE PERMIT FEES (2003), *available at* http://www.ecy.wa.gov/programs/wq/permits/permit_fees/index.htm.

196 HARDING, *supra* note 194, at 2.

197 The fees within a state can vary substantially. In Colorado, for instance, fees for NPDES permits range from $150 to $17,926. *Id.* at 3. Indiana's fees also encompass a large range, $400 to $34,300. *Id.* Wisconsin's fees seem to top the chart, ranging from $250 to $1,192,000. *Id.*

198 *Id.* at 2.

199 Hamel, *supra* note 115.

200 *See* HARDING, *supra* note 194, at 3.

201 *Id.*

that the permit will not be revoked by the issuing agency[202] or renewed at the end of the period, thus subjecting the permitee to endless uncertainty. Pesticide users, who are oftentimes performing valuable services for the human population, such as providing irrigation for crops and preventing disease, should not be subject to such burdens.

B. FIFRA Can Protect the Environment and Deal with Violators

Pesticides will only be approved under FIFRA if they do not pose "unreasonable adverse effects" to the environment.[203] The EPA considers the intended function of the pesticide and the common ways in which it is used in making this determination.[204] Approval will only be granted if the effects are reasonable, and, if conditions should change, the EPA has reserved the right to "suspend, cancel, or restrict the use of a pesticide that poses unreasonable adverse effects or imminent hazards to the environment."[205] Thus, FIFRA gives the EPA the necessary flexibility to contend with changing environmental conditions and needs. If a particular pesticide poses a potentially larger threat to the environment, the EPA can label it as "restricted." By doing so, the EPA will require that the pesticide be applied by a certified user,[206] thereby increasing the likelihood that the pesticide will be applied with minimal adverse effects on the environment. The FIFRA-approved label will include appropriate uses of the pesticide

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202 Permits can be revoked for any one of a number of reasons. *See* WASH. STATE DEP'T OF ECOLOGY, *supra* note 193, at 12–13 (listing, among others, "a change in any condition that requires . . . [a] reduction or elimination of the permitted discharge" and a "determination that the permitted activity endangers human health or the environment" as reasons for revoking a permit).

203 EPA Interim Statement, *supra* note 5, 68 Fed. Reg. at 48,387 (citing 7 U.S.C. § 136a(c)(5) (2000)); *see also* Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 530 (9th Cir. 2001):

> The EPA then registers the herbicide if it determines that its composition is such as to warrant the proposed claims for it, that its labeling complies with FIFRA requirements, that it will perform its intended function without unreasonable adverse effects on the environment, and, when used in accordance with widespread practice, that it will not generally cause unreasonable adverse effects on the environment.

Id. (quoting Andrus v. AgrEvo USA Co., 178 F.3d 395, 398 (5th Cir. 1999)).

204 *See* EPA Interim Statement, *supra* note 5, 68 Fed. Reg. at 48,387 (citing 7 U.S.C. § 136a(c)(5) (2000)).

205 SANNE KNUDSON, QUICK REFERENCE: FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT (FIFRA) 1 (Univ. Mich. Center for Sustainable Systems 2003), *available at* http://css.snre.umich.edu/css_doc/FIFRA.pdf.

206 *Id.*

and any necessary limitations.[207] These restrictions can also be amended and modified as the EPA sees fit. If the user fails to comply with the requirements on the label, he or she will be subject to penalties.

There are numerous sanctions available for violations of the conditions imposed by FIFRA, and the EPA and state agencies are actively engaged in dealing with such violations. FIFRA requires that all pesticides be registered and the EPA maintains ultimate authority over the enforcement of the statute.[208] The EPA allows state agencies to participate in the enforcement of FIFRA only when the state has a federally approved pesticide program.

The law already provides for the punishment of those who inappropriately use FIFRA-regulated pesticides. Punishments inhere for violations such as distributing or selling misbranded or adulterated pesticides, altering or defacing FIFRA-approved labels, and failing to comply with inspection and reporting requirements.[209] These violations are subject to both civil and criminal penalties and can range from fines of $5000 to $50,000 and up to three years imprisonment.[210]

History has shown that the EPA is willing to punish FIFRA violators harshly. For example, in September 2002, the EPA settled with Micro Flo, an alleged FIFRA violator, for a civil penalty of $1,053,858.[211] Micro Flo was a pesticide manufacturer charged with selling pesticides that differed in composition from the approved version and for dealing with unapproved producers.[212] Although this amount may not be a typical fine for a FIFRA violation,[213] it demonstrates the potential impact that FIFRA can have.

FIFRA would have similar effects in cases discussed in this Note. For instance, because the product used in the *Headwaters* case was not used in the appropriate manner, the users have violated FIFRA and could face sanctions from the EPA.[214] The label warned that MAGNA-

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207 *Id.* at 2.

208 *Id.* at 1.

209 *Id.*

210 *Id.*

211 Press Release, U.S. Envtl. Prot. Agency, EPA Signs Consent Agreement and Final Order with Micro Flo, LLC to Settle FIFRA Violations (Sept. 19, 2002), *available at* http://www.epa.gov/region4/oeapages/02press/09-19-02.htm.

212 *Id.*

213 This amount was the second largest penalty assessed by the EPA under FIFRA. *Id.* More typical penalties seem to be in the $2000–$8000 range. *See* U.S. ENVTL. PROT. AGENCY, ENFORCEMENT ACTION SUMMARY FISCAL YEAR 2000: FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE (FIFRA) (2001), *available at* http://www.epa.gov/region5/orc/enfactions/enfactions2000/law-fifra.htm.

214 *See* discussion *supra* notes 112–30 and accompanying text.

CIDE H needed to be used carefully and only under certain circumstances because of the adverse effects it would have on fish.[215] Because the pesticide was not used appropriately, a fine should be levied against defendants. They should not, however, be expected to obtain a NPDES permit under the CWA, thus subjecting them to additional regulation. Those who use pesticides in the appropriate manner and in compliance with FIFRA should be free from liability.

C. *Who Should Overrule* Forsgren ?

The *Forsgren* decision could effectively be overruled by any one of a number of federal actors, or alternatively by a combination of many of them. Potential candidates include the Supreme Court of the United States, Congress, and the EPA. The EPA has already had a hand in finding a solution by preparing its Interim Statement on this issue.[216] A final declaration by the EPA may not be enough, however, to settle the dispute.[217] Thus, either the Supreme Court or Congress may have to throw its hat in the ring to affirmatively establish the principle that pesticides used in compliance with FIFRA should not require NPDES permits under the CWA.

Some individuals and groups want the Supreme Court to grant certiorari and review the *Forsgren* decision. In fact, because there is such great concern over this issue, a group of bipartisan lawmakers petitioned Attorney General John Ashcroft to seek such a Supreme Court review.[218] The petition was signed by twenty-eight Senators, and numerous House members were signatories of a companion letter.[219] The lawmakers were concerned about the potentially broad consequences of the *Forsgren* decision and said "[t]his ruling will have enormous implications for the health of our public and private forests and for innumerable beneficial pest control [initiatives] nationwide."[220] The basis for the concern is that requiring permits for activities such as mosquito and moth control, which are often time-critical endeavors, could lead to impermissible delay.[221] Additionally, farmers

215 *See* BAKER PETROLITE CORP., *supra* note 116, at 4; Hamel, *supra* note 115. MAGNACIDE H is registered under FIFRA and bears an EPA-approved label. This label warns about the potential lethal effects of this chemical but does not state that a NPDES permit is required for its use. *See supra* note 115.

216 *See supra* notes 79–111 and accompanying text.

217 *See* Werner, *supra* note 180.

218 Karen L. Werner, *Environment: Senate, House Members Urge Ashcroft to Seek Review of Insecticide Spraying Case*, 97 Daily Rep. for Executives (BNA), at A31 (May 20, 2003).

219 *Id.*

220 *Id.*

221 *Id.*

and other pesticide users are likely to be confused as to when a NPDES permit is needed.[222] Pesticides and insecticides are often used for critical programs that protect our forests, crops, and human health.[223] The legislators are concerned that the *Forsgren* decision set a "dangerous precedent" and should be reviewed by the Supreme Court.[224]

Other groups think an amendment to FIFRA is the appropriate remedy for resolving this conflict.[225] They are also concerned about the broad potential reach of the *Forsgren* decision and recognize that it could have ramifications for things like chemicals used to clean up oil spills, agricultural interests, and pest control.[226] These constituents believe that EPA guidance on the issue may not be sufficient to end the confusion and the accompanying litigation. Representative John Duncan supports the idea of amending FIFRA.[227] His staff director and senior counsel, Susan Bodine, suggested that EPA guidance would articulate how the agency interprets the law but that cases would still be brought, with plaintiffs arguing for another interpretation.[228] Recognizing the possible inadequacies of EPA rulemaking or guidance, an amendment to FIFRA is a viable option. Amendment of FIFRA is preferable to an amendment of the CWA because FIFRA is likely to be amended in the near future for the ratification of the Stockholm Convention on Persistent Organic Pollutants.[229] It may be best to address this issue by coupling the proposed amendment with a more popular and well-accepted initiative because some argue that "stand alone legislation on the topic does not stand a chance."[230] If the CWA/FIFRA overlap issue were included in this amendment, then there would be no more confusion about which law should govern.

Of the three alternatives—EPA guidance, Supreme Court review, or a legislative fix—there is no clear winner as to which would best address the issue. Final EPA guidance would more clearly state the agency's position on this matter. Naturally, this position would be entitled to deference,[231] but there is reason to believe that some would

222 *Id.*
223 *Id.*
224 *Id.*
225 *See* Werner, *supra* note 180.
226 *Id.*
227 *Id.*
228 *Id*
229 *Id.*
230 *See id.* (citing Rep. Dennis Cardoza and acknowledging that it may be best for the overlap issue to go "under the radar").
231 *See* Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 531 (9th Cir. 2001) (citing Res. Inv., Inc. v. U.S. Army Corps of Eng'rs, 151 F.3d 1162, 1165 (9th Cir.

argue for a different interpretation.[232] Alternatively, Supreme Court review, and subsequent reversal, of the *Forsgren* decision would establish a valuable precedent for lower courts and provide guidance as to how similar pesticide cases should be decided in the future. Such a fix, however, may not be the end of the conflict. As in other facets of the law, attorneys would argue that their case could be distinguished from *Forsgren* and would require the application of a different standard. Finally, a clearly articulated statutory amendment could provide adequate guidance for courts, pesticide users, and environmentalists. Yet, if this amendment to FIFRA needs to go "under the radar,"[233] as suggested above, its reception would likely be controversial. Ideally, the best solution would be for the Supreme Court, the EPA, and the legislature to all take these steps, thus presenting a united front.

CONCLUSION

The *Forsgren* decision has led to a great deal of uncertainty for those who use pesticides. The holding declared that pesticides that are applied to U.S. waters are subject to NPDES permitting requirements, yet the court reached this conclusion by assuming that such pesticides are considered "pollutants" under the CWA. Based on the guidance issued by the EPA, it appears that such a conclusion is unfounded. Despite this criticism from the EPA, the *Forsgren* decision remains in effect and could potentially have broad ramifications.

The decision impacts those engaged in activities such as irrigation, farming, and disease prevention. In the irrigation business, for instance, herbicides are used to remove vegetation from the irrigation canals, thereby ensuring an adequate supply of water can be delivered to the crops and flood damage can be minimized.[234] As this example illustrates, chemicals such as herbicides and pesticides perform numerous beneficial functions and often ultimately protect human health and safety. When such products are used for their intended purpose and in compliance with FIFRA, they should not be subject to NPDES permitting requirements.

We do not want these critical activities to be delayed or potentially stopped. We need fire control and we need mosquito eradica-

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1998), which noted that "an agency's construction of a statute it is charged with enforcing is normally entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress").

232 *See* Werner, *supra* note 180 (noting that some individuals suspect that EPA guidance will not be sufficient to put an end to the dispute).

233 *Id.* (quoting Rep. Dennis Cardoza).

234 Hamel, *supra* note 115.

tion efforts. Potentially, if entities stopped performing these functions because of the need to obtain a permit, water quality could actually be impaired—a result that nobody wants.

NPDES permits are not free. As such, all pesticide users will be expected to face these increased costs in order to undertake activities that have traditionally not been subject to such a requirement. NPDES permits should be reserved for the disposal of unwanted wastes and should not apply to activities that are beneficial and useful.[235]

People who use pesticides are still subject to fines if they violate the conditions imposed by FIFRA. Thus, those who use pesticides inappropriately will be punished. For instance, because the product used in the *Headwaters* case was not used in the appropriate manner, a substantial fine should be imposed. Those who use pesticides in the appropriate manner, however, and by doing so promote human health and safety, should not be punished.

FIFRA is the appropriate statute to govern the use of pesticides. The CWA should not be used in this capacity. Whether it comes from the EPA, the Supreme Court, or the Legislature, we need some authority to clearly articulate this stance.

235 *See id.*