

REDUCING REGULATORY BURDENS ACT OF 2011

MARCH 29, 2011.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. MICA, from the Committee on Transportation and Infrastructure, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 872]

[Including cost estimate of the Congressional Budget Office]

The Committee on Transportation and Infrastructure, to whom was referred the bill (H.R. 872) to amend the Federal Insecticide, Fungicide, and Rodenticide Act and the Federal Water Pollution Control Act to clarify Congressional intent regarding the regulation of the use of pesticides in or near navigable waters, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:  
Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Reducing Regulatory Burdens Act of 2011”.

**SEC. 2. USE OF REGISTERED PESTICIDES.**

Section 3(f) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136a(f)) is amended by adding at the end the following:

“(5) USE OF REGISTERED PESTICIDES.—Except as provided in section 402(s) of the Federal Water Pollution Control Act, the Administrator or a State may not require a permit under such Act for a discharge from a point source into navigable waters of a pesticide registered under this Act, or the residue of such a pesticide, resulting from the application of such pesticide.”.

**SEC. 3. DISCHARGES OF PESTICIDES.**

Section 402 of the Federal Water Pollution Control Act (33 U.S.C. 1342) is amended by adding at the end the following:

“(s) DISCHARGES OF PESTICIDES.—

“(1) NO PERMIT REQUIREMENT.—Except as provided in paragraph (2), a permit shall not be required by the Administrator or a State under this Act for a discharge from a point source into navigable waters of a pesticide authorized for sale, distribution, or use under the Federal Insecticide, Fungicide, and Rodenticide Act, or the residue of such a pesticide, resulting from the application of such pesticide.

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

“(A) A discharge resulting from the application of a pesticide in violation of a provision of the Federal Insecticide, Fungicide, and Rodenticide Act that is relevant to protecting water quality, if—

“(i) the discharge would not have occurred but for the violation; or

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

“(B) Stormwater discharges regulated under subsection (p).

“(C) The following discharges regulated under this section:

“(i) Manufacturing or industrial effluent.

“(ii) Treatment works effluent.

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

**PURPOSE OF THE LEGISLATION AND SUMMARY**

The Reducing Regulatory Burdens Act of 2011, H.R. 872, amends the Federal Insecticide, Fungicide, and Rodenticide Act and the Federal Water Pollution Control Act to clarify Congressional intent regarding the regulation of the use of pesticides in or near navigable waters.

**BACKGROUND AND NEED FOR THE LEGISLATION**

*The Federal Insecticide, Fungicide, and Rodenticide Act*

The Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) is a regulatory statute that governs the sale and use of pesticides in the United States through the registration and labeling of such products. Its objective is to protect human health and the environment from unreasonable adverse effects of pesticides, taking into account the costs and benefits of various product uses. Pesticides regulated under FIFRA include insecticides, herbicides, fungicides, rodenticides, and other designated substances. The Environmental Protection Agency (“EPA”) reviews scientific data submitted by chemical manufacturers on toxicity and behavior in the environment to evaluate risks and exposure associated with a product’s use.

FIFRA prohibits the sale of any pesticide unless it is registered and labeled indicating approved uses and restrictions. It is a violation of Federal law to use such a chemical in a manner that is inconsistent with the label instructions. If a registration is granted, EPA makes a finding that the chemical “when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.” (7 U.S.C. 136a(c)(5)(D)) EPA then specifies the approved uses and conditions of use of the pesticide, and this is required to be explained on the product label.

#### *The Clean Water Act*

The objective of the Federal Water Pollution Control Act (commonly known as the “Clean Water Act” or the “CWA”) is to restore and maintain the chemical, physical, and biological integrity of the nation’s waters. The primary mechanism for achieving this objective is the CWA’s prohibition on the discharge of any pollutant without a National Pollutant Discharge Elimination System (“NPDES”) permit. EPA has the authority to regulate the discharge of pollutants either through general permits or through individual permits. NPDES permits specify limits on what pollutants may be discharged from point sources and in what amounts. Under the CWA, 47 states and territories have been authorized to implement NPDES permits and enforce permits. EPA manages the Clean Water Act program in the remaining states and territories.

NPDES permits are the basic regulatory tool of the CWA. EPA or an authorized state may issue compliance orders, or file civil suits against those who violate the terms of a permit. In addition, in the absence of Federal or state action, individuals may bring a citizen suit in United States district court against those who violate the terms of an NPDES permit, or against those who discharge without a valid permit.

#### *Litigation*

In over 30 years of administering the CWA, EPA had never required an NPDES permit for the application of a pesticide, when the pesticide is applied in a manner consistent with FIFRA and its regulations. While the CWA contains a provision granting citizen suits against those who violate permit conditions or those who discharge without an NPDES permit, FIFRA has no citizen suit provision. As a result, beginning in the late 1990s, a series of citizen lawsuits were filed by parties, contending that an NPDES permit is necessary when applying a FIFRA-regulated product over, into, or near waterbodies. These cases generated several Court of Appeals decisions that created confusion and concern among pesticide users regarding the applicability of the CWA with regard to pesticide use.

As the litigation continued, concern and confusion grew among farmers, forest landowners, and public health officials, prompting EPA to issue interim, and later final, interpretive guidance in August 2003 and January 2005, and then to undertake a rulemaking to clarify and formalize the Agency’s interpretation of the CWA as it applied to pesticide use. The EPA rule was finalized in November 2006 (71 *Fed. Reg.* 68483 (Nov. 27, 2006)), and was the culmination of a three year participatory rulemaking process that began with

the interim interpretive statement in 2003 and involved two rounds of public comment.

The 2006 EPA rule codified EPA's long-standing interpretation that the application of chemical and biological pesticides for their intended purpose and in compliance with pesticide label restrictions is not a discharge of a "pollutant" under the CWA, and therefore, that an NPDES permit is not required. The rule clearly defined specific circumstances in which the use of pesticides in accordance with all relevant requirements under FIFRA is not a CWA "discharge of a pollutant," explaining in detail the rationale for the Agency's interpretation.

When the rule was finalized, environmental groups, as well as farm and pesticide industry groups, filed petitions for review of the rule in several Federal Circuit Courts of Appeal. The petitions were consolidated in the Sixth Circuit. The Sixth Circuit ultimately vacated the rule on January 7, 2009 in *National Cotton Council v. EPA* (553 F.3d 927; hereinafter, *National Cotton Council*), concluding that the final rule was not a reasonable interpretation of the CWA's permitting requirements. The court rejected EPA's contention that, when pesticides are applied over, into, or near waterbodies to control pests, they are not considered pollutants as long as they comply with FIFRA, and held that NPDES permits are required for all pesticide applications that may leave a residue in water.

EPA estimated that the ruling would affect approximately 365,000 pesticide applicators that perform some 5.6 million pesticide applications annually. The court's decision, which would apply nationally, was to be effective seven days after the deadline for rehearing expires or seven days after a denial of any petition for rehearing. Parties had until April 9, 2009 to seek rehearing.

On April 9, 2009, the government chose not to seek rehearing in the *National Cotton Council* case. The government instead filed a motion to stay issuance of the court's mandate for two years to provide EPA time to develop an entirely new NPDES permitting process to cover pesticide use. As part of this, EPA needed to propose and issue a final NPDES general permit for pesticide applications, for states to develop permits, and for EPA to provide outreach and education to the regulated community. Industry groups filed a petition seeking *en banc* review, asking the full Sixth Circuit to reconsider the decision from the three-judge panel.

On June 8, 2009, the Sixth Circuit granted EPA a two-year stay of the court's mandate, in response to their earlier request. The Sixth Circuit denied the industry groups' petition for rehearing in August 2009. The court-ordered deadline for EPA to promulgate a new permitting process for pesticides under the Clean Water Act is April 9, 2011. On March 3, 2011, EPA filed another request for an extension with the court. On March 28, 2011, the Sixth Circuit granted an extension through October 31, 2011. The court order to vacate the rule remains in place. The Court's extension only temporarily postpones the need for an NPDES permit for pesticide use, and does not obviate the need for this legislation.

Two petitions were filed with the U.S. Supreme Court in December 2009 by representatives of the agriculture community and the pesticide industry, requesting that the U.S. Supreme Court review the *National Cotton Council* case. A number of parties, including

numerous Members of Congress, filed *amicus* briefs with the U.S. Supreme Court, in support of or opposition to the petitions. On February 22, 2010, the U.S. Supreme Court denied the petitioners' request without comment.

*EPA development of a new permitting process to cover pesticide use*

With a two-year stay of the Sixth Circuit's mandate in place, EPA continues to move ahead with developing a new NPDES permitting process to cover pesticide use. The permit covers four pesticide uses: (1) mosquito and other flying insect pest control; (2) aquatic weed and algae control; (3) aquatic nuisance animal control; and (4) forest canopy pest control. It does not cover terrestrial applications to control pests on agricultural crops or forest floors, and does not cover activities exempt from permitting under the CWA (irrigation return flow, agricultural stormwater runoff) and discharges that will require coverage under an individual permit, such as discharges of pesticides to waterbodies that are considered impaired under CWA § 303(d) for that discharged pesticide.

*Implications*

The Committee has received testimony and other information on the implications of the Sixth Circuit's holding in the *National Cotton Council* case, and the new permitting process that EPA has to develop under the CWA as a result of that holding, on state and local agencies, mosquito control districts, water districts, pesticide applicators, agriculture, forest managers, and other stakeholders. On February 16, 2011, the Subcommittee on Water Resources and Environment of the House Committee on Transportation and Infrastructure held a joint hearing with the Nutrition and Horticulture Subcommittee of the House Committee on Agriculture to consider means for reducing the regulatory burdens posed by the case, *National Cotton Council v. EPA* (6th Cir. 2009), and to consider related draft legislation.

Despite being limited to four categories of pesticide uses, EPA's new general permit for covered pesticides stands to be the single greatest expansion of the permitting process in the history of the NPDES program. EPA has estimated that it can expect approximately 5.6 million covered pesticide applications per year by approximately 365,000 applicators—virtually doubling the number of entities currently subject to NPDES permitting. (U.S. EPA, Fact Sheet for 2010 *Public Notice of: Draft National Pollutant Discharge Elimination System (NPDES) Pesticides General Permit (PGP) for Discharges from the Application of Pesticides to or over, including near Waters of the U.S.*, at 14, available at [http://www.epa.gov/npdes/pubs/proposed\\_pgp\\_fs.pdf](http://www.epa.gov/npdes/pubs/proposed_pgp_fs.pdf).)

With this unprecedented expansion comes real and tangible burdens, for EPA, the states that will have to issue the permits, those whose livelihoods depend on the use of pesticides, and even everyday citizens going about their daily lives.

EPA has said that it will be able to conform its current process to meet the Sixth Circuit's mandate. Even so, much of the responsibility of developing and issuing general permits falls on the states. Forty-five states (and the Virgin Islands) will face increased financial and administrative burdens in order to comply with the new permitting process. In a time when too many states are being

forced to make difficult budgetary cuts, the nation cannot afford to impose more financial burdens.

The expanded permitting process also imposes enormous burdens on pesticide users who encompass a wide range of individuals from state agencies, city and county municipalities, mosquito control districts, water districts, pesticide applicators, farmers, ranchers, forest managers, scientists and others. The new and duplicative permitting process will increase both the administrative difficulty and costs for pesticide applicators to come into compliance with the law. Compliance will no longer mean simply following instructions on a pesticide label. Instead, applicators will have to navigate a complex process of identifying the relevant permit, filing with the regulatory authority a valid notice of intent to comply with the permit and having a familiarity with all of the permit's conditions and restrictions. Along with increased administrative burdens comes an increased monetary burden. Estimates are that the cost associated with the EPA permit scheme to small businesses could be as high as \$50,000 per business annually.

In addition to the costs of coming into compliance, pesticide users will be subject to an increased risk of litigation and exorbitant fines. Applicators not in compliance face fines of up to \$37,500 per day per violation, not including attorney's fees. Given the fact that a large number of applicators have never been subject to NPDES and its permitting process, even a good faith effort to be in compliance could fall short. Moreover, the CWA allows for private actions against individuals who may or may not have committed a violation. Thus, while EPA may exercise its judgment and refrain from prosecuting certain applicators, they remain vulnerable to citizen suits. Unless Congress acts, hundreds of thousands of farmers, foresters, and public health pesticide users will go into the next season under threat of lawsuits once the Sixth Circuit's April 9, 2011 deadline passes.

It is not only pesticide regulators and applicators who will be affected by new permitting requirements. Rather, the Sixth Circuit's decision will affect everyday citizens, who rely on the benefits provided by pesticides and their responsible application. Pesticide use is an essential part of agriculture. Imposing a burdensome and duplicative permitting process on our nation's farmers threatens their ability to continue to provide the country with a safe and reliable food supply. Many family farmers and small applicators lack the resources to ensure compliance with a cumbersome and detailed permit scheme. Moreover, for those farmers who are able to comply, delays that are inherent in permitting schemes are ill-suited for prompt pest control actions necessary in agriculture. Failure to apply a pesticide soon after a pest is first detected could result in recurring and greater pest damage in subsequent years if a prolific insect were to become established in plant hosts. The Secretary of Agriculture, Hon. Thomas J. Vilsack, has said that a permitting system under the CWA for pesticide use "is ill-suited to the demands of agricultural production." (Letter, Hon. Thomas J. Vilsack, Secretary of Agriculture, to Hon. Lisa P. Jackson, Administrator, U.S. Environmental Protection Agency, Subject: *The National Cotton Council of America, et al., v. United States Environmental Protection Agency* (Mar. 6, 2009)).

Forest landowners also will suffer under the new permit scheme. EPA's permit scheme will result in a reduction in the use of forest pest control as a forest management tool, resulting in the acceleration of tree mortality and general decline in overall forest health. It will also erect barriers for the control of pests, such as Gypsy Moth and Forest Tent Caterpillar. This may result in a higher incidence of preventable tree kills and defoliated landscapes.

Finally, the Sixth Circuit's holding could have significant implications for public health. The National Centers for Disease Control officially recognizes the following as a partial list of mosquito-borne diseases—Eastern Equine Encephalitis, Japanese Encephalitis, La Crosse Encephalitis, St. Louis Encephalitis, West Nile Virus, Western Equine Encephalitis, Dengue Fever, Malaria, Rift Valley Fever, and Yellow Fever. (Centers for Disease Control and Prevention, [http://www.cdc.gov/ncidod/diseases/list\\_mosquitoborne.htm](http://www.cdc.gov/ncidod/diseases/list_mosquitoborne.htm).) EPA's permit program poses the possibility of critical delays in emergency responses to insect and disease outbreaks and will divert resources from controlling environmental pests to litigation and administrative burdens.

*Development of legislation in response to the Sixth Circuit decision*

As a result of concerns raised by Federal, state, local, and private stakeholders regarding the interrelationship between FIFRA and the CWA and the concerns posed by the new and duplicative permitting process under the CWA, the House Committee on Transportation and Infrastructure and House Committee on Agriculture sought technical assistance from EPA to draft very narrow legislation targeted only at responding to the Sixth Circuit's holding in *National Cotton Council* and return the state of pesticide regulation to the status quo—before the courts got involved. H.R. 872 is based on the technical assistance that EPA provided to the Committees, and is intended to be consistent with EPA's final rule from November 2006. The bill amends FIFRA and the CWA to eliminate the requirement of an NPDES permit for applications of pesticides authorized for sale, distribution, or use under FIFRA.

LEGISLATIVE HISTORY

On March 2, 2011, Subcommittee on Water Resources and Environment Chairman Bob Gibbs introduced H.R. 872, the "Reducing Regulatory Burdens Act of 2011." On March 16, 2011, the Committee on Transportation and Infrastructure met in open session to consider H.R. 872, and ordered the bill reported favorably to the House by roll call vote with a quorum present. The vote was 46 yeas to 8 nays. An amendment in the nature of a substitute was offered in Committee by Mrs. Schmidt, which was adopted by voice vote. The amendment made two technical and clarifying changes to the bill: to clarify that any pesticide authorized for sale, distribution, or use under FIFRA is covered by the permitting exemption provided by the bill; and to clarify the scope of an exception to the exemption. Mr. Bishop also offered and withdrew an amendment that would have ended, after five years, the permitting exemption provided by the bill.

## HEARINGS

On February 16, 2011, the Subcommittee on Water Resources and Environment held a joint hearing with the Nutrition and Horticulture Subcommittee of the House Agriculture Committee to consider means for reducing the regulatory burdens posed by the case, *National Cotton Council v. EPA* (6th Cir. 2009), and to consider related draft legislation. Representatives of the Environmental Protection Agency, state water quality agencies, a State agricultural agency, the irrigation community, and the mosquito control community testified on the economic and regulatory impacts of the Sixth Circuit decision in *National Cotton Council* and on a discussion draft of the bill.

## COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires each committee report to include the total number of votes cast for and against on each record vote on a motion to report and on any amendment offered to the measure or matter, and the names of those members voting for and against. During consideration of H.R. 872, a total of one vote was taken, which was on a final vote ordering the bill reported as amended. The bill, as amended, was reported to the House with a favorable recommendation after a record vote which was disposed of as follows:

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE  
 FULL COMMITTEE – ROLL CALL  
 U.S. HOUSE OF REPRESENTATIVE – 112<sup>TH</sup> CONGRESS

Number of Members: (33/26)      Quorum: 30      Working Quorum: 20  
 Date: March 16, 2011      Presiding: Chairman Mica  
 Amendment or matter voted on: Ordering H.R. 872, the Reducing Regulatory Burdens Act of 2011, reported  
 Vote: 46 - 8

	Yeas	Nays	Present		Yeas	Nays	Present
Mr. Mica	X			Mr. Larsen	X		
Mr. Rahall	X			Mr. Lipinski		X	
Mr. Altmire	X			Mr. LoBiondo	X		
Mr. Barletta	X			Mr. Long	X		
Mr. Bishop	X			Mr. Meehan	X		
Mr. Boswell	X			Mr. Michaud	X		
Ms. Brown				Mr. Miller (CA)	X		
Dr. Bucshon	X			Ms. Miller (MI)	X		
Ms. Capito	X			Mr. Nadler			
Mr. Capuano	X			Mrs. Napolitano		X	
Mr. Carnahan	X			Ms. Norton		X	
Mr. Coble	X			Mr. Petri	X		
Mr. Cohen	X			Mr. Reed	X		
Mr. Costello	X			Ms. Richardson			
Mr. Cravaack	X			Ms. Schmidt	X		
Mr. Crawford	X			Mr. Shuler	X		
Mr. Cummings		X		Mr. Shuster	X		
Mr. DeFazio		X		Mr. Sires	X		
Mr. Denham	X			Mr. Southerland	X		
Mr. Duncan	X			Mr. Walz			
Ms. Edwards		X		Mr. Young	X		
Mr. Farenthold	X						
Mr. Filner		X					
Mr. Fincher	X						
Mr. Gibbs	X						
Mr. Graves	X						
Mr. Guinta	X						
Mr. Hanna	X						
Dr. Harris	X						
Mrs. Herrera Beutler	X						
Ms. Hirono	X						
Mr. Holden							
Mr. Hultgren	X						
Mr. Hunter	X						
Mr. Johnson (IL)	X						
Ms. Johnson (TX)		X					
Mr. Landry	X						
Mr. Lankford	X						

## COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Transportation and Infrastructure's oversight findings and recommendations are reflected in this report.

## COST OF LEGISLATION

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives does not apply where a cost estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974 has been timely submitted prior to the filing of the report and is included in the report. Such a cost estimate is included in this report.

## NEW BUDGET AUTHORITY AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of new budget authority, entitlement authority, or tax expenditures or revenues contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974, included below.

## CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirement of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 872 from the Director of the Congressional Budget Office:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, March 18, 2011.*

Hon. JOHN L. MICA,  
*Chairman, Committee on Transportation and Infrastructure,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 872, the Reducing Regulatory Burdens Act of 2011.

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

Sincerely,

DOUGLAS W. ELMENDORF,  
*Director.*

Enclosure.

*H.R. 872—Reducing Regulatory Burdens Act of 2011*

HR. 872 would prohibit the Environmental Protection Agency (EPA) and states authorized to issue National Pollutant Discharge Elimination System (NPDES) permits from requiring a permit for some discharges of pesticides authorized for use under the Federal Insecticide, Fungicide, Rodenticide Act (FIFRA). Under the bill, public and private entities would no longer need to obtain an NPDES permit for certain discharges of pesticides except in cases

where the application of the pesticide would not fall under FIFRA, or in cases where the discharge is regulated as a stormwater, municipal, or industrial discharge under the Clean Water Act. Under a recent court ruling, the requirement to obtain an NPDES permit will become effective on April 9, 2011; at that time, pesticide applications not covered by an NPDES permit will be subject to a fine.

Based on information from EPA, CBO estimates that enacting this legislation would have no significant impact on the federal budget. Any administrative savings to EPA that might result from issuing fewer permits would be negligible because EPA has delegated the authority to issue most NPDES permits to states.

Pay-as-you-go procedures do not apply to H.R. 872 because the bill would not affect direct spending or revenues.

H.R. 872 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

On March 11, 2011, CBO transmitted a cost estimate for H.R. 872, the Reducing Regulatory Burdens Act of 2011, as ordered reported by the House Committee on Agriculture on March 9, 2011. The two versions of the legislation are similar, and the CBO cost estimates are the same.

The CBO staff contact for this estimate is Susanne S. Mehlman. This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

#### PERFORMANCE GOALS AND OBJECTIVES

With respect to the requirement of clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the performance goals and objectives of this legislation are to reduce regulatory burdens caused by duplicative regulatory requirements associated with the use of pesticides in or near navigable waters by amending the Federal Insecticide, Fungicide, and Rodenticide Act and the Clean Water Act.

#### ADVISORY OF EARMARKS

In compliance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 872 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of rule XXI.

#### FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act (Public Law 104-4).

#### PREEMPTION CLARIFICATION

Section 423 of the Congressional Budget Act of 1974 requires the report of any Committee on a bill or joint resolution to include a statement on the extent to which the bill or joint resolution is intended to preempt state, local, or tribal law. The Committee states that H.R. 872 does not preempt any state, local, or tribal law.

## ADVISORY COMMITTEE STATEMENT

No advisory committee within the meaning of section 5(b) of the Federal Advisory Committee Act was created by this legislation.

## APPLICABILITY TO THE LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act (Public Law 104–1).

## SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

*Section 1. Short title*

Section 1 of the bill designates the title of the bill as the “Reducing Regulatory Burdens Act of 2011.”

*Section 2. Use of registered pesticides*

Section 2 of the bill amends section 3(f) of FIFRA (7 U.S.C. 136a(f)) by adding at the end a new paragraph (5). Paragraph (5) provides that, except as provided in section 402(s) of the Federal Water Pollution Control Act (the CWA), the Administrator or a State may not require a permit under the CWA for a discharge from a point source into navigable waters of a pesticide registered under FIFRA, or the residue of such a pesticide, resulting from the application of such pesticide. The exceptions provided in section 402(s) of the CWA are provided in new subsection (s)(2), discussed further below.

The net effect of this provision is to exempt, from the CWA’s NPDES permitting process, a discharge from a point source into navigable waters of a pesticide registered under FIFRA, or the residue of such a pesticide, resulting from the application of the pesticide, where the pesticide is used for its intended purpose and the use is in compliance with pesticide label requirements.

The Committee has received testimony on how EPA uses its full regulatory authority under FIFRA to ensure that pesticides do not cause unreasonable adverse effects on human health and the environment, including our nation’s water resources. The regulatory restrictions imposed by EPA under FIFRA directly control the amount of pesticide available for transport to navigable waters, either by reducing the absolute amount of pesticide applied, or by changing application conditions to minimize transport and make transport of applied pesticide less likely.

Therefore, as long as a pesticide is authorized for sale, distribution, or use under FIFRA, the pesticide is used for its intended purpose, and the use is in compliance with pesticide label requirements, then the Committee sees no need to require the user of the pesticide to apply for and obtain an NPDES permit for that use. The Committee believes that requiring an NPDES permit in such circumstances is unnecessary and would impose duplicative and wasteful regulatory burdens on EPA and state permitting agencies, and on pesticide users.

*Section 3. Discharges of pesticides*

Section 3 of the bill amends section 402 of the Federal Water Pollution Control Act (33 U.S.C. 1342) by adding at the end a new subsection (s).

New subsection (s)(1) provides that, except as provided in paragraph (2) of subsection (s), the Administrator or a State shall not require a permit under the CWA for a discharge from a point source into navigable waters of a pesticide authorized for sale, distribution, or use under FIFRA, or the residue of such a pesticide, resulting from the application of such pesticide. This provision is aimed at mirroring the provision added to FIFRA under Section 2 of the bill.

This provision, like that in Section 2 of the bill, is intended to exempt from the CWA's NPDES permitting process, subject to the exceptions in paragraph (2), a discharge from a point source into navigable waters of a pesticide authorized for sale, distribution, or use under FIFRA, or the residue of such a pesticide, resulting from the application of the pesticide, where the pesticide is used for its intended purpose and the use is in compliance with pesticide label requirements.

As noted earlier, as long as a pesticide is authorized for sale, distribution, or use under FIFRA, the pesticide is used for its intended purpose, and the use is in compliance with pesticide label requirements, then the Committee sees no need to require the user of the pesticide to apply for and obtain an NPDES permit for that use. The Committee believes that requiring an NPDES permit in such circumstances is unnecessary and would impose duplicative and wasteful regulatory burdens on EPA and state permitting agencies, and on pesticide users.

The Committee adopted a technical change to the language of paragraph (1) in a Committee meeting held on March 16, 2011, to clarify that any pesticide authorized for sale, distribution, or use under FIFRA is covered by this exemption. This change was made to conform Section 3 of the bill with a change the House Committee on Agriculture made to Section 2 of the bill in a meeting of that committee on March 9, 2011.

Paragraph (2) of new subsection (s) provides certain exceptions to the exemption from NPDES permitting provided in paragraph (1). The categories of discharges listed in paragraphs (2)(A) and (B) are not exempted and therefore require an NPDES permit if those discharges contain a pesticide or a residue of a pesticide as a component in those discharges. None of the exceptions in paragraph (2) are intended to expand the permitting authority of EPA or a state to require a permit under the CWA, or to provide a backdoor way to narrow or negate the exemption in paragraph (1) from the CWA's NPDES permitting process of a discharge from a point source into navigable waters of a pesticide authorized for sale, distribution, or use under FIFRA, or the residue of such a pesticide, resulting from the application of the pesticide, where the pesticide is used for its intended purpose and the use is in compliance with pesticide label requirements.

The exception in subparagraph (A) of paragraph (2) applies to circumstances where there has been an application of a pesticide in violation of a provision of FIFRA relevant to protecting water quality, and as a result of that application of the pesticide in viola-

tion of FIFRA, there has been a discharge of a pesticide or residue of a pesticide that either would not have occurred but for the violation of FIFRA, or the amount of pesticide or residue of a pesticide contained in the discharge is greater than would have occurred without the violation of FIFRA. A violation of FIFRA is considered to be relevant to protecting water quality only if that violation results in the occurrence of a discharge of a pesticide or residue of a pesticide from an application of the pesticide, and that discharge either would not have occurred but for the violation, or the amount of pesticide or residue of a pesticide contained in the discharge is greater than would have occurred without the violation.

Hence, a violation of FIFRA not involving or affecting a discharge into navigable waters of a pesticide or residue of a pesticide from an application of the pesticide (e.g., a violation of a FIFRA requirement that a person mixing a pesticide must wear protective clothing) does not trigger permitting requirements under the CWA and is not a violation of the CWA. Similarly, a violation of FIFRA, where a discharge of a pesticide or residue of a pesticide did not occur even with the FIFRA violation, or the amount of pesticide or residue of a pesticide contained in the discharge is not increased as compared to what would have occurred without the FIFRA violation, does not trigger permitting requirements under the CWA and is not a violation of the CWA. Enforcement under the CWA under the circumstances presented in paragraph (2)(A)(i) or (ii) would require proof of both a CWA violation and a FIFRA violation.

It is the intent of the Committee that, regarding biological pesticides, including those produced by plants, H.R. 872 shall not apply to plants because they are not a point source. The exemption requires a discharge from a point source. Moreover, section 402 of the CWA only requires an NPDES permit for a point source discharge.

The bill is not intended to exempt from NPDES permitting under CWA section 402 certain discharges of waste streams merely because they may contain a pesticide or residue of a pesticide as a component in them. Therefore, the exceptions in subparagraphs (B) and (C) of paragraph (2) identify those types of discharges that remain subject to NPDES permitting under CWA section 402, even if those discharges may contain in them a pesticide or residue of a pesticide as a component. The categories of discharges described in subparagraphs (B) and (C) are intended to encompass all of the types of discharges, which, if they do contain as a component a pesticide or residue of a pesticide, would continue to require an NPDES permit.

The exception in subparagraph (B) of paragraph (2) applies to stormwater discharges regulated under subsection (p) of CWA section 402. Discharges regulated under subsection (p) include stormwater discharged from certain municipal stormwater systems, certain areas associated with industrial activity, certain construction sites, and certain other impervious areas.

The exception in subparagraph (C) of paragraph (2) applies to the following other discharges regulated under subsection (p) of CWA section 402: manufacturing or industrial effluent; treatment works effluent; and discharges incidental to the normal operation of a vessel, including a discharge resulting from ballasting operations or vessel biofouling prevention.

The Committee adopted a technical change to the language of subparagraph (C) in a Committee meeting held on March 16, 2011, to clarify the scope of the exceptions in subparagraph (C).

“Manufacturing or industrial effluent” under subparagraph (C)(i) is intended to cover point source discharges of wastewater from facilities with manufacturing or industrial processes, where those discharges contain pollutants that are pesticides. This may include wastewater discharges containing pesticides from pesticide and other agricultural chemical manufacturing and formulating facilities, and facilities, including utilities, that use biocides to prevent fouling of lines, mains, pipes, or cooling towers.

“Treatment works effluent” under subparagraph (C)(ii) is intended to cover point source discharges of wastewater from treatment works, where those discharges contain pollutants that are pesticides. The term “treatment works” is defined in section 212 of the CWA.

“Discharges incidental to the normal operation of a vessel, including a discharge resulting from ballasting operations or vessel biofouling prevention” under subparagraph (C)(iii) is intended to cover point source discharges from vessels that are subject to permitting under EPA’s NPDES vessels program that regulates incidental discharges from the normal operation of vessels, where those discharges contain pollutants that are pesticides. The vessels currently subject to permitting under the NPDES vessels program consist of all non-recreational, non-military vessels of 79 feet or greater in length which discharge into navigable waters.

Recreational vessels as defined in section 502(25) of the CWA are exempted from NPDES permitting in section 402(r) of the CWA. It is the Committee’s intent to leave undisturbed this exemption from NPDES permitting for recreational vessels in section 402(r). In addition, vessels of the Armed Forces, as defined in section 312(a)(14) of the CWA, are not subject to permitting under the NPDES vessels program. With the exception of ballast water discharges, non-recreational vessels less than 79 feet in length, and all commercial fishing vessels, regardless of length, currently are not subject to permitting under the NPDES vessels program, although they may be in the future when a moratorium from regulation established by Public Law 111–215 ends on December 18, 2013.

The intent of the Committee is for sections 2 and 3 of the bill to reverse the Sixth Circuit’s holding in the *National Cotton Council* case and return the state of pesticide regulation to the status quo, before any courts ruled on the applicability of the CWA to pesticide applications regulated under FIFRA. H.R. 872 eliminates the requirement of an NPDES permit for the application of pesticides authorized for sale, distribution, or use under FIFRA.

#### CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

**FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT**

\* \* \* \* \*

**SEC. 3. REGISTRATION OF PESTICIDES.**

(a) \* \* \*

\* \* \* \* \*

(f) MISCELLANEOUS.—

(1) \* \* \*

\* \* \* \* \*

(5) *USE OF REGISTERED PESTICIDES.*—*Except as provided in section 402(s) of the Federal Water Pollution Control Act, the Administrator or a State may not require a permit under such Act for a discharge from a point source into navigable waters of a pesticide registered under this Act, or the residue of such a pesticide, resulting from the application of such pesticide.*

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**FEDERAL WATER POLLUTION CONTROL ACT**

\* \* \* \* \*

**TITLE IV—PERMITS AND LICENSES**

\* \* \* \* \*

**NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM**

**SEC. 402. (a) \* \* \***

\* \* \* \* \*

(s) *DISCHARGES OF PESTICIDES.*—

(1) *NO PERMIT REQUIREMENT.*—*Except as provided in paragraph (2), a permit shall not be required by the Administrator or a State under this Act for a discharge from a point source into navigable waters of a pesticide authorized for sale, distribution, or use under the Federal Insecticide, Fungicide, and Rodenticide Act, or the residue of such a pesticide, resulting from the application of such pesticide.*

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

(A) *A discharge resulting from the application of a pesticide in violation of a provision of the Federal Insecticide, Fungicide, and Rodenticide Act that is relevant to protecting water quality, if—*

*(i) the discharge would not have occurred but for the violation; or*

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

(B) *Stormwater discharges regulated under subsection (p).*

(C) *The following discharges regulated under this section:*

*(i) Manufacturing or industrial effluent.*

*(ii) Treatment works effluent.*

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

\* \* \* \* \*

## MINORITY VIEWS

We agree, generally speaking, that duplicative Federal regulation should be avoided as it has the potential to impose financial or administrative burdens on regulated entities, with no readily apparent benefit. In situations where Federal regulations are truly duplicative, we agree that every effort should be taken to eliminate duplication.

Yet, we believe that, with respect to pesticide application, the answer of whether the requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Federal Water Pollution Control Act, more commonly known as the Clean Water Act, are truly duplicative is unknown at this time. Unfortunately, our efforts to answer this and other basic questions about whether permanently exempting pesticide applications from the Clean Water Act is warranted and advisable, have been rebuffed by the Republican majority at every turn, including its refusal to even allow one witness called by the Minority members of the Subcommittee on Water Resources and Environment to testify before a joint Subcommittee hearing on this subject, held in conjunction with the House Agriculture Subcommittee on Nutrition and Horticulture.

This, combined with the fact that pesticides are currently being detected in surface and ground waters at levels sufficient to cause significant impacts to the fish and wildlife that rely on such waters, and at levels that have exceeded the human health benchmark for pesticides in drinking water, have led us to question whether this legislation is the best way to protect human health and the environment. More specifically, if the status quo regulatory framework in which pesticide applications are regulated under FIFRA but not the Clean Water Act (which this legislation seeks to maintain) is sufficiently protective of human health and the environment as the advocates of this legislation have argued, then why are pesticides currently detected in 97 percent of streams in both agricultural and urban areas.

For these reasons, we continue to have reservations with or are opposed to H.R. 872 in its current form, and recommend that Congress delay further action on this legislation until it has the critical information necessary to answer how best to protect human health and the environment from the adverse impacts of pesticides.

## ISSUES RELATED TO PESTICIDE USE

According to the U.S. Geological Survey (USGS), about 1 billion pounds of conventional pesticides are used each year to control weeds, insects, and other pests, resulting in a range of benefits, including increased food production and the prevention of insect-borne disease.

While pest control and fire suppression provide important health and economic benefits, the relationship between the legal use of chemical and biological pesticides and their impacts on water quality—both in-stream and drinking water—remains of concern. As noted in a 2006 report of the USGS,<sup>1</sup> even properly applied pesticides can cause water quality impairment once in the water. In certain situations, pesticides can harm the aquatic ecosystem and diminish the value of the water body as a drinking water source. Where that is the case, other steps must be taken to protect the resource, additional costs are incurred in removing chemicals from drinking water, and public health can be compromised.

*Pesticides in the Nation's Streams and Groundwater*

In 2006, the National Water-Quality Assessment (NAQWA) program of USGS released its decadal assessment on pesticide occurrence and concentrations in streams and groundwater, based on the results from studies completed by USGS during the period from 1992 to 2001. According to this report, at least one pesticide was detected in water from all streams tested throughout the nation, and pesticide compounds were detected throughout most of the year from streams with agriculture (97 percent of samples), urban (97 percent of samples), and mixed-land-use watersheds (94 percent of samples). In addition, certain classes of pesticides (such as DDT), which have been banned in the United States for decades, were found in the fish tissue and bed-sediment samples from most streams in agricultural, urban, and mixed-land-use watersheds. According to USGS, the frequency of pesticide detections, especially those that have not been used in the United States for decades, suggests the persistence of pesticide impacts to the natural environment.

State water pollution control agencies have similarly identified a number of waterbodies that are currently contaminated by pesticides. For example, in the Environmental Protection Agency's (EPA) 2010 National Summary of State Information,<sup>2</sup> States have reported that approximately 16,599 miles of rivers and streams, 1,380 square miles of bays and estuaries, and 372,020 acres of lakes are currently impaired or threatened by pesticides—meaning that the particular waterbody fails to meet (or is threatened on) a particular use, such as a source of drinking water, fish, shellfish, and wildlife propagation, or recreation. In the State of California, alone, pesticides are listed as the number one source of water quality impairment in the state, with 312 specific waterbodies being impaired for 31 different categories of pesticides. EPA has also suggested that the number of State waterbodies currently impaired by pesticides may not reflect the actual number of impaired waters because states' do not test or regularly monitor for a significant number of common pesticides.

<sup>1</sup> See *Pesticides in the Nation's Streams and Ground Water, 1992–2001*. (<http://water.usgs.gov/nawqa/pnsp/>)

<sup>2</sup> See [http://iaspub.epa.gov/waters10/attains\\_nation\\_cy.control](http://iaspub.epa.gov/waters10/attains_nation_cy.control).

Pesticide detections in ground water are also common. According to USGS, pesticides and pesticide compounds were detected in the shallow ground water of agricultural areas (61 percent of samples), urban areas (55 percent of samples), and mixed-land-use areas (33 percent of samples). While the data suggests that surface waters are more vulnerable to pesticide contamination, USGS suggested that ground water contamination is also a concern because shallow ground water sources often are used as a source of drinking water (typically in rural or suburban areas) where such water is not treated before consumption, and because ground water contamination is difficult to reverse once it occurs.

According to USGS, other predictive factors for the presence of pesticides in surface and ground waters are the frequency of use of the pesticide and the relationship between land and pesticide use. According to the report, the most frequently detected herbicides used mainly for agriculture during the study period—atrazine, metolachlor, cyanazine, alachlor, and acetochlor—generally were detected most often and at the highest concentrations in water samples from streams in agricultural areas with their greatest use, particularly in the Corn Belt of the United States. Five herbicides commonly used in urban areas—simazine, prometon, tebuthiuron, 2,4-D, and diuron—and three commonly used insecticides—diazinon, chlorpyrifos, and carbaryl—were most frequently detected in urban streams throughout the Nation. Similarly, USGS samples also suggested a connection between seasonal use of pesticides, such as spring use of herbicides in the Corn Belt and fall/winter use of diazinon during the dormant period for San Joaquin Valley almond growers, and the occurrence of pesticide concentrations in stream water.

#### *Pesticides in Sources of Drinking Water*

According to EPA, the potential human health impacts of pesticide exposure depend on the type of pesticide, and the pathway, concentration, and duration of the exposure. According to the Agency, the potential human health implications can range from irritation of the skin and eyes, to impacts to the nervous system, to impacts during the gestation and adolescent development of children, to disruption of the hormone or endocrine system, to their potential as a human carcinogen.

One potentially significant source of human exposure to pesticides comes from consuming pesticide—contaminated drinking water. As noted earlier, USGS has frequently detected the presence of pesticides in streams and ground water throughout the nation. In a separate study, USGS found pesticides (and other man-made compounds) in the surface water sources for nine community water systems in nine separate States throughout the nation, serving communities ranging from 3,000 people to 2 million people.<sup>3</sup> Finally, according to the U.S. Department of Agriculture's Pesticide Data Program, pesticides were detected in 44 percent of all potable

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<sup>3</sup>See *Man-Made Organic Compounds in Source Water of Nine Community Water Systems that Withdraw from Streams, 2002–05*. (<http://pubs.usgs.gov/fs2008-3094.pdf>)

groundwater samples taken by the agency, as well as a number of public drinking water reservoirs and treated water supply.”<sup>4</sup>

While, in the majority of these cases, pesticide detection levels were below the currently-assessed human health benchmarks for those detected pesticides that have standards,<sup>5</sup> USGS has found a number of incidents where pesticide detection levels were above such benchmarks—where the greatest potential impact is to communities with the least resources to address these contaminants. Similarly, while the pesticide detection levels were often below the current human health benchmark, this does not address the equally troubling question of what are the potential human health implications of long-term, low-level exposure to pesticides, especially to the health of children, pregnant women, and the elderly.

In addition, USGS found widespread occurrences of pesticide “mixtures,” typically in streams, that may increase the toxicity of individual pesticides. According to the agency, the frequent detection of pesticide mixtures complicates questions on the potential risks to human health and the environment from exposure to pesticides (either individually or in combination) because little is known about them.

Additional studies have demonstrated that concentrations of pesticides (and other man-made compounds) are generally not affected by drinking water treatment facilities. According to USGS and EPA, drinking water treatment facilities are typically not designed to remove pesticides (and similar compounds) from drinking water. As a result, if pesticides are present in surface and ground waters that serve as a source of drinking water, it is likely that these pesticides will be detected in treated waters in the distribution system.

In our view, the combination of these factors—the frequency of pesticide detections in surface and ground waters, the fact that some detections exceed human health benchmarks (where there are appropriate benchmarks), the frequency and uncertainty created by pesticide “mixtures”, and the fact that modern drinking water treatment technologies are not designed to remove pesticides—compel us to move cautiously on any legislative proposal that would reduce options for minimizing the amount of pesticides being released into our nation’s waters.

#### FUNDAMENTAL DIFFERENCES BETWEEN THE CLEAN WATER ACT AND FIFRA

Over the past few years, there has been significant interest in the statutory and regulatory relationship between the Clean Water Act and FIFRA. Affected stakeholders, including the agricultural, silvicultural, fire-suppression, and pest-control communities, have expressed concern about how to reconcile the requirements of both FIFRA and the Clean Water Act when applying chemicals and pesticides directly onto or near waters of the United States.

<sup>4</sup>See U.S. Department of Agriculture, Pesticide Data Program—Progress Report 2008–2010. (<http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3002094>)

<sup>5</sup>According to the 2006 USGS report, only 47 of the 83 pesticides and degradates analyzed by USGS had drinking water standards (under the Safe Drinking Water Act) or human health guidelines developed by EPA’s Office of Water. EPA does not have an appropriate human health standard for a significant number of pesticides (and degradates) that are currently present in the nation’s surface and ground waters.

The goal of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. To that end, the Act provides that, except in compliance with a permit, the discharge of any pollutant from a point source into the waters of the United States, which includes wetlands, is unlawful. Under section 402 of the Act, EPA<sup>6</sup> or approved state agencies may issue permits that allow the discharge of pollutants into the waters of the United States<sup>7</sup> Under section 402(k) of the Act, any person who discharges a pollutant in compliance with a permit issued under the Act (including EPA's proposed pesticide general permit) is deemed in compliance with the Act, and is not subject to Federal enforcement action (under section 309) nor a citizen suit brought by a third party (under section 505).

For the past thirty years, however, pesticide use has been regulated under FIFRA, which was enacted to ensure that pesticides are safe, effective, and meet risk-benefit tests established by EPA to prevent *unreasonable adverse effects on human health and the environment* through their intended and approved use. Under FIFRA, EPA regulates the sale and use of pesticides through registration and labeling of the estimated 21,000 pesticide products currently in use. FIFRA prohibits the sale of any pesticide in the U.S. unless it is registered and labeled to indicate approved uses and restrictions. It is a violation of the law to use a pesticide in a manner that is inconsistent with the label instructions.

These two statutes, although complementary in certain respects, are not substitutes for one another or duplicative as some have argued. FIFRA and the Clean Water Act were enacted to achieve different objectives. Whereas the Clean Water Act was enacted to restore and maintain the integrity of U.S. waters, with a primary focus on the protection of water quality, FIFRA is primarily focused on ensuring that pesticides are regulated and uniformly labeled indicating approved uses and restrictions.

In protecting water quality, the Clean Water Act focuses on the characteristics of specific water bodies, addressing site-specific water quality impairments with individual plans tailored to meet particular use goals. In contrast, FIFRA focuses on uniform, national standards for pesticide registration and labeling, and does not take (and, based on information from EPA, traditionally has not taken) into consideration the potential localized impact from the discharge of chemicals into individual water bodies. In approving the use of pesticides under FIFRA, EPA is directed only to consider that the overall national economic benefits of allowing the use of the product outweigh adverse environmental effects. Under current FIFRA regulations, EPA does not warrant that compliance with a FIFRA label satisfies all other Federal laws, nor that the use of a particular product is appropriate in every situation.

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<sup>6</sup>For purposes of the draft Pesticide General Permit, EPA would be the regulatory authority in six states (AK, ID, MA, NH, NM, and OK). The remaining 44 states would implement their own regulatory authority; however, expectations are that most of these states would use the PGP as the model for State authority.

<sup>7</sup>The Clean Water Act provides the Administrator of EPA with the authority to issue general permits for certain discharges, such as the application of pesticides, provided that the discharges will have only a minimal adverse impact on the environment. In its proposed Pesticide General Permit (PGP), EPA has proposed using its general permit authority for the majority of applications of pesticides.

The fundamental distinction between the ability of these two Federal statutes to protect local water quality conditions was reiterated by the Ninth Circuit Court of Appeals, in the *Headwaters, Inc. v. Talent Irrigation District*<sup>8</sup> decision, which noted that the “label’s general rules for applying [a pesticide] must be observed under FIFRA, but where the [pesticide] will enter waters of the United States, FIFRA provides no method for analyzing the local impact,” nor does FIFRA provide for any “local monitoring” of potential impacts.

At the February 16, 2011 joint hearing on this issue, several witnesses alluded to the EPA’s risk assessment process undertaken during a pesticide registration process as evidence of FIFRA’s ability to protect human health, the environment, and water quality from the potential adverse impacts of pesticides. However, we continue to have questions about the adequacy of this risk assessment process to provide this protection based on several concerns.

First, as stated above, we are concerned that, despite the decades-long implementation of FIFRA pesticides continue to be detected in surface and ground waters throughout the nation. It would seem difficult to suggest that the thousands of miles of streams and hundreds of thousands of lake acres that are currently impaired by pesticides is proof that FIFRA is protective of water quality. Similarly, it is difficult to suggest that frequent detection of pesticides in the drinking water sources of millions of Americans is proof that FIFRA is protective of human health. However, that is the status quo success rate of FIFRA that H.R. 872 seeks to maintain.

Second, we recognize that EPA, in developing a draft pesticide general permit under the Clean Water Act, distinguished between the discharge of pesticides, generally, and the discharge of pesticides into a waterbody already impaired by pesticides. According to the Agency’s pesticide general permit, additional precautions and impacts-analysis is warranted where the intended discharge of a pesticide is into a pesticide-impaired waterbody. We are concerned, however, that under H.R. 872, no additional analysis or action would be required for the discharge of pesticides into a pesticide impaired waterbody, likely worsening water quality in a waterbody that already is experiencing degraded conditions or impacts to fish, shellfish, or wildlife.

Finally, we are concerned that the current FIFRA labeling process only subjects “active ingredients” to ecological risk assessment testing protocols. However, many registered pesticides are comprised of both “active” and “inert” ingredients; yet, the current FIFRA registration process does not subject a pesticide’s inert ingredients to the same risk assessment process as active ingredients. According to EPA’s published list of “Inert Ingredients Permitted for Use in Nonfood Use Pesticide Products,” the list of

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<sup>8</sup>243 F.3d 526, 529 (9th Cir. 2001).

“inert” ingredients includes chemicals, including benzene,<sup>9</sup> ethylbenzene,<sup>10</sup> styrene,<sup>11</sup> toluene,<sup>12</sup> and vinyl chloride.<sup>13</sup>

As EPA notes, a chemical’s characterization as “inert” does not mean “non-toxic.” In fact, many of the chemicals currently listed on EPA’s list of “inert” ingredients are also identified on the Clean Water Act’s “priority toxic pollutants” list, established by section 307 of the Act, as well as the list of “hazardous substances”, established under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Considering the potential public health and environmental implications from low-level exposure to these chemicals, we are concerned with the implications of subjecting the discharge of these chemicals, which are not subject to ecological risk assessment testing protocols in the pesticide registration process, into the nation’s waters with less scrutiny, as is proposed by H.R. 872.

#### EPA DRAFT PESTICIDE GENERAL PERMIT

In the more than 30 years that EPA has administered the Clean Water Act, the Agency has never issued a National Pollutant Discharge Elimination System (NPDES) permit for the application of a pesticide to target a pest that is present in or over, including near, the water where such application results in a discharge to waters of the United States. Instead, as mentioned above, for decades, EPA has been regulating these types of applications through FIFRA.

However, starting in 2001, several courts have held that the Clean Water Act requires the issuance of a permit for the application of pesticides to U.S. waters. In response to these cases, the Bush Administration issued a rule (“the 2006 Rule”) that excluded certain pesticide applications from Clean Water Act coverage. They were: (1) the application of pesticides directly to water to control pests; and (2) the application of pesticides to control pests that are present over, including near, water where a portion of the pesticides will unavoidably be deposited to the water to target the pests, and in both instances provided that the application is consistent with relevant FIFRA requirements.

In 2009, the 6th Circuit Court of Appeals in *National Cotton Council v. EPA*, vacated EPA’s 2006 Rule, and directed the Agency to require a NPDES permit for discharges of pesticides to U.S. wa-

<sup>9</sup>According to EPA’s National Primary Drinking Water Regulations, the potential health effects from long term exposure to benzene (above the maximum contaminant level (MCL)) include anemia, a decrease in blood platelets, and an increased risk of cancer. EPA has established a public health goal of zero for the presence of benzene in drinking water.

<sup>10</sup>According to EPA’s National Primary Drinking Water Regulations, the potential health effects from long term exposure to ethylbenzene (above the maximum contaminant level (MCL)) include liver, kidney, or circulatory system problems. EPA has established a public health goal of 0.7 mg/L<sup>2</sup> for the presence of ethylbenzene in drinking water.

<sup>11</sup>According to EPA’s National Primary Drinking Water Regulations, the potential health effects from long term exposure to styrene (above the maximum contaminant level (MCL)) include liver, kidney, or circulatory system problems. EPA has established a public health goal of 0.1 mg/L<sup>2</sup> for the presence of styrene in drinking water.

<sup>12</sup>According to EPA’s National Primary Drinking Water Regulations, the potential health effects from long term exposure to toluene (above the maximum contaminant level (MCL)) include nervous system, liver or kidney problems. EPA has established a public health goal of 1.0 mg/L<sup>2</sup> for the presence of toluene in drinking water.

<sup>13</sup>According to EPA’s National Primary Drinking Water Regulations, the potential health effects from long term exposure to vinyl chloride (above the maximum contaminant level (MCL)) include an increased risk of cancer. EPA has established a public health goal of zero for the presence of vinyl chloride in drinking water.

ters related to their application. In its ruling, the Court held that the Clean Water Act unambiguously prohibits the discharge of any pollutant (the definition of which includes “chemical wastes” and “biological materials”) into U.S. waters without a permit. The Court noted that, because pesticides are often comprised of biological materials or produce residual chemical wastes, they clearly fall within the Act’s definition of a pollutant, and therefore require a permit before they may be applied to U.S. waters.

In response to the *National Cotton* decision, EPA was compelled to develop a Clean Water Act permit for the discharge of pesticides to U.S. waters, and, in June 2010, proposed a draft NPDES Pesticide General Permit (PGP). Generally speaking, the draft PGP would provide Clean Water Act coverage to the majority of pesticide applicators for mosquito and other flying insect pest control; weed and algae pest control; animal pest control; and forest canopy pest control, provided that pesticide applications complied with the labeling requirements of FIFRA, and that certain high-volume pesticide applicators implemented “integrated pest management” techniques (IPM).<sup>14</sup> For a significant number of pesticide applicators, permit coverage under the draft PGP would be automatic, with only those applicators that exceed EPA’s use thresholds, being required to provide an additional “notice of intent” to obtain coverage under the permit. As noted earlier, any pesticide applicator who complies with the terms of the draft PGP (i.e., complies with the FIFRA labeling requirements, and implements, where applicable, the integrated pest management techniques) would be immune from Federal, State, or private lawsuit under the Clean Water Act.

EPA expects to release its final PGP in April 2011. However, on March 3, 2011, EPA requested an extension from the 6th Circuit Court of Appeals to allow more time for pesticide operators to obtain permits for pesticide discharges into U.S. waters. EPA requested that the deadline be extended from April 9, 2011 to October 31, 2011, and during this period, permits for pesticide applicators would not be required under the Clean Water Act. The EPA’s request for a stay was granted by the court, providing Congress with additional time to discuss the potential impacts of H.R. 872.

#### FAILURE TO FOLLOW THE RULES OF THE HOUSE AND THE COMMITTEE ON MINORITY WITNESSES

Our concern with this legislation have been amplified by a legislative process that has, to date, failed to provide the opportunity for a balanced debate on this issue and on the potential impacts of H.R. 872 to the protection of public health, the environment, and the water quality of the nation.

For example, at the February 16th joint hearing, the Ranking Member of the Subcommittee, Representative Timothy H. Bishop, requested two additional witnesses to discuss the potential implica-

<sup>14</sup>FIFRA defines IPM as a “sustainable approach to managing pests by combining biological, cultural, physical, and chemical tools in a way that minimizes economic, health, and environmental risks,” such as requiring all operators to minimize pesticide discharges by using the lowest effective amount of pesticide; performing regular equipment maintenance; calibrating, cleaning, and repairing equipment; and monitoring and reporting any adverse incidents. See 7 U.S.C. 136r-1. USDA estimates that some level of IPM had been implemented on about 70 percent of the nation’s crop acreage by the end of crop year 2000. See Agricultural Pesticides: Management Improvements Needed to Further Promote Integrated Pest Management (GAO-01-815 (2001)).

tions of a draft bill similar to H.R. 872. The first was the lead author of the 2006 USGS report describing the presence of pesticides in surface and ground waters. The second was the lead plaintiff in the *National Cotton Council* decision. Both witnesses would have provided the Members of the Subcommittees with critical information on the levels of pesticides in the current water-related environment, as well as on the benefits and drawbacks of addressing pesticide application under both FIFRA and the Clean Water Act. Unfortunately, neither was invited to testify.

By tradition of our Committee, the rule protecting the right of the minority to call witnesses has been honored by accommodating these witnesses on the same day as the majority witnesses. However, neither the tradition nor the letter and spirit of the rules were honored in this instance.

Unfortunately, the lack of opposing views on the witness panel has further hindered our ability to answer fundamental questions on this complicated issue that Members are struggling to understand—the potential benefits and drawbacks from regulating the discharge of pesticides into U.S. waters under either the FIFRA or the Clean Water Act.

#### CONCLUSION

We remain concerned with the potential adverse human health and environmental impacts caused by the presence of pesticides in our nation's surface waters, ground water, and drinking water sources. In our view, it is difficult to suggest that the continuing presence of pesticides, pesticide degradates, and pesticide mixtures in the nation's waters is evidence that the status quo regulatory structure is protective of human health and the environment.

In addition, although we share the concerns of the regulated community on the need to reduce needless regulatory duplication, at this time, it is not clear that the primary objectives of the Clean Water Act and FIFRA are duplicative. With respect to the specific issue of how to address localized adverse impacts of pesticides on water quality, the track-record of FIFRA implementation (and case law) suggest an inability to address localized impacts. Whether this requires additional authority under FIFRA or under the Clean Water Act is a valid point for debate; however, that is not the subject of the legislation before us today. All that is contemplated under H.R. 872 is to remove the one tool from the regulatory tool box; and not to augment the protection of surface waters, ground water, and drinking water sources under either statute.

For these reasons, we continue to have reservations with or are opposed to H.R. 872 in its current form. We recommend that Congress delay further action on this legislation until it has the critical information necessary to address how best to protect human health and the environment from the adverse impacts of pesticides.

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