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INSIDE

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IN FUTURE ISSUES

- Agricultural liens under Revised Article 9 of the U.C.C.

Agricultural storm water discharges

Changes in animal production in the United States have been accompanied by concerns about their waste byproducts and production practices. With the marked expansion of concentrated animal feeding operations (CAFOs), contamination of waters by animal manure has attracted the attention of the public. Environmental Protection Agency, *National pollution discharge elimination system permit regulation and effluent limitations guidelines and standards for concentrated animal feeding operations*; proposed rule, 66 Fed. Reg. 2960-3145 (January 12, 2001). The Environmental Protection Agency (EPA) responded to this issue with new final regulations for CAFOs effective on April 14, 2003. Environmental Protection Agency, *National pollutant discharge elimination system permit regulation and effluent limitations guidelines and standards for concentrated animal feeding operations*, 68 Fed. Reg. 7176-7274 (Feb. 12, 2003)(to be codified at 40 Code of Federal Regulations, parts 122 and 412 (effective Apr. 14, 2003))(EPA CAFO Regulations).

Under the federal Clean Water Act, CAFOs are listed as point sources of pollutants. 30 U.S.C.A. § 1362(14). CAFOs are defined by federal regulations as AFOs that have additional characteristics concerning number of animals at a single facility and discharges of pollutants. EPA CAFO Regulations, *supra*, at 7265-66 (40 C.F.R. § 122.23). AFOs that are not CAFOs are not regulated under the Clean Water Act's permitting provisions. The Act also contains an exclusion for agricultural storm water discharges (30 U.S.C.A. § 1362(14)) which has facilitated the continued use of established agronomic practices.

However, the agricultural storm water exclusion has been controversial in the drafting of regulations governing CAFOs. Producers have maintained that this longstanding regulatory exemption means that runoff from the application of manure cannot be regulated under the CAFO regulations. EPA CAFO Regulations, *supra*, at 7196. Rather, producers have argued that nonpoint-source water pollution regulations govern the application of manure.

The EPA maintains that the regulation of runoff from the land application of manure from CAFOs is a significant point-source pollutant concern. *Id*. Therefore, the new regulations include explicit provisions governing discharges from the land application of manure from CAFOs. Id. At 7267-68 (to be codified at 40 C.F.R. section 122.23(e)). The revised regulations distinguish unpermitted impairment of water quality from permitted discharges under the agricultural storm water discharge exclusion.

Agricultural storm water discharges can occur due to a rainfall event when manure is

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Crop insurers required to exhaust administrative remedies

In an action involving a crop insurance dispute between several sugar beet growers and their insurers in which the insurers filed a third-party complaint against the Federal Crop Insurance Corporation ("FCIC") and the FCIC filed a motion to dismiss the third-party complaint, the United States District Court for the District of Minnesota has ruled that it lacked jurisdiction to consider the FCIC's motion to dismiss. *In re 2000 Sugar Beet Crop Ins. Litigation 2002*, 228 F.Supp.2d 999, 1001 (2002). The district court ruled that it lacked jurisdiction because the insurers were required to exhaust their administrative remedies before the matter could be judicially reviewed. *See id.* at 1003-07.

The plaintiffs were sugar beet growers who purchased multi-peril crop insurance policies from several crop insurance companies to cover their crops for the 2000 growing season. *See id.* at 1001. The growers submitted claims to the insurers after their crops were damaged by frost. *See id.* The insurers denied the growers' claims and the growers brought a state court action against them seeking coverage under their policies. *See id.* The insurers removed the matter to federal court and filed a third-party complaint against the FCIC. *See id.* They asserted in the third-party complaint that they had no obligation to the growers and that "liability should be borne instead by the FCIC." *Id.* The

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applied in accordance with site-specific nutrient management practices. In this situation, the producer applies the manure, litter, or process wastewater in a manner to ensure appropriate agricultural utilization of the nutrients so that the application is intended as a production input. Discharges from such applications continue to be excluded from point-source pollution controls by the agricultural storm water discharge exclusion. *Id*.

However, discharges that can arise from a CAFO's land application area because manure, litter, or process wastewater were not applied in accordance with site-specific nutrient management practices to ensure appropriate agricultural utilization of the nutrients regulated. These discharges are not agricultural storm water discharges and thereby are subject to CAFO limitations. *Id*. At 7197-98. Only discharges that occur despite the use of site-specific management practices to ensure appropriate agricultural utilization of the nutrients in manure, litter, and process wastewater are excused by the agricultural storm water discharge exclusion.

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FCIC responded by filing a motion to dismiss the third-party complaint. *See id.*

The insurers claimed that a bulletin issued by the Risk Management Agency ("RMA") on March 2, 2001, "altered the terms of the insurance and reinsurance agreements, thereby relieving the companies of any liability for the farmers' loss." *Id.* This bulletin addressed "'[w]hether 2000 crop year sugar beets affected by drought, freeze, or other insurable causes during the insurance period that later manifested damage after being delivered to the processor are insurable.'" *Id.* (citation omitted). The bulletin provided, in part, that:

> RMA believes that the type of losses experienced by the Minnesota producers in the above listed counties were contemplated under the Sugar Beet Crop Insurance Provisions when RMA elected to cover freeze as a cause of loss. Sugar beet experts assert that freeze damage did not manifest itself until after the end of the insurance period and following delivery of the affected sugar beets to the processor. In this case, RMA will reinsure any such 2000 crop year sugar beet losses that the reinsured companies elect to pay in those effected counties. RMA notes that it is solely the reinsured company's decision with respect to payment of these claims. RMA does not in any manner direct or obligate reinsured companies to pay these claims.

Id. at 1001-02.

The FCIC requested that the district court dismiss the third-party complaint for lack of jurisdiction because "the insurance companies failed to exhaust their administrative remedies, thereby barring federal jurisdiction, or alternatively limiting judicial consideration of the third-party claims." *Id.* at 1002. The district court ruled that it lacked jurisdiction to consider the FCIC's motion to dismiss because the insurance companies were required to exhaust their administrative remedies before the matter could be submitted for judicial review. *See id*.

The court stated that because federal courts are courts of limited jurisdiction, "the requirement that jurisdiction be established as a threshold matter is inflexible and without exception." *Id.* (citation omitted). It also stated that "[w]hen required by Congress, failure to exhaust administrative remedies bars federal jurisdiction." *Id.* (citation omitted). The court explained that the exhaustion requirement makes certain that courts "receive the fullest benefit of administrative review, avoiding 'premature interruption of the administrative process,' promoting deference to agency discretion, and allowing the agency to 'develop the necessary factual background.'" *Id.* at 1002-03 (citation omitted). It added that:

> Congressional intent is paramount when considering whether exhaustion is jurisdictional. "Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs." When Congress has adopted a statutory provision, the Court cannot waive exhaustion. Conversely, where Congress has not enacted an explicit requirement, a court may not create one.

Id. (internal citations omitted).

The court explained that 7 U.S.C. § 6912(e) explicitly requires that administrative remedies be exhausted before an action can be brought against the USDA or any of its agencies, such as the FCIC. *See id.* at 1003. Section 6912(e) provides that "a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against . . . an agency . . . of the Department." *Id.* The district court noted that although the Eighth Circuit had not previously considered whether § 6912(e) is jurisdictional, several other courts had considered the issue. *See id.*

In *Bastek v. Federal Crop Insurance Corp.*, 145 F.3d 90 (2d Cir. 1998), the Second Circuit ruled that the section 6912(e) exhaustion requirement was "unambiguous, and therefore jurisdictional." *Id.* (citing *Bastek*, 145 F.3d at 95) (additional citations omitted). The Second Circuit stated that it "harbored 'little doubt that Congress's intent, in enacting this statute, was to require plaintiffs to exhaust all administrative remedies before bringing suit in federal court.'" *Id.* at 1003-04 (quoting *Bastek*, 145 F.3d at 95). However, in *McBride Cotton and Cattle Corp. v. Veneman*, 290 F.3d 973 (9th Cir. 2002), the Ninth Circuit ruled that "'failure to exhaust does not deprive a federal court of jurisdiction when the exhaustion statute is merely codification of the exhaustion requirement,' and lacks 'sweeping and direct language' requiring exhaustion." *Id.* at 1004 (quoting *McBride*, 290 F.3d at 978).

In the present case, the district court adopted the reasoning in *Bastek*, stating that *Bastek* was "most consistent with the Eighth Circuit's approach to exhaustion, as seen in other administrative law cases, and more consonant with the Supreme Court's decision in *Weinberger v. Salfi*, 422 U.S. 749, 757 (1975)." *Id.* (citations omitted). In *Chellete v. Harris*, 229 F.3d 684 (8th Cir. 2000), the Eighth Circuit ruled that the exhaustion requirement contained in the Prison Litigation Reform Act was "not jurisdictional because its language is indirect and a general codification." *Id.* The exhaustion requirement at issue in *Chellete* stated that "'no action shall be brought . . . until such administrative remedies as are available are exhausted ....'" *Id*. In *Weinberger*, the Supreme Court required that there be "clear language expressing jurisdictional nature of exhaustion require-

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ment." *Id.*

In the present case the court concluded that:

> In enacting 7 U.S.C. § 6912(e) . . . Congress made exhaustion an affirmative requirement, providing that "a person shall exhaust" administrative remedies before initiating litigation against the FCIC. "[W]hen Congress enacted section 6912(e), it did so against the backdrop of principles of collateral estoppel, res judicata, and administrative estoppel." A waiver of exhaustion would divest the USDA of its prerogative to review determinations and pronouncements prior to judicial action. It would remove the FCIC's ability to create a factual record, and render the agency's crop insurance expertise moot. Under these conditions, this Court finds the requirement jurisdictional.

Id. (internal citations omitted).

The court next examined whether the insurers were required to exhaust the administrative appeal process outlined in 7 C.F.R. section 400.169. *See id.* The court explained that section 400.169 "require[s] that an insurance company appeal any dispute concerning whether an FCIC Bulletin explains, restricts or interprets the [Standard Reinsurance Agreement] to the Board of Contract Appeals." *Id.* at 1005. The district court stated that it "'must give substantial deference to an agency's interpretation of its own regulations'" unless that interpretation is "'plainly erroneous or inconsistent with the regulations.'" *Id.* (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)).

The court noted that "[i]n 1997, the USDA Board of Contract Appeals considered an appeal under an earlier version of 7 C.F.R. § 400.169, in a case involving application of the exhaustion regulation to an FCIC Manager's Bulletin." *Id.* (citing *Rain & Hail Ins. Serv., Inc.*, AGCBA No. 97-143-F (1997)). In the present case, the insurers asserted that *Rain and Hail* involved an appeal "of any directive that might '*affect*, interpret, explain or restrict" the terms of the reinsurance agreement. *Id.* (citation omitted) (emphasis supplied). After *Rain and Hail* was decided, however,section 400.169 was modified by removing the word "affect" from the regulation's language. *See id.* (citation omitted). The insurers argued that this modification removes the Board of Contract Appeals's jurisdiction over appeals involving Manager's Bulletins because the decision in *Rain and Hail* caused the regulation to be amended. *See id.*

The district court rejected this argument, stating that there was "no basis upon which to read more into the modification than the regulation's language requires. [Section 400.169] restricts the terms of the reinsurance agreement; as such, it is covered by the exhaustion requirement." *Id.*

The court noted that the Eighth Circuit has recognized three limited exceptions to the requirement that a party exhaust its administrative remedies before it can seek judicial review. *See id.* at 1006. The court stated that these exceptions occur "where the litigant '(1) raises a colorable constitutional claim collateral to his substantive claim of entitlement; (2) shows the irreparable harm would result from exhaustion; and (3) shows that the purposes of exhaustion would not be served by requiring further administrative procedures.'" *Id.* (quoting *Anderson v. Sullivan*, 959 F.2d 690, 693 (8th Cir. 1992)). In this case, the insurers did not assert a constitutional claim nor assert that the Board of Contract Appeals' consideration of the Manager's Bulletin "would be inimical to the purposes of exhaustion." *Id.* Rather, the insurers only argued that exhaustion would waste judicial resources. *See id.*

The court stated that "Congress imposed the exhaustion requirement 'to provide the Secretary of Agriculture with the necessary authority to streamline and reorganize the Department of Agriculture to achieve greater efficiency, effectiveness, and economics in the organization and management of the programs and activities carried out by the Department." *Id.* at 1006-07 (citing 7 U.S.C. § 6901). It also stated that "[e]xhaustion promotes judicial economy by 'avoiding needless repetition of administrative and judicial factfinding, and by perhaps avoiding the necessity of any judicial involvement at all, if the parties successfully vindicate their claims before the agency.'" *Id.* (citation omitted). The court ruled that the insurers' desire to save judicial resources provided "no basis on which to reject Congress's explicit exhaustion requirement." *Id.*

The district court concluded that the insurers' failure to comply with the exhaustion requirement deprived it of jurisdiction, and that it was therefore "without power to consider third-party defendants' motion to dismiss for failure to state a claim." *Id.* Thus, it granted the FCIC's motion to dismiss. *See id.*

—Patricia Farnese, Graduate Fellow

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Fraud found in connection with marketing of hedge-to-arrive contracts in Ohio

Numerous types of forward contracts are offered in the cash grain market. Forward contracts permit a grain producer to market grain before it is harvested and even before planting the crop. During the 1990s, so-called hedge-to-arrive forward contracts contained pricing formulas that referenced pricing movements on a federally regulated futures market such as the Chicago Board of Trade. Many of these contracts were negatively affected by price movements during the 1995/96 grain marketing year. This resulted in numerous contract disputes, lawsuits and arbitrations throughout Ohio and other grain production states.

The federal Commodity Futures Trading Commission (CFTC) on November 13, 1996, filed three separate administrative complaints related to hedge-to-arrive contracts that the agency contended violated the Commodity Exchange Act. One of the cases alleged fraud in the marketing of the contracts by an Ohio-based individual, along with charging an Ohio agricultural cooperative and others with related violations of the Commodity Exchange Act. The CFTC administrative law judge on February 25, 2003, issued his findings. The CFTC's summary is set forth below.

In the Matter of Roger J. Wright d/b/a Agricultural Marketing Service d/b/a Micah I Investment Club, Buckeye Countrymark, Inc., Philip L. Luxenburger and A.G. Edwards & Sons, Inc., and respondent Fifth Third Bank. This Initial Decision began with a nine-count complaint and involved claims of offering illegal futures and options contracts, fraud, failures to register, failures to make and keep necessary records, and aiding and abetting. After a careful review of the record it was determined that the Division of Enforcement had succeeded in proving that Roger J. Wright had committed fraud in violation of the Commodity Exchange Act. In addition, it was determined that Wright's futures commission merchant, A.G. Edwards & Sons, Inc., had failed to comply with a Commission requirement to create and keep records concerning the trading control that Wright exercised over the records of others. As a result, it was ordered that respondent Roger J. Wright cease and desist from violating the Com-

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Ninth Circuit decision poses new hurdles to pesticide applications

In early November of last year, the Ninth Circuit Court of Appeals issued a decision preventing the Forest Service from protecting over 600,000 acres of national forest land in Oregon and Washington from infestation by the Douglas Fir Tussock Moth. In its decision in *League of Wilderness Defenders/Blue Mountain Diversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002), the court held that the Forest Service could not spray pesticides for moth control without first acquiring an NPDES permit under the Clean Water Act. *Id.* at 1183. While the decision did not address farming practices, the *Forsgren* case is potentially significant to production agriculture as its reasoning could be found equally applicable to spraying chemicals on crops.

Given the decision's broadsweeping implications, the government filed a petition for rehearing in January. Several industry advocates, including the American Farm Bureau Federation, CropLife America, the Aquatic Pesticides Coalition, and Oregonians for Food and Shelter, joined the American Forest and Paper Association and American Forest Resources Council in filing an amicus brief in support of the government's request. On March 14, 2003, the court denied rehearing. With ninety days to seek review by the Supreme Court, the government is not expected to take further action— leaving mainstream production practices in Western states vulnerable to challenge.

Background

Nearly three decades ago, the Tussock Moth defoliated a substantial amount of forest land in Oregon, Washington, and Idaho. *Id.* Following that outbreak, the Forest Service developed an early warning system to predict future outbreaks. *Id.* In response to this detection mechanism, the Forest Service predicted an outbreak in 2000, 2001, and 2002, and designed an aerial spraying program to minimize pest damage to scenic areas, critical habitat, and areas containing agency improvements such as seed orchards. *Id.*

When the Forest Service started to implement its program, the League of Wilderness along with seven other environmental groups (hereinafter "Environmental Groups") filed suit in district court challenging the Forest Service's actions. *Id.* at 1182. Specifically, they asserted that the Forest Service failed to obtain an NPDES permit, which they argued was required for this type of aerial spraying. *Id.* In addition, they contended that the Environmental Impact Statement ("EIS") prepared by the Forest Service was inadequate. *Id.*

The district court granted summary judgment in favor of the Forest Service on the NPDES and EIS claims. *Id.* The Environmental Groups then filed an appeal on both issues. *Id.* There, the Ninth Circuit reversed the decision and remanded the case with instructions to the district court to enter an injunction prohibiting the Forest Service from conducting further spraying until it obtains an NPDES permit and completes a revised EIS. *Id.* at 1183.

Analysis

NPDES claim

Definition of point source pollution

In reversing the lower court, the Ninth Circuit began with the question of whether the Forest Service activity of spraying insecticide from an aircraft is classified as point source pollution. *Id.* at 1184. If the spraying is defined as point source pollution, the government must obtain an NPDES permit. *Id.* If the activity is characterized as non-point source pollution, then no permit is required. *Id.*

On this issue, the Forest Service argued that its spraying should be classified as non-point source pollution whereas the Environmental Groups asserted that such activity should be classified as point source pollution. *Id.* In resolving this matter, the court first laid out the definitions set forth in the Clean Water Act. *Id.* Under section 402 of that law, the "discharge of any pollutant" requires an NPDES permit. *Id.* (citing 33 U.S.C. §§ 1311(a), 1323(a)).

The term "discharge of any pollutant" is defined as: "any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 309 F.3d at 1184 (quoting 33 U.S.C. § 1362(12)). "Pollutant" means: "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…" 309 F.3d at 1184 (quoting 33 U.S.C. § 1362(6)). And, the Act defines "point source" as: "any discernable, 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." 309 F.3d at 1184 (quoting 33 U.S.C. § 1362(14)).

With little discussion, the court concluded from these definitions that the aerial application of insecticides over rivers and streams running through the area being sprayed by the Forest Service in this case constituted the discharge of a pollutant to those waters from a point source. 309 F.3d at 1185. In so doing, the court stated that the insecticides at issue met the definition of "pollutant" under the statute.[1] *Id.* The Forest Service aircraft spray these chemicals directly into rivers, which the parties agreed are "navigable waters" subject to the Clean Water Act. *Id.* Finally, the court declared, with no explanation, that an airplane fitted with tanks and mechanical spraying apparatus is a "discrete conveyance." *Id.* Thus, each of the elements of point source pollution were met. *Id.*

EPA regulation defining silvicultural point sources

Notwithstanding the statutory definition of a point source, the Forest Service contended that its spraying activities were excluded from any NPDES requirements by 40 C.F.R. § 122.27. *Id.* There, the Environmental Protection Agency ("EPA") defines silvicultural point sources as:

> 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 cultivation 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(b)). Relying on this definition, the Forest Service asserted that its aerial spraying was not subject to permitting for two reasons.

First, the agency argued that aerial spraying is a silvicultural pest control activity and that the regulation excludes pollution arising from silvicultural pest control activities from NPDES permit requirements by defining such pollution as non-point source. 309 F.3d at 1185. In rejecting this argument, the court first stated that the clean water statute is clear and unambiguous on the definition of a point source. *Id.* The statutory definition of a point source, "any discernable, confined and discrete conveyance, including but not limited to any. .. vessel," clearly encompasses an aircraft equipped with tanks spraying pesticide from mechanical sprayers directly over covered waters. *Id.* (quoting 33 U.S.C. § 1362(14)). Thus, under the Supreme Court's holding in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Forest Service cannot read an administra-

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tive regulation in a manner that contravenes clear Congressional intent. 309 F.3d at 1186.

The court then disputed the Forest Service's reading of the regulation as a blanket exclusion for all silvicultural pest control activities. *Id.* In applying the rule, the Forest Service maintained that the modifying phrase "from which there is natural runoff" applies only to "road construction and maintenance," the last term in the list of activities named as non-point sources of pollution, and does not reach back to qualify pest control. *Id.* Under this reading all silvicultural pest control activities, including aerial spraying for Tussock Moth, are exempt from NPDES permitting requirements. By contrast, the court concluded that the final modifying phrase applies to all of the listed activities in the sentence. *Id.* Therefore, silvicultural pest control activity is exempt only where it involves natural runoff. *Id.* at 1186-87. Because discharging pesticides from an airplane, the spraying at issue in this case, has nothing to do with runoff, the court held that the regulation was inapplicable. *Id.* at 1187.

Second, the Forest Service contended that the first sentence of the regulation limits point sources to only the four listed point source activities: "Silvicultural point source means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting or log storage." *Id.* (quoting 40 C.F.R. § 122.27). In support of this reading, the Forest Service relied on a paragraph in the Federal Register that appeared with publication of the regulation: "only discharges from four activities related to silvicultural enterprises, rock crushing, gravel washing, log sorting and log storage facilities, are considered point sources and thus subject to the NPDES permit program." 309 F.3d at 1187 (quoting 41 Fed. Reg. 24710 (June 18, 1976)).

The court rejected this argument concluding that its reading of the entire text of the Federal Register notice revealed that at the time the regulation was promulgated only these four activities had previously been identified as point source activities associated with silviculture. 309 F.3d at 1187. The regulation's explanation set forth the general criteria applicable to silviculture for identifying point and non-point sources. *Id.* There would be no reason to announce the criteria for identifying point sources if the narrow list of four activities were intended to be exhaustive. *Id.* at 1188. Further, the court noted that the explanation included a justification for listing the four activities. *Id.* The point of listing the four activities was to ensure that they continued to be subject to permit requirements after the new criteria for identifying point and non-point sources took effect, not to exclude all other silvicultural activities from NPDES permit requirements. *Id.*

EPA authority

Lastly, the court concluded that even if EPA tried to define pesticide applications as non-point source pollution, the agency would lack the statutory authority to do so. *Id.* at 1190. While EPA has some power to define point and non-point pollution where there is room for reasonable interpretation of the statutory definition, the agency may not exempt from NPDES permit requirements that which clearly meets the statutory definition of a point source by defining it as a non-point source. *Id.* Because the court determined the pesticide application in this case clearly met the statutory definition of a "discharge of a pollutant," it concluded that EPA may not adopt a more narrow interpretation to exempt the source from permitting requirements. Accordingly, the Forest Service must obtain an NPDES permit before resuming its spraying activities. *Id.*

EIS claim

Under the National Environmental Policy Act, the Forest Service is required to conduct an EIS to disclose all foreseeable direct and indirect impacts of its activities on the human environment. *Id.* at 1191. Case law has interpreted this requirement to mean that agencies must adequately consider a project's potential impacts and that the consideration given must amount to a "hard look" at the environmental effects of the government's activity. *Id.* (citing *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360 (1989)).

Here, the Forest Service prepared an EIS to identify and analyze the potential impacts of its aerial spraying project. The EIS adequately identified and analyzed the potential impacts within the geographic area that was targeted for spraying. 309 F.3d at 1191. However, the Environmental Groups asserted the analysis failed to consider the impacts of the drift of pesticide into areas outside the target spray area. *Id.*

After reviewing the EIS, the court concluded that the Forest Service's documentation was deficient. *Id.* at 1192. Specifically, the EIS did not consider how far pesticide might drift, in what direction the drift might carry or the effect of spraying or not spraying at different wind speeds. *Id.* With these deficiencies, the court ruled that the Forest Service's efforts did not measure up to a "hard look" that would ensure the environmental consequences of the aerial spraying project had been fairly evaluated. *Id.* Therefore, the Forest Service may not engage in further spraying activity without first supplementing the EIS. *Id.* at 1193.

Implications

In a December 2002 letter to Attorney General Ashcroft asking the government to seek rehearing of the Ninth Circuit's decision, a coalition of agricultural interests[2] described the ruling in *Forsgren* as "disturbing" for several reasons. According to the Department of Agriculture, nearly twenty-five percent of all commercial agricultural pesticide applications are made via aerial application. Additional restrictions on such applications from the court's decision could have a profound impact on industry's ability to successfully control and manage numerous pests including gypsy moths in forests and communities in the eastern United States, boll weevils in cotton fields, a wide variety of pests found in orchards and other fruit crops, and fire ants and noxious weeds in pastures and rangeland. Moreover, the ruling's effect may limit aerial spraying for mosquitoes to prevent the spread of West Nile diseaseand other serious threats to public health and safety.

Beyond these important considerations, industry is concerned that *Forsgren* will place an "unjustifiable" and "unreasonable" burden on ground application of pesticides. Should a court find the Ninth Circuit's logic persuasive, the user community and government would be saddled with an unprecedented level of bureaucracy if every aerial and ground application in the country requires an NPDES permit. Further, the ruling could make users and applicators subject to even more litigation under the Clean Water Act citizen suit provisions or penalties from EPA enforcement.

Similarly, in its petition for rehearing, the government argued that the *Forsgren* decision sets aside the interpretation and regulation adopted by EPA and other federal courts, and relied on by the regulated community during the 25-year history of the rule. Government Petition at 7. In addition, the government expressed concern that the decision could be read to subject a wide range of activities to the NPDES permit process. *Id.* One example of obvious concern is fire control. Consider the Forest Service which is often unable to predict forest fires long in advance. With its critical need to be able to respond quickly to an incident, the Forest Service may be significantly hampered in its ability to protect human health and the environment by an NPDES permit requirement. *Id.* Such a requirement would be particularly burdensome in the context of fire or pest outbreaks because pests and wildfire generally cross jurisdictional lines, and the Forest Service or other similarly-situated entities would be required to seek NPDES permits from the agency authorized to administer the NPDES program within each of the rel-

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Pesticide applications/Cont. from page 5
evant jurisdictions. *Id.*

Despite the importance of these potential implications, the Ninth Circuit denied the government's request to reconsider its decision last month. With the likelihood of a petition by the government for review of the decision by the Supreme Court growing increasingly dim, it is important to consider where the *Forsgren* decision fits with earlier precedent.

The Ninth Circuit has previously addressed the issue of NPDES permitting requirements for pesticide applications in *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001). There, the defendant irrigation district was applying an herbicide directly into the waters of irrigation canals in a manner consistent with the label approved by EPA under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") but without obtaining an NPDES permit under the Clean Water Act. 243 F.3d at 529. In holding that compliance with FIFRA did not eliminate the irrigation district's obligation to obtain an NPDES permit, the court stated that a FIFRA label and an NPDES permit serve entirely different purposes— the label establishes nationwide use requirements while the permit focuses on the condition of the water, providing for monitoring of the local environmental quality. *Id.* at 531.

It then concluded that application of herbicide in irrigation canals to control the growth of aquatic weeds and vegetation constitutes a discharge of pollutant from a point source subject to regulation through an NPDES permit. *Id.* at 532. In this case, the irrigation district was applying the herbicide into the canals through a hose that the parties agreed was a point source. *Id.* The court determined that the irrigation canals were "tributaries" of waters of the United States because they receive water from, and return it to, such waters. *Id.* at 534. Lastly, the court held that the herbicide constituted a pollutant because the residual product left from its active ingredient qualified as a "chemical waste" product included in the definition of a pollutant under the clean water statute. *Id.* at 533. With the elements of a point source discharge established, the court ruled that the irrigation district was in violation of the Clean Water Act for failure to obtain a permit. *Id.* at 534.

By contrast, courts in the Second Circuit have addressed pesticide spraying with mixed results. In *No Spray Coalition v. City of New York*, 2000 U.S. Dist. LEXIS 1319 (S.D.N.Y. 2000), the U.S. District Court for the Southern District of New York rejected a claim that a mosquito spraying program to control the West Nile virus required an NPDES permit. There, the court stated: "It would be stretching the language of the statute well beyond the intent of Congress to hold that the *de minimus* incidental drift over navigable waters of a pesticide is a discharge from a point source into those waters. 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 Clean Water Act." 2000 U.S. Dist. LEXIS 1319 at 10.

In a second case, however, the Second Circuit reached a different conclusion on the question of whether pesticides applied for mosquito control over federal wetland areas without a permit violated the clean water statute. *Altman v. Town of Amherst*, 2002 U.S. App. LEXIS 20498 (2d Cir. September 26, 2002). In that case, the court held that the plaintiff citizens filing the appeal had been entitled to discovery before the district court resolved a number of issues. The court remanded the case with instructions for the lower court to allow discovery and to consider, among other things, whether the spraying constituted a "deliberate discharge" of pollutants into waters of the United States, whether the pesticides applied were "pollutants" under the statute given the circumstances in which they were applied, and the persuasiveness of the *Talent* decision described above. *Id.* at 15-16.

Finally, the Eighth Circuit addressed this question in a 1998 decision, *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803 (8th Cir. 1998). There, the court affirmed summary judgment in favor of the Forest Service against a variety of challenges to four timber sales in the Ozark National Forest. In so doing, the court took a very different reading of 40 C.F.R. § 122.27 than the *Forsgren* Court. Reading the regulation broadly, the court stated: "EPA regulations do not include the logging and road building activities cited by the Wildlife Association in the narrow list of silvicultural activities that are point sources requiring NPDES permits." *Id.* at 810.

The differences in opinion by these courts on the question of NPDES permitting requirements for pesticide applications provides a strong basis to argue that the Supreme Court ought to address this issue. If and when that challenge arises, it is far from certain what the outcome will be. However, because there is little obvious difference for purposes of the Clean Water Act between spraying pesticides from an airplane over forests or communities for pest control and applying chemicals onto crops from a ground spray apparatus, the ultimate fate of the *Forsgren* decision and subsequent cases merits close attention.

[1] In footnote 2, the Court stated that the parties did not dispute that the insecticides in this case met the definition of a pollutant under 33 U.S.C. § 1362(6). This is significant in that the question of whether a pesticide constitutes "chemical waste" for purposes of the definition of pollutant has become a dispositive issue in several appellate court decisions. *See Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 532-33 (9th Cir. 2001); *Altman v. Town of Amherst*, 2002 U.S. App. LEXIS 20498 at 15 (2d Cir. September 26, 2002). In its petition for rehearing, the government in this case argued that the Ninth Circuit was wrong in its assertion of agreement between the parties as the Forest Service had specifically reserved the issue of whether the insecticides associated with controlling the Tussock Moth were pollutants in its motion for summary judgment before the district court. Petition for Rehearing and Suggestion for Rehearing En Banc of the United States, *League of Wilderness Defenders/Blue Mountain Diversity Project v. Forsgren*, No. 01-35729 at 17 (D. Ore., Jan. 21, 2003) (hereinafter "Government Petition").

[2] Groups signing the letter included: Agricultural Retailers Association, American Farm Bureau Federation, American Forest & Paper Association, American Forest Resources Council, American Nursery & Landscape Association, National Agricultural Aviation Association, National Corn Growers Association, National Potato Council, US Apple Association, National Cotton Council.

Fraud/Cont. from p. 3.
modity Exchange Act and Commission regulations; respondent A.G. Edwards & Sons, Inc., cease and desist from violating Commission rule 1.37(a); respondent Roger J. Wright be permanently prohibited, directly or indirectly, from trading on or subject to the rules of any contract market, either for his own account or for the account of any persons, interest or equity, and all contract markets were permanently required to refuse Roger J. Wright any trading privileges; respondent Roger J. Wright pay a civil monetary penalty of $500,000 within 30 days of the effective date of this order; and respondent A.G. Edwards & Sons, Inc. pay a civil monetary penalty of $20,000 within 30 days of the effective date of this order. Administrative Law Judge, Bruce C. Levine. CFTC Docket No. 97-2

—David C. Barrett, Jr., Dublin, OH

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Cash rent not income from farming operation

The United States Bankruptcy Court for the Central District of Illinois has ruled that a farmer who received cash rent "up front and in full" from a lease of farm ground was ineligible for Chapter 12 bankruptcy relief. *In re Swanson*, 289 B.R. 372, 372-75 (C.D. Ill. 2003). The bankruptcy court determined that the cash rent was not income derived from a farming operation and therefore the farmer did not earn more than fifty percent of his gross income from a farming operation, as required to be a "family farmer" eligible for Chapter 12 bankruptcy relief. *See id.* at 372-75.

To be eligible for Chapter 12 a debtor must be a "family farmer with regular income." *Id.* at 373. (citing 11 U.S.C. § 109(f)). A "family farmer" is defined as an:

> (A) individual or individual and spouse engaged in a farming operation whose aggregate debts do not exceed $1,500,000 and not less than 80 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse unlesss such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income for the taxable year preceding the taxable year in which the case concerning such individual or such individual and spouse was filed.

Id. (quoting 11 U.S.C. § 101(18)).

A "farming operation" is defined as including "'farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state.'" *Id.* (quoting 11 U.S.C. § 101(21)).

Paul R. Swanson, Sr., was an Illinois farmer who filed a Chapter 12 bankruptcy petition in 2002. *See id.* His gross income for 2001 was itemized as (1) $39,750.00 from cash that he received for a lease on his farm property; (2) $36,454.00 from a one-half interest in proceeds derived from the sale of hogs, cattle, and grain; (3) $219.00 from income earned derived from interest on other funds; (4) $7,992.00 from social security payments; and (5) approximately $2,000.00 from wages earned from an off-farm job. *See id.* The debtor sought to have his bankruptcy plan confirmed and one of his creditors, the Union/Central Bank ("Bank"), filed motions seeking relief from the bankruptcy stay, dismissal of the debtor's Chapter 12 case, and that the debtor show cause for denying the Bank's appraiser access to the farm property. *See id.* at 372-73. The bankruptcy court ruled that the debtor was not eligible for Chapter 12 relief because he was not a "family farmer" with regular annual income and granted the Bank's motion to dismiss. *See id.*

The bankruptcy court noted that there was no dispute that the $36,454.00 derived from the sale of livestock and grain was income derived from a farming operation, and that the income from social security payments, wages from the debtor's off-farm job, and interest payments were not derived from a farming operation. *See id.* Therefore, the court explained, the debtor's "eligibility for Chapter 12 turns on whether the cash rent is or is not income received from a farming operation." *Id.* Thus, the only issue before the bankruptcy court was whether the $39,750.00 of cash rent received from the annual lease of the debtor's farm real estate was income received from a farming operation. *See id.*

In *In re Armstrong*, 812 F.2d 1024 (7th Cir. 1987), the Seventh Circuit was faced with the issue of "whether the debtor was a 'farmer' who, by virtue of that status, could not be forced into bankruptcy via an involuntary petition . . . ." *Id.* at 374. In *Armstrong*, the debtor received money derived from a land lease in which the tenant tendered payment "'in cash and up front." *Id.* The Seventh Circuit ruled that because the payment was "'in cash and up front'" the debtor did not have the normal risks associated with crop production, and therefore "he did not meet the definition of farmer and could be subject to an involuntary filing." *Id.*

In *In re Seabloom*, 78 B.R. 543 (Bankr.C.D.Ill. 1987), a debtor tried to distinguish his cash rental payment from the *Armstrong* decision because part of the rent was due up front, and part of the rent was due after the crops were sold. *See id.* In that case, the bankruptcy court rejected this distinction because the tenant's "obligation to pay the rent was absolute and not contingent upon the crop yields or prices, the risks were solely on the shoulders of the tenant." *Id.*

In the present case, the debtor argued that *Armstrong* was not binding because it involved eligibility for an involuntary petition. *See id.* The debtor also asserted that the "totality of the circumstances test," rather than the "mechanistic risk analysis approach" used in *Armstrong*, should be applied to his case. *See id.*

The court noted that in *In re Coulston*, 98 B.R. 280 (Bankr.E.D.Mo. 1989), the bankruptcy court rejected the holding in *Armstrong* and "held that cash rent could be farm income where the debtor 'behaved historically as a farmer' and ''had both an honest intention and a reasonable probability of returning to 'true' farming.'" *See id.* (quoting *Coulston*, 98 B.R. at 283). In *Coulston*, the bankruptcy court determined that the debtor met this two-part test "and ruled that the cash rent he received in the year prior to bankruptcy was farm income thereby making him eligible for Chapter 12 relief." *Id.*

In the present case, the court stated that it was required to follow the holding in *Armstrong* because of the "binding precedent rule." *See id.* The binding precedent rule requires lower courts to "follow the holdings of their court of appeals and the Supreme Court, [and] affords a lower court no discretion where a higher court has decided the issue before it." *Id.* (citations omitted). The court explained, however, that "[l]ower courts are not bound to follow a higher court's dictum.'" *Id.* (citation omitted). It also explained that a court's statement is considered dictum if it was not necessary for the court's decision, and that statements that explain a court's rationale are considered to be part of the holding. *See id.* (citation omitted).

The court stated that "[t]here is simply no doubt that the Seventh Circuit's determination in *Armstrong*, that cash rent, paid in full and up front, is not income received from a farming operation, is part of its holding. That determination was necessary to the result, and was in no way gratuitous." *Id.* at 375. The court added that even though the ultimate issue in *Armstrong* was different from the issue in the present case, the determination of whether cash rent was income from a "'farming operation'" was central and identical in both cases. *See id.* The court also ruled that *Armstrong* could not be distinguished on the facts because in both cases the rent "was paid in full and up front." *Id.* Thus, the court ruled that *Armstrong* was binding in the present case. *See id.*

The bankruptcy court concluded that since the *Armstrong* decision was binding, the debtor's cash rent income was not income from a farming operation. *See id.* Therefore, the debtor did not meet the definition of a family farmer because less than fifty percent of his 2001 income arose from a farming operation. *See id.*

—Sean Brister, National Ag Law Center Graduate Fellow, University of Arkansas School of Law

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