ASIWPCA
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Testimony of Dr. Andrew Fisk
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United States House of Representatives

Committee on Agriculture, Subcommittee on Nutrition and Horticulture
Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment

Regarding

Pesticide Permitting and the Clean Water Act's National Pollutant Discharge Elimination System Program

Good Afternoon Chairman Gibbs, Chairwoman Schmidt, and Members of the Subcommittees:

My name is Andrew Fisk and I am the Director of the State of Maine's Bureau of Land and Water Quality and the current president of the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA). I have been working in state environmental quality programs for 13 years.

ASIWPCA is the national, nonpartisan, professional organization of State and Interstate agencies responsible for the implementation of water protection programs throughout the nation. ASIWPCA celebrates its 50th Anniversary this year and was created by States and Interstates to lead the way in realizing a vision for clean water in America. As the national voice of State and Interstate water programs (hereafter referred to collectively as states), ASIWPCA's members are responsible as co-regulators for on-the-ground implementation of the Clean Water Act (CWA). We are the institutions who, under the authorities delegated to us by the United States (U.S.) Environmental Protection Agency (EPA) via the CWA, issue permits to control and limit discharges to waters of the United States.

We are on the front lines of CWA monitoring, inspection, compliance, and enforcement across the country. Our members are responsible for implementing Congress's goal of restoring and maintaining the chemical, biological, and physical integrity of our nation's waters.

We take that task to heart every day.

I am pleased to present testimony on behalf of ASIWPCA today regarding the impact of the *National Cotton Council*[1] case on state water quality programs. This case held that pesticide applications to U.S. waters must be permitted under the CWA, despite their regulation under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

Overview

For nearly three decades, the application of pesticides to water was regulated under FIFRA, not the CWA. A series of lawsuits in the 1990s, however, yielded a trio of 9th Circuit Court of Appeals decisions[2] which when taken together held that these pesticide applications also needed CWA National Pollutant Discharge Elimination System (NPDES) permits. To clear up the confusion, EPA promulgated a final regulation in 2006 to clearly exempt certain applications of aquatic pesticides[3] from the CWA's NPDES program. EPA's final rule was challenged in the 6th Circuit, and in 2009, the *National Cotton Council* court held that EPA's longstanding approach to this matter was not entitled to deference and its interpretation of the CWA was unreasonable, and thus vacated EPA's final rule. The *National Cotton Council* decision exposed pesticide applicators and states to CWA liability. With the support of many affected entities, including ASIWPCA, EPA sought a two year stay of the court's mandate. Since 2009, EPA has worked diligently and closely with states on a good faith effort to develop a workable general permit model under the CWA for applications of pesticides to water. Over the same time, states across the nation began devoting resources to developing their own state general permits for such applications.

The general permits being developed must work for over 360,000 (estimated) new permittees brought within the purview of the NPDES program by the *National Cotton Council* court. Adding sources to the NPDES program carries with it regulatory and administrative burdens for states beyond merely developing and then issuing permits. It goes without saying that a meaningful environmental regulatory program is more than a

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[1] Nat'l Cotton Council v. U.S. Envtl. Protect. Agency, 553 F.3d 927 (6th Cir. 2009) (hereinafter "*National Cotton Council*").

[2] Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001) (Application of an herbicide to irrigation canals to control aquatic weeds and vegetation requires an NPDES permit. Application of the pesticides leaves residue after pesticide application performed its intended effect. In *Talent*, the applicator violated the FIFRA label requirement to contain the herbicide-laden water in an irrigation canal for a specified number of days, which eventually lead to a large fish kill in a downstream creek.); League of Wilderness Defenders v. Forsgren, 309 F.3d 1181 (9th Cir. 2002) (Aerial application of pesticide to control gypsy moths constituted a point source discharge subject to NPDES permitting. In *Fosgren*, the court did not decide whether the pesticide was a pollutant or not because the Forest Service had conceded that point at the District Court level. *Id.*); Fairhurst v. Hagener, 422 F.3d 1146 (9th Cir. 2005) (Pesticides intentionally applied directly to a lake to eliminate non-native fish species, where there are no residues or unintended effects, are not "pollutants" under the CWA because they are not chemical wastes). It is important to note that ASIWPCA went on record with EPA at many points after these decisions urging EPA not to apply the decisions nationally.

[3] EPA states "that the application of a pesticide in compliance with relevant requirements of FIFRA does not require an NPDES permit in two specific circumstances. The first circumstance is when the application of the pesticide is made directly to waters of the United States to control pests that are present in the water. The second circumstance is when the application of the pesticide is made to control pests that are over, including near, waters of the United States." *See* Application of Pesticides to Waters of the United States in Compliance with FIFRA, 71 Fed. Reg. 68, 483 (Nov. 27, 2006)).

paper exercise. It is not just a permit. EPA and states must provide technical and compliance assistance, monitoring, and as needed, enforcement. These 360,000 new permittees do not bring with them additional federal or state funding. In fact, federal and state funding for water programs has been insufficient for a long time. *See* Figure 1, *infra*.

Despite EPA's diligence, the complexities of implementing the *National Cotton Council* court's mandate have made it difficult for EPA to meet interim deadlines during the two year stay. EPA's final general permit is not yet complete. In order to provide a consistent framework, many states want to use this permit as a model for their own permit development. The stay of the court's mandate expires on April 9, 2011. Last week, ASIWPCA and other state regulatory organizations states requested that EPA pursue a six month extension of the stay.

If sought by the Agency and granted by the court, a further stay may allow more states to finalize permits. However, no matter the duration, a stay does not address a fundamental question – is this the appropriate way to manage pesticide applications in or near water going forward? Is this necessary when another federal statute already regulates these applications and provides states sufficient authority to regulate these discharges in consideration of local and site specific water quality issues?

Growth of the NPDES Program

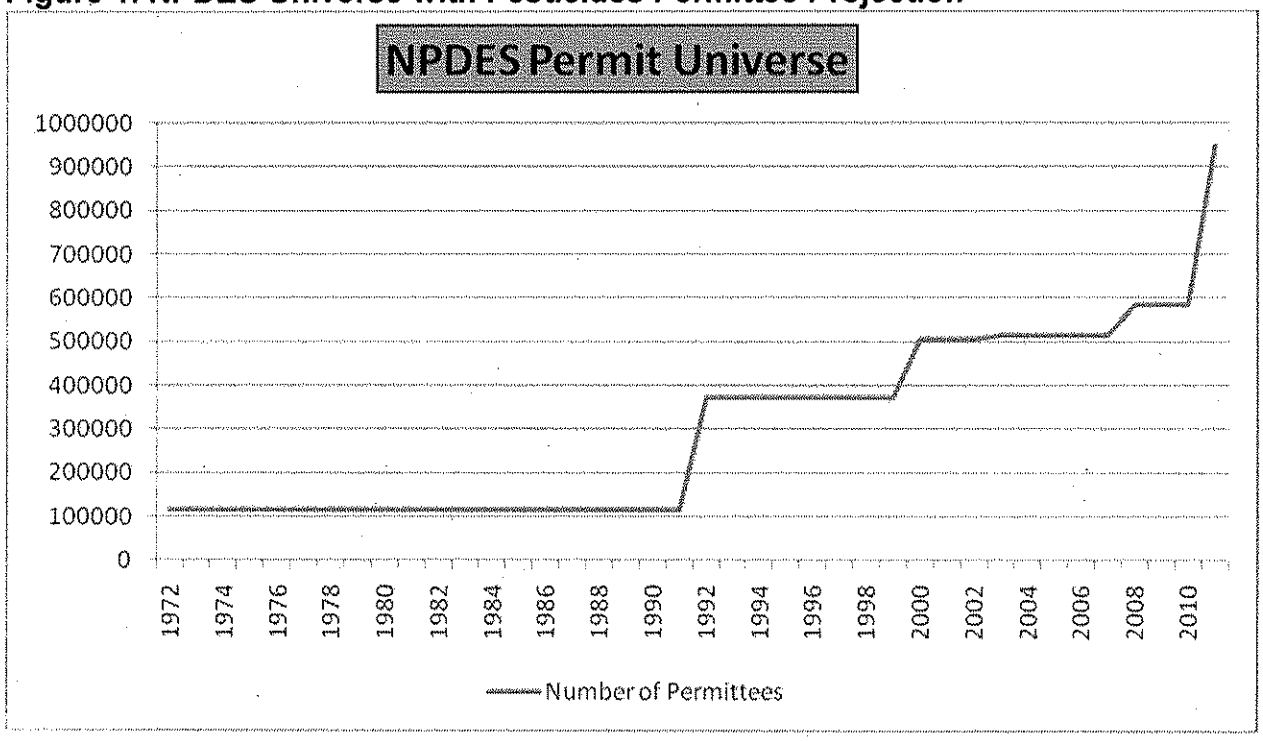
ASIWPCA and its state members are proud of the significant reductions in water pollution yielded by the NPDES program since its establishment. The NPDES program continues to work, although we are very concerned that it will be compromised by the addition of more and more sources to permit, at the same time as federal funds to support the program decline. A strong federal/state partnership, good data, adequate and sustainable funding, clear performance standards, and prioritization are at the heart of this program. The NPDES program has accomplished much due to its focus on predictable and manageable flows, identifiable end-of-pipe controls, extensive monitoring, and substantial federal and state funding for treatment facilities and technologies. Pesticide permitting will touch hundreds of thousands of transient, mini-point sources very unlike those the NPDES program was designed to control.

Since its inception, the NPDES program universe has continued to grow, not just because there has been an increase in the number of traditional industrial/municipal sources, but more profoundly because more and more new sources are added to the program as a result of litigation or new regulations. As you can see from Figure 1, the inclusion of municipal stormwater, construction stormwater, industrial stormwater, concentrated animal feeding operations, and most recently vessel discharges has vastly increased the NPDES program's scope.

EPA's projection of more than 365,000 pesticide permittees would increase the size of state NPDES programs by 60 percent. This programmatic increase will not be equally distributed. Those states that require more pesticides applications for human health

safety, habitat protection, and pest control will see the greatest increases and shoulder the greatest burdens.

Figure 1. NPDES Universe with Pesticides Permittee Projection



The NPDES Program is Not a Mere Paper Exercise

The CWA was designed for states to take on the vast majority of its work under the oversight of EPA and Congress. We have done that. Today, 46 states have received authority to administer the NPDES program.[4]

The issuance of a NPDES permit is an expression of technology-based requirements, water quality standards, ambient water quality conditions, and where appropriate, a waste-load allocation derived from a total maximum daily load (TMDL). Incorporating water quality standards into permits can be a resource intensive process. Today's water quality standards today are scientifically more complex than those of the early days of the NPDES program. They often require specialized implementation in different ecological regions. The maturation of the TMDL program adds another layer of complexity, in that a permittee must be controlled within the context of its watershed and the other sources of pollution in that watershed.

Pesticide applicators are unlike traditional NPDES permittees such as municipal treatment plants. It is nearly impossible to treat runoff from these dispersed applications to meet specific effluent limitations – which is what the CWA requires.

[4] Alaska is the 46th state and currently is receiving authorization in phases. EPA's general permit will apply in Alaska.

So what do states do? We impose buffers or setbacks and require applicators to ensure they are using the right amount of chemicals, in the right places, at the right times. That is a sensible and responsible approach. We do not need the CWA to do this. FIFRA has that authority and ability. States also have their own authorities which let them take additional action they may deem necessary.

The implications on state resources associated with adding pesticide applications to the NPDES program are far reaching. It bears repeating that states must not only develop permits, but then ensure compliance with general and individual permits, which requires inspections, monitoring, reporting, compliance assistance, outreach, training, and more. As a program matures, EPA more clearly defines expectations for drafting quality permits, inspection frequency, data collection and annual reporting, monitoring, and compliance assurance and enforcement activities. As administrative details are fleshed out for states and other regulators, the true cost of implementing this program will far exceed the initial estimates provided by EPA.[5]

The NPDES program prevents the discharge of billions of pounds of pollutants to our nation's rivers, lakes, wetlands, and coastal waters each year. Measuring and reporting environmental progress and results are critical aspects of managing any environmental program. Measuring and reporting serves as a basis for communicating progress and maximizing public accountability. Given the limited resources available to implement the NPDES program, we must increasingly focus on meaningful planning to set priorities and utilize resources efficiently. With an increasing workload, resources are often drawn from base program activities that, in the long term, are critical to the NPDES program.

In Maine, adding the 5,000 to 6,000 (estimated) new pesticide permittees to our NPDES program will draw resources away from the 1,100 other regulated entities already in the program. 700 of these 1,100 are new to the Maine program due to regulatory developments over the past five years. To credibly run our program to work with these businesses – many who have never seen a NPDES permit – I have brought on three additional staff. Imagine, then, the cumulative impact of this new program on all states.

In preparation for this hearing, ASIWPCA asked states if they anticipated meaningful water quality improvements through permitting this new group of sources. Of those states able to respond in a tight timeframe, an overwhelming majority said no. Given the stretched state resources, it seems less than fruitful to have states regulating sources already covered under another environmental statute.

In good faith, states have been making tremendous progress in the development and issuance of state general pesticide permits. However, we must emphasize that for over a decade, ASIWPCA has maintained that pesticide applications to water are better covered under FIFRA, as they were before *National Cotton Council* and earlier court decisions.

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[5] ASIWPCA is concerned that the economic analyses conducted by the Agency for this program dramatically underestimate the costs to states of the long term and continued oversight and management of this program – essentially, the full costs of its implementation.

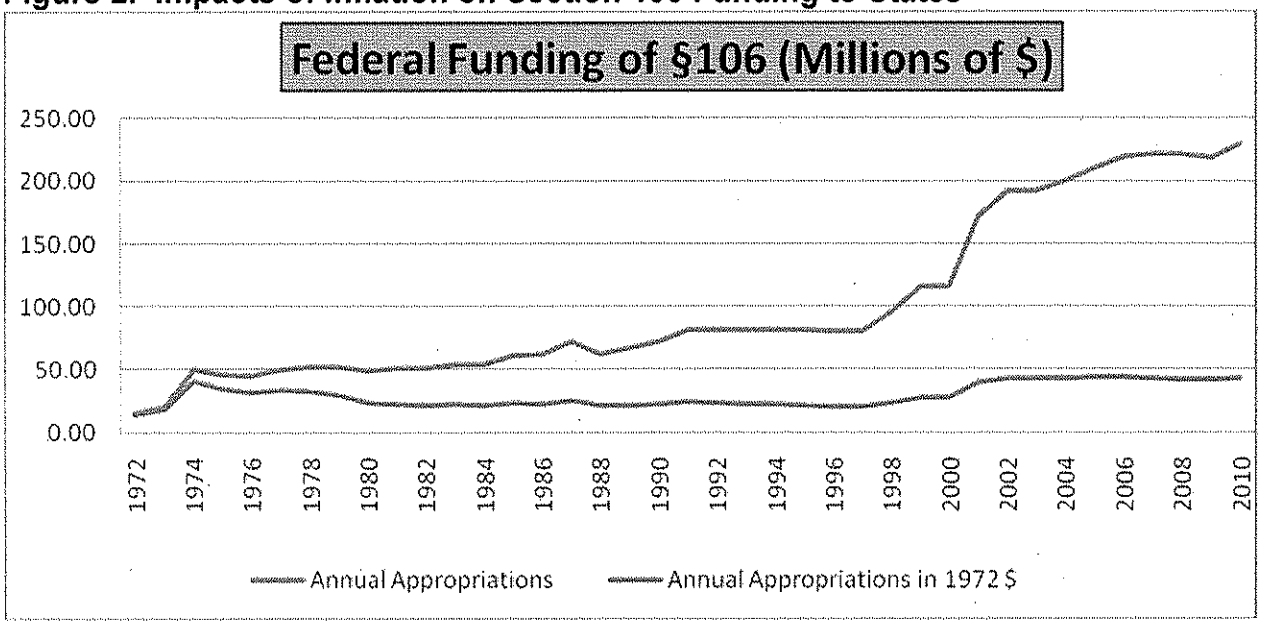
Declining Resources

The nation depends on the CWA to protect water supplies, recreational areas, aquatic life, and other uses of our water resources. One of the principal funding sources for states' work is CWA Section 106 funding. In 2003, EPA, the states, the Government Accountability Office, and the National Academy of Public Administration were all in substantial agreement that the gap between actual and needed funding to support all CWA programs was between $800 million and $1 billion annually.[6] Since 2003, federal mandates have only increased the workload for state programs.

There are other less direct, but substantial pressures on states working to address today's water quality issues. They include high attrition rates of state NPDES permitting staff, state staff furloughs and retirements due to budget limitations, increasingly sophisticated and complex water quality issues, and numerous legal challenges requiring continued defense of state programs and actions.

Figure 2 below provides context regarding § 106 appropriations that highlights impacts that inflation has had on annual funding. These figures are devastating – one can only imagine the stress that a 60 percent increase in the NPDES universe will have on states[7].

Figure 2. Impacts of Inflation on Section 106 Funding to States



[6] *State Water Quality Management Resource Analysis Report* ("[A]t the highest level of aggregation, this resource gap indicates that state agencies are receiving less than one-half of the resources they need to fully implement the requirements of the Federal Clean Water Act.")

[7] While some states charge fees for permits, these fees do not completely offset program costs nor do these fees always come directly back to the program. And, in the current economic climate, many state legislatures are unlikely to update permit fee funding legislation to support this new program.

Liability Exposure

It is incumbent upon us, as public officials, to make every effort to provide the public, industry, and nongovernmental organizations the stability that comes with clear, concise laws and regulations. And though EPA has proposed specific size thresholds and application types in or near water to be regulated by the permit, nothing in the CWA or the permit protects many other FIFRA compliant pesticide applications from CWA citizen suits. This creates an uncertain liability for users applying pesticides to golf courses and public utility rights of way, as well as private homes and businesses, which are not covered by the general permit. Given this uncertainty, several states are creating a "miscellaneous" or "other" category, should these entities and others wish to seek permit coverage and protection.

Significant financial penalties are associated with CWA violations, including for paperwork violations, which could be very high as compared to the scope and scale of some pesticide operations. The CWA's citizen suit provisions also will expose pesticide applicators to costly legal defense obligations. Public health agencies will be similarly vulnerable to these CWA penalties, fines, citizen suits, and defense costs.

Conclusion

Shortly after passing the CWA, Congress also passed major amendments to FIFRA which included committee reports. Committee reports shed light on legislative intent. A 1971 House Committee Report[8] on FIFRA is particularly helpful in this regard:

> "The Congress hereby finds that pesticides are valuable to our Nation's agricultural production and to the protection of man and the environment from insects, rodents, weeds, and other forms of life which may be pests; but ***it is essential to the public health and welfare that they be regulated closely to prevent adverse effects on human life and the environment, including pollution of interstate and navigable waters***;...and that ***regulation by the Administrator and cooperation by the States and other jurisdictions as contemplated by the Act are appropriate*** to prevent and eliminate the burdens upon interstate and foreign commerce, to effectively regulate such commerce, and ***to protect the public health and welfare and the environment***."

This language, in context with nearly three decades of FIFRA performing these functions, may be helpful as the Subcommittees study the impact of the *National Cotton Council* court decision.

Thank you for your time and attention to my remarks today. It is a privilege to present to you and I am happy to answer any questions that you may have.

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[8] H.R. REP. NO. 511, 92nd Cong., 1st Sess. 13 (1971) (emphasis added).