

# FIFRA at 40: The Need for Felonies for Pesticide Crimes

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## Summary

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In 1996, Congress abandoned a seven-year effort by consecutive Republican and Democratic administrations to increase FIFRA's misdemeanor penalties for criminal violations to the felony levels provided under the other major federal environmental laws. More than 20 years later, this disparity remains, despite a series of incidents and criminal prosecutions that demonstrate the inability of misdemeanor penalties to effectively deter pesticide crimes. This Article provides an overview of the FIFRA criminal provisions, reviews the previous failed attempts to amend FIFRA to increase its criminal penalties, describes cases that EPA and the U.S. Department of Justice have prosecuted since the failure of those legislative attempts, and discusses the consequent need today for stronger FIFRA criminal penalty provisions.

[T]he bottom line is that even if it was an accident, even if it was not intentional, by that I mean nobody set out that day to cripple a little boy, I mean nobody did that, nobody does that. If I thought that, I would never have accepted the plea. But it happened. And just as things happen and there are death cases where it was involuntary manslaughter, nobody intended to kill anybody, there are consequences to actions. And in this case, the government, in their position as the prosecution, has decided that the maximum sentence that I can give you is one year in jail, and that is what I am going to give you, each of you. And if I had the ability to give you more, I would research and see whether it was an appropriate thing to do. But under the circumstances of the plea agreement, the maximum sentence which I can give you is one year, and I am prepared to do that at this time for both of you.

—*The Hon. Jose E. Martinez, U.S. District Judge*<sup>1</sup>

In 1976, the U.S. Congress passed the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)<sup>2</sup> to regulate the production, sale, distribution, and use of pesticides in the United States. In 1996, Congress abandoned a seven-year effort by consecutive Republican and Democratic administrations to increase FIFRA's misdemeanor penalties for criminal violations to the felony levels provided for environmental crimes under the other major federal environmental laws. Twenty years later, in 2016, U.S. District Judge Jose Martinez lamented the fact that FIFRA's maximum sentence was one year in prison for defendants whose knowing, illegal application of pesticides had permanently injured a nine-year-old boy.

In those 20 intervening years of FIFRA criminal enforcement limited to misdemeanor offenses—crimes in some instances classified as “petty” under FIFRA and the criminal code—the U.S. Environmental Protection Agency (EPA) has investigated and assisted in the prosecution of FIFRA crimes in which people have died or been incapacitated; land has been contaminated; wildlife indiscriminately poisoned; and false information submitted to the government. The perpetrators of these crimes have ranged from individuals to small businesses to giant corporations. This record demonstrates the inability of FIFRA's misdemeanor penalty provisions to effectively deter pesticide crimes, and the need for felony penalties under the statute.

This Article will (1) provide an overview of the FIFRA criminal provisions and how EPA chooses FIFRA cases

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*Author's Note: The views and opinions expressed in this article are those of the authors and do not necessarily represent the views or position of the EPA or the U.S. government.*

1. Sentencing Hearing, *United States v. Sunland Pest Control, Inc.*, No. 16-14001-CR-JEM (S.D. Fla. May 12, 2016).
2. 7 U.S.C. §§136-136y; ELR STAT. FIFRA §§2-35.

for criminal investigation; (2) review the previous failed attempts by presidents and Congress to amend FIFRA to increase its criminal penalties; (3) describe cases that the EPA criminal program and the U.S. Department of Justice (DOJ) have prosecuted since the failure of those previous legislative attempts, which expose the inadequacy of the current FIFRA criminal penalty provisions; and (4) discuss the consequent need today for stronger FIFRA criminal penalty provisions.

## I. Overview of FIFRA

Unique among the federal environmental laws, FIFRA does not regulate a waste stream, such as hazardous waste, created by the manufacturing or use of a product, nor the “negative externalities,” such as air or water pollution, from manufacturing or other activities. Rather, FIFRA directly regulates the production, distribution, sale, and use of a socially and economically valued consumer product, the legal purpose of which is to kill or otherwise control things deemed to be “pests.”<sup>3</sup> FIFRA therefore has a twofold purpose: (1) it licenses commercial products (pesticides) through a registration process that makes them legal to make, distribute, sell, and use; and (2) it regulates the production, distribution, sale, use, ingredients, and labeling of those pesticides. Pesticide production facilities, and pesticide products, are regulated through registration processes, and through regulations, in order to prevent and limit harm to people and the environment.<sup>4</sup> In short, FIFRA both facilitates and regulates commerce in and use of desired pesticide products.

### A. FIFRA’s Regulatory System

Registration of pesticides is central to FIFRA’s purposes. With relatively few exceptions, a pesticide cannot be sold, distributed, or used unless it is registered with EPA.<sup>5</sup> A registered pesticide has a single specified, EPA-accepted formula and a product label, the required contents of which EPA establishes in the registration process.<sup>6</sup> The EPA-accepted label states the manner in which that pesticide can be used. Importantly, the label also must have EPA-accepted safety and first aid information. In addition, EPA reviews, and accepts or rejects, claims made for the

effectiveness of the product on the label or in advertisements. A pesticide product bearing a label that differs from that accepted by EPA may be “misbranded,” or contain claims that differ from those registered by EPA, and in either event is illegal to distribute or sell.<sup>7</sup>

Pesticide products fall into two legal “use” classifications under FIFRA. A “general use” pesticide is one that EPA has determined “will not generally cause unreasonable adverse effects on the environment.”<sup>8</sup> A “restricted use” pesticide is one that EPA has determined “may generally cause, without additional regulatory restrictions, unreasonable adverse effects on the environment, including injury to the applicator.”<sup>9</sup> Only certified applicators, who have undergone specialized training and hold a valid license, may apply restricted use pesticides.<sup>10</sup>

The persons and entities regulated by FIFRA include the “producer” (manufacturer) of the product, the “registrant” of the product with EPA, and distributors, sellers, and applicators of the product.<sup>11</sup> FIFRA distinguishes two classes of pesticide applicators: “commercial” and “private” applicators. Commercial applicators generally are those who use restricted use pesticides for any purpose on another’s property.<sup>12</sup> Private applicators generally are those who use restricted use pesticides for agricultural production purposes on their own property (i.e., farmers).<sup>13</sup>

Given this wide range of regulated actions and actors, FIFRA’s list of “unlawful acts” is rather long. However, violations can be categorized under four general objectives:

- (1) ***To ensure that product manufacturers’ confidential information submitted to EPA in the registration process is protected from unauthorized disclosure.*** FIFRA prohibits disclosure of confidential information; disclosure of manufacturer formulas with intent to defraud; and disclosure by federal employees, of trade secrets and commercial or financial information.<sup>14</sup>
- (2) ***To ensure that only registered establishments produce pesticides, and that no one distributes or sells a pesticide product that EPA has not authorized through the pesticide registration process.*** FIFRA prohibits the production of pesticides in unregistered establishments; the distribution or sale of unregistered, canceled, or suspended pesticides; violations of EPA orders cancelling pesticide registrations, or orders stopping the sale of pesticides; pesticides with unaccepted claims; pesticides whose composition differs from the registered pesticide

3. FIFRA’s definition of “pesticide” includes substances intended for “preventing, destroying, repelling or mitigating any pest,” or intended for use as a plant regulator, defoliant, or desiccant. *See id.* §136(u).

4. *See id.* §§136a (registration of pesticides) and 136e (registration of “establishments”). *See also* 40 C.F.R. §152.15 (pesticide products required to be registered). FIFRA also regulates the production and labeling of pesticide “devices,” but does not require their registration. FIFRA’s definition of a “device” includes instruments for trapping, destroying, repelling, and mitigating pests. *See* 7 U.S.C. §§136j(a)(1)(F) (prohibition of misbranded devices) and 136(h) (definition of “device”).

5. 7 U.S.C. §136a(a). The exceptions are provided in EPA’s FIFRA regulations, which provide exemptions for pesticides adequately regulated by another federal agency, pesticides of a character not requiring FIFRA regulation, and specified categories of pesticides in circumstances EPA has specified do not require registration. *See* 40 C.F.R. §§152.20, 152.25, and 152.30.

6. 7 U.S.C. §136a(c)(1).

7. *Id.* §§136(q), 136j(a)(1)(E).

8. *Id.* §136a(d)(1)(B).

9. *Id.* §136a(d)(1)(C).

10. *Id.* §136a(e)(1).

11. *Id.* §§136(e), (w), (y), (gg), 136a-136l.

12. *Id.* §136(e)(3).

13. *Id.* §136(e)(2).

14. *Id.* §§136j(a)(2)(D), 136l(b)(3), 136h(a), (f).

formula; and adulterated, misbranded, and certain discolored pesticides.<sup>15</sup>

- (3) ***To ensure the safe distribution, sale, use, and disposal of pesticides.*** FIFRA prohibits sale or distribution of a restricted use pesticide to someone who is not licensed to apply it; tampering with pesticide labeling; advertising a restricted use pesticide without stating the restricted use classification; use of a pesticide in a manner inconsistent with its labeling; experimental pesticide use on humans without their consent, or contrary to permit provisions; and use of a pesticide contrary to an EPA order.<sup>16</sup>
- (4) ***To ensure the success, and safeguard the integrity, of the FIFRA regulatory system.*** FIFRA prohibits the falsification of information, test results, and data used during the registration process; violation of any regulation governing registration; refusal to keep or submit required records and reports; falsification of records and reports; and removing from or adding substances to products in a manner to defeat regulatory purposes.<sup>17</sup>

## B. FIFRA Criminal Penalties

Federal law classifies crimes as “felonies” or “misdemeanors” based upon the maximum term of imprisonment that is authorized for the crime.<sup>18</sup> FIFRA contains only one felony penalty, applicable to “[a]ny person, who, with intent to defraud, uses or reveals information relative to formulas of products” that is acquired during the registration process.<sup>19</sup> A defendant convicted of this crime may face up to three years in prison, a fine not more than \$10,000, or both.<sup>20</sup> This is a Class E felony.<sup>21</sup> The maximum prison term of this felony (three years) is three times that of FIFRA’s highest Class A misdemeanor prison term, but its maximum fine (\$10,000) is less than that of FIFRA’s Class A misdemeanors (\$25,000 to \$50,000).

The other criminal unlawful acts under FIFRA carry only Class A and Class C misdemeanor penalties, applicable to “knowing” violations of any provision of FIFRA.<sup>22</sup> A “registrant, applicant for a registration, or producer” of a pesticide is subject to a Class A misdemeanor penalty of up to one year in prison and/or a fine of \$50,000.<sup>23</sup> A commercial applicator of a restricted use pesticide is also subject to a Class A misdemeanor term of imprisonment up to one year, but a fine is capped at \$25,000.<sup>24</sup> In addition, any

federal employee who discloses pesticide trade secrets faces a Class A misdemeanor penalty of up to one year in prison and up to a \$10,000 fine.<sup>25</sup>

In contrast, a “private applicator or other person” (i.e., a farmer or other person who does not fall into the categories listed above) faces a Class C misdemeanor for knowingly violating any provision of FIFRA.<sup>26</sup> A Class C misdemeanor is defined as a “petty offense.”<sup>27</sup> It carries a maximum jail sentence of 30 days and a maximum fine of \$1,000.<sup>28</sup> Therefore, a private applicator who knowingly violates a FIFRA requirement and causes the death or serious injury of another person, has committed a “petty offense.”<sup>29</sup>

Under the Alternative Fines Act, Congress increased the fine amounts for Class A misdemeanors to a maximum of \$100,000 for individuals and \$200,000 for corporations.<sup>30</sup> For Class C misdemeanors, the maximum fine amount under the Alternative Fines Act is \$5,000 for individuals and \$10,000 for organizations.<sup>31</sup> The maximum fines under the Alternative Fines Act for felonies are \$250,000 for individuals and \$500,000 for organizations.

## C. Practical Realities of FIFRA Criminal Enforcement

Several practical realities for FIFRA criminal enforcement must be accounted for in assessing the need for higher FIFRA criminal penalties.

First, many if not most FIFRA crimes involve some degree of motivation to make or save money. Pesticide product registrants have a financial motivation to make label claims for their product that distinguish it from its competitors and maximize sales, but that may be unfounded in fact. Commercial applicators of pesticides to residences may be incentivized by warranty programs to over-apply pesticides in violation of use restrictions, in order to avoid the costs of returning to reapply pesticides if the first application is ineffective. Farmers may have a financial incentive to use whatever pesticide is least costly or most effective, and provide inadequate training of farm laborers, in order to maximize crop yields and profits. Do-it-yourselfers making their own unregistered pesticide formulas at home and selling them to others, and people applying unregistered pesticides obtained cheaply (and illegally) from the black market, are usually motivated by a desire to save and/or make money. People who poison wildlife may be motivated by a legitimate desire to save crops, protect livestock from injury, or provide a profitable recreational service such as hunting.

This financial motivation means that in order to provide an effective deterrent to FIFRA crimes, FIFRA’s monetary criminal penalties must outweigh the monetary

15. *Id.* §§136a(a) (requirements of registration), 136d(c) (suspension), 136e (registration of establishments), 136j(a)(1)(A)-(E) (unlawful acts), 136k(a) (stop sale orders).

16. *Id.* §136j(a)(2)(A), (a)(2)(E)-(H), (a)(2)(P), (a)(2)(I)-(K).

17. *Id.* §136j(a)(2)(B)-(C), (a)(2)(L)-(O), (a)(2)(Q)-(S).

18. 18 U.S.C. §3559(a).

19. 7 U.S.C. §136l(b)(3).

20. *Id.*

21. 18 U.S.C. §3559(a)(5).

22. 7 U.S.C. §136l(b)(1)-(2).

23. *Id.* §136l(b)(1)(A).

24. *Id.* §136l(b)(1).

25. *Id.* §136h(f).

26. *Id.* §136l(b)(2).

27. 18 U.S.C. §§19, 3559.

28. 7 U.S.C. §136l(b)(2).

29. *See* 18 U.S.C. §§19, 3571(b)(6).

30. *Id.* §3571(b)(5), (c)(5).

31. *Id.* §3571(b)(6), (c)(6).

benefits from committing the crimes. However, FIFRA's current authorization of only up to \$1,000 in fines for private applicators is unique among the federal environmental statutes, and is likely to signal to prosecutors and judges that such pesticide crimes are not serious offenses. In the plea bargain process in which judges or prosecutors may have incentives to obtain or ratify a plea agreement by not requiring a maximum fine, FIFRA's \$1,000 criminal penalty limit for private applicators may often be reduced to an actual fine amount that provides little or no deterrence. Moreover, even where FIFRA may authorize a significantly higher misdemeanor fine (e.g., against commercial applicators), federal judges or DOJ prosecutors may feel inclined to limit criminal fine amounts to lower levels more traditionally associated with misdemeanors, in order to avoid trial and reach successful plea agreements.

Second, federal prosecutors evaluate a case based on the required investment of their effort, and the anticipated benefit, when allocating scarce resources. They will weigh the type of crime to be charged, granting more weight to felonies, and the type of sentence that may result.<sup>32</sup> Prosecutors are reluctant to initiate complex prosecutions if the most serious, provable offense is a misdemeanor. FIFRA pesticide crimes may involve complex legal or factual issues that do require significant "investment" of prosecutorial time and resources. Moreover, in the many types of justifiable FIFRA criminal cases that do not involve deaths, the seriousness of the crime may seem less apparent to a federal prosecutor (or judge), unless accurately reflected in the FIFRA penalty structure. In short, the disincentive to prosecute misdemeanors further weakens FIFRA's already low deterrence capability for criminal wrongdoing.

Finally, another practical reality in FIFRA enforcement is grounded in the fact that making false statements to EPA regarding pesticides is subject to a more lenient penalty than is provided under Title 18, §1001, for essentially identical misconduct. Knowing violation of the FIFRA prohibition against false statements to EPA by pesticide registrants is subject to a maximum of one year imprisonment under FIFRA.<sup>33</sup> In contrast, false statements to EPA under Title 18, §1001, are subject to a maximum of five years imprisonment.<sup>34</sup> Judges in a pesticide case may look to the maximum penalty in the governing environmental statute for guidance in sentencing decisions, since it can be seen as a clearer or more specific statement by Congress of the seriousness of the environmental crime. Moreover, they are free to impose lower sentences within FIFRA's penalty limit even in cases charging §1001 false statements. The current FIFRA false statement penalty in effect signals that lying to EPA about pesticide registrations is less seri-

ous than lying to the government in other types of cases. FIFRA's lower maximum penalty provides a potential rationale for agreeing to a penalty within its limit, even in cases where a higher penalty under §1001 was available.

## II. Historical Efforts to Strengthen FIFRA

### A. The Weakest Federal Environmental Statute

Until very recently, FIFRA has been the only federal environmental statute that lacks felony penalties for an environmental crime.<sup>35</sup> Other environmental statutes have long ago been updated to provide for felony provisions for most knowing violations, and also include even heavier felony penalties for violations that involve "knowing endangerment" of people. Between 1984 and 1990, Congress upgraded the criminal penalties in the hazardous waste, water pollution, and air pollution statutes from misdemeanors to felonies.<sup>36</sup> Felony penalties apply under these statutes to knowing unpermitted handling, discharges or releases of certain wastes and pollutants to the environment, violations of regulations, and falsification of information required to be submitted to EPA.<sup>37</sup> In addition, it is also a felony to violate these laws in a manner that "knowingly endangers" someone else (i.e., when the defendant "knows at the time that he thereby places another person in imminent danger of death or serious bodily injury").<sup>38</sup> The Clean Air Act (CAA) also contains a negligent endangerment provision.<sup>39</sup>

These other statutes therefore provide felony penalties for unlawful acts that are similar in type to unlawful acts under FIFRA. Like FIFRA, they make unlawful the knowing mishandling or discharge of dangerous or harmful materials (e.g., hazardous chemical waste or air pollutants) without or in violation of federal authorization (e.g., granted via a permit). Similar to FIFRA, they prohibit the falsification of information required by the law at issue.

32. One can see this disincentive reflected in the subtitle of an article by the federal prosecutor who handled the Bugman case, in the *U.S. Attorneys' Bulletin* (a DOJ periodical meant for prosecutors). See Jared C. Bennett, *The Soothsayer, Julius Caesar, and Modern Day Ides: Why You Should Prosecute FIFRA Cases*, 59 U.S. ATTORNEYS' ENVTL. CRIMES BULL. 84 (2011), available at <https://www.justice.gov/sites/default/files/usao/legacy/2011/12/16/usab5904.pdf>.

33. 7 U.S.C. §§136j(a)(M), 136l(b)(1)(A).

34. 18 U.S.C. §1001(a).

35. As discussed below, FIFRA's one felony penalty is for the non-environmental crime of disclosing confidential information. 7 U.S.C. §136l(b)(3). Until it was amended in 2016, the Toxic Substances Control Act (TSCA), 15 U.S.C. §§2601 et seq., provided only misdemeanor penalties for those violations it subjected to criminal enforcement. 7 U.S.C. §2615(b). The 2016 amendments provided a knowing endangerment felony offense for violations of §15 or §409. 15 U.S.C. §2615(b)(2)(A). Many of TSCA's criminally enforceable provisions relate to the testing, manufacture, processing, distribution in commerce, or commercial use of specified chemicals. 7 U.S.C. §2615. In addition, TSCA has subjected lead paint abatement to criminal enforcement. *Id.* §2689. Most violations of these provisions are still subjected to mere misdemeanor penalties. See *id.* §2615(b).

36. 42 U.S.C. §6928(d) (hazardous waste); 33 U.S.C. §1319(c) (water pollution); 42 U.S.C. §7413(c) (air pollution).

37. For example, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6928(d)(2)(A), (C) (disposal without a permit or in violation of regulations), and *id.* §6928(d)(3) (false statements); the Clean Water Act (CWA), 33 U.S.C. §1319(c)(2) (discharges in violation of permits and standards), and *id.* §1319(c)(4) (false statements); the Clean Air Act (CAA), 42 U.S.C. §7413(c)(1) (discharges in violation of plans, orders, and standards), and *id.* §7413(c)(2) (false statements).

38. See 33 U.S.C. §1319(c)(3)(A), 42 U.S.C. §6928(e), and *id.* §7413(c)(5)(A).

39. 42 U.S.C. §7413(c)(4).

Adding felony sanctions to these statutes was seen as providing a broader range of sentencing options and flexibility in enforcement to ensure enforcement responses appropriate to the gravity of the violation.

The upgrading of penalties in the other major environmental statutes raises the question why Congress did not similarly amend FIFRA during the same period. In fact, for a period of at least seven years, from 1989 to 1996, administration proposals by Republican and Democratic presidents to amend FIFRA, and corresponding bills sponsored by Republicans and Democrats, were introduced and considered by Congress. The administration proposals included measures to upgrade FIFRA's criminal penalties to felonies. A review of the legislative hearings on these proposals and bills reveals the reasons deployed for and against the strengthening of FIFRA's criminal penalties.

### B. History of FIFRA Penalty Proposals

In 1989, Congress received a proposal from the Administration of President George H.W. Bush, identifying “four critical areas for reform” of FIFRA and the federal food safety law, the Federal Food, Drug, and Cosmetic Act (FFDCA). Stimulated in part by a recent controversy over the detection of the pesticide Alar on apples, the proposal sought to amend FIFRA and the FFDCA to (1) make them more consistent and compatible; (2) improve pesticide cancellation procedures and suspension authorities; (3) strengthen FIFRA's enforcement authorities; and (4) establish periodic review of pesticides and national uniformity in pesticide tolerances.<sup>40</sup> With regard to stronger enforcement authority, the administration testified that “[t]he enforcement provisions of FIFRA are substantially weaker than the authorities contained in comparable environmental statutes, even though the substances to be regulated are potentially just as risky. . . . The most blatant, knowing and willful criminal acts are only misdemeanors[.]”<sup>41</sup>

Accordingly, the Administration proposed to raise knowing violations of FIFRA to felonies for most parties subject to FIFRA (registrants, distributors, testing facilities, commercial applicators), while retaining misdemeanors for knowing violations by private applicators, unless the violation constituted “knowing endangerment.”<sup>42</sup> The major rationale for the proposal was that:

violations of FIFRA—which involve misuse of dangerous chemicals—result in harms that are similar in nature to, and equally as serious as, violations of other environmental statutes. Those violations result in penalties, both civil and criminal, that are much more severe than FIFRA currently provides. Most environmental statutes (Clean

Water Act, Resource Conservation and Recovery Act, Superfund, and the Safe Drinking Water Act) have been revised in recent years to strengthen civil and criminal enforcement provisions significantly. Primarily, they provide felony penalties for knowing violations of the acts, and for “knowing endangerment” offenses.<sup>43</sup>

The Administration further noted that “the need for reform in this area has been widely recognized,”<sup>44</sup> and that none of the bills then pending in Congress addressed EPA's FIFRA enforcement needs.<sup>45</sup>

This lack of a legislative vehicle containing enhanced FIFRA criminal penalties, and the introduction of the Administration's proposal to Congress in late 1989, meant that an actual bill to enhance FIFRA penalties did not appear until 1990. Sen. Richard Lugar (R-Ind.) proposed U.S. Senate bill S. 2490, the Pesticide Safety Improvement Act of 1990, which upgraded FIFRA's Class A misdemeanor penalty for knowing violations by most parties except private applicators, to Class E felonies for which penalties were up to three years in prison, and up to a \$50,000 fine. In addition, S. 2490 provided a new “knowing endangerment” Class C felony, which would authorize up to 15 years in prison, a \$250,000 fine for individuals, and up to a \$1,000,000 fine for organizations; and penalties would double after the first violation. Finally, FIFRA's Class C misdemeanors for remaining parties (primarily private applicators) would be enhanced to Class A misdemeanors, punishable by up to one year in prison and a \$5,000 fine. However, this proposal went nowhere after being referred to a Senate subcommittee that conducted no hearings on the bill. Similarly, no FIFRA criminal penalty proposal was introduced in the U.S. House of Representatives.

It was not until 1991 that Congress moved again to act on a proposal to provide felony penalties for FIFRA. That year, in response to a renewed Bush Administration proposal, a bill to amend FIFRA penalties received its first congressional hearing in the House. The bill reflected the penalty approach of S. 2490, providing felonies for knowing violations by most parties; a higher class felony for knowing endangerment; and an enhanced (Class A) misdemeanor for all other persons.<sup>46</sup> The rationale the Administration provided in support of these enhancements generally mirrored its testimony in 1989. They would bring the “substantially weaker” FIFRA penalties “closer in line with . . . other environmental statutes,” since the substances to be regulated under FIFRA are “potentially just as risky” as those regulated under the other statutes.<sup>47</sup> The Adminis-

40. *Pesticide Regulatory Reform Amendments of 1989 and the Food Safety Assurance Act of 1989: Hearings on H.R. 3153 and H.R. 3292 Before the Subcomm. on Dep't Operations, Research, and Foreign Agriculture of the House Comm. on Agriculture*, 101st Cong. 581, 585-97 (1991) (statement of Linda J. Fisher, Assistant Administrator for Pesticides and Toxic Substances, EPA, and Jack C. Parnell, Deputy Secretary, U.S. Department of Agriculture).

41. *Id.* at 594-95.

42. *Id.* at 606.

43. *Id.*

44. *Id.* at 600.

45. *Id.* at 596.

46. The bill was titled the Pesticide Safety Improvement Act of 1991. Section 116 addressed criminal penalties. See *Pesticide Safety Improvement Act of 1991: Hearings on H.R. 3742 Before the Subcomm. on Dep't Operations, Research, and Foreign Agriculture of the House Comm. on Agriculture*, 102d Cong. 6-7 (1992).

47. *Id.* at 60, 100 (oral and written statements of Linda J. Fisher, Assistant Administrator for Pesticides and Toxic Substances, EPA).

tration further argued that the Agency's power to enforce the law "is another key to the success and credibility of the pesticide program."<sup>48</sup>

In addition, the 1991 proposal garnered the first formal reactions to the proposal from the public. Significantly, one of the world's biggest pest control companies, Terminix International Co. Ltd. Partnership, opposed the proposal to strengthen FIFRA's penalty provisions. At the time of the hearings on the Bush Administration's FIFRA penalty reform initiative, Terminix had more than 500 "company-owned and franchised" business locations in the United States.<sup>49</sup> Specifically addressing the proposed increase in civil penalties, Terminix testified:

Since commercial applicators are (1) trained and certified users of products registered by others and (2) like the do-it-yourselfer, are end-users of the products, we feel that including the commercial applicator in the same category for equal penalties with other non end-users is burdensome, onerous and oppressive. Under current law, the farmer, another business end-user, is only subject to fines of up to \$1,000. We feel that the committee should allow the language to stand as has been created in existing law, at a maximum of \$5,000.<sup>50</sup>

In addition, Terminix argued that because no fines had yet been imposed on commercial applicators at the maximum level allowed by the existing FIFRA provisions, there was no need to increase FIFRA's penalties.<sup>51</sup>

Notably, however, the idea of increasing some penalties was not universally opposed by pesticide industry groups. For example, the idea of increasing penalties found general support from the national industry association representing sellers of agricultural pesticides, the National Agrichemical Retailers Association (NARA).<sup>52</sup> However, NARA stated that the specifics of the penalty legislation were unacceptable as applied to its members, pesticide "dealers."<sup>53</sup> These dealers were mostly small businesses akin to farmers, NARA argued, so they should have lower penalty ceilings like those for farmers; or, at most, fines "that rest somewhere between the farmer penalty and those expressed for civil and criminal penalties under H.R. 3742."<sup>54</sup> In short, the group argued for increased civil penalties for others, but lower penalties for its own members. NARA did not specifically address the criminal penalty provisions in the bill.

Both the civil and the criminal penalty provisions were addressed by the Pesticide Lawn Care Association

of America (PLCAA), representing pesticide applicators in lawn care and landscaping. The PLCAA opposed the bill's increases in civil penalties, primarily on the familiar grounds that most of their members who would be exposed to such penalties "are small businesses with few employees, and . . . imposing large fines on small business exposes them to unreasonable burden."<sup>55</sup> This prompted Rep. Charles Stenholm (D-Tex.) to respond, in defense of the principle of deterrence underlying the federal criminal code, that offenses in which people can be killed or severely harmed should have heavy penalties. He stated:

I think . . . once we can agree in legislation that this is the standard and somebody violates it, that somebody needs to understand there's going to be a very heavy penalty. . . . [I]f you are responsible, clearly proven under a court of law that what you have done with a chemical has killed person x in a court of law, not much difference between that and a bullet, right?<sup>56</sup>

In response to Representative Stenholm's question, the PLCAA's representative conceded the general propriety of heavier penalties in criminal cases involving death, stating:

I think if we look back over the some 15 years of implementation of FIFRA, a commercial applicator has probably never been fined \$5,000, and so I wonder why we need to raise it to \$25,000. But if we specify under what conditions that would be imposed, then I could see there could be some conditions when a death was involved and cases like that, but that would be under a criminal penalty rather than a civil.<sup>57</sup>

This acknowledgment that significant criminal penalties in cases like those involving death (or, presumably, serious injury) were appropriate, was a step too far, however, for the National Agricultural Chemicals Association (NACA), another pesticide industry group testifying at the hearings. NACA was unpersuaded that the "knowing endangerment" felony penalty in the proposed bill was appropriate in cases involving pesticides applied on farms, or in homes or private institutions, declaring:

Persons who knowingly violate FIFRA and are aware that the violation places another in danger of death or serious injury are subject to increased penalties under a new "knowing endangerment" provision (page 72, line 19). While one may be sympathetic with severely penalizing irresponsible criminal acts, the provision as proposed in H.R. 3742 is inappropriate to pesticide use in farms, homes and private institutions.<sup>58</sup>

NACA's stated rationale for its opposition to a "knowing endangerment" felony raised the prospect of someone being prosecuted for "violating" the "standard label warning" found on pesticide products, that "it is a violation of

48. *Id.* at 100 (statement of Linda J. Fisher, Assistant Administrator for Pesticides and Toxic Substances, EPA).

49. *Id.* at 366 (statement of Norman Goldenberg, Director of Government Affairs, ServiceMaster Consumer Services L.P.).

50. *Id.* at 369.

51. *Id.* ("We should also like to point out that there have been no fines imposed up to the existing maximum level against commercial applicators and, therefore, they should be excluded from any proposed increase.")

52. *Id.* at 233 (statement of NARA, presented by Dooie Leach, President, Farm Chemicals, Inc.).

53. *Id.* (statement of NARA, presented by Dooie Leach, President, Farm Chemicals, Inc.).

54. *Id.*

55. *Id.* at 151 (statement of Thomas J. Delany, Director, Government Affairs, PLCAA).

56. *Id.* at 163 (statement of Rep. Stenholm).

57. *Id.* (statement of Thomas J. Delany, Director, Government Affairs, PLCAA).

58. *Id.* at 210 (statement of Jay J. Vroom, NACA).

Federal law to use this product in a manner inconsistent with its labeling.”<sup>59</sup> In addition, the group noted that the knowing endangerment provision did not require injury in order to be applicable, thus subjecting farmers to unreasonable financial risk if they did not comply with FIFRA regulations: “[R]ecalling that the provision does not require an injury to occur, only be threatened, farmers may be liable to penalties far beyond their financial means if they violate EPA’s soon-to-be final reentry regulations.<sup>[60]</sup> The ‘knowing endangerment’ provision should be deleted.”<sup>61</sup>

A number of public interest environmental groups also testified in the 1991 and 1992 hearings on the bill. But these groups largely focused on other aspects of the bill, and none of them addressed the enhanced criminal penalties. One group, the Natural Resources Defense Council (NRDC), characterized the overall enforcement provisions in the bill as “needed improvements,” but complained that they needed to go further, without suggesting how.<sup>62</sup> A coalition of environmental groups, the National Coalition Against the Misuse of Pesticides (NCAMP), recognized that the enforcement provisions “must be strengthened with teeth that hurt.”<sup>63</sup> But rather than address felony penalties, NCAMP instead opined that “[t]he most important provision to strengthen to ensure compliance with the law is the civil penalty structure.”<sup>64</sup> Moreover, after urging much higher civil penalties than those proposed, NCAMP proposed an additional FIFRA enforcement mechanism outside the sphere of government entirely; a “private right-of-action” to enforce FIFRA. “NCAMP has historically promoted the concept of citizen suit provisions to enable the act to become self-enforcing.”<sup>65</sup>

Another environmental group, the Agricultural Resources Center (ARC), elaborated on the rationale for a citizen suit provision:

The single most important step that Congress could take in improving enforcement of FIFRA would be to allow citizens to help enforce it through law suits. This right is important for many reasons, including limited public resources devoted to pesticide enforcement and repeated patterns of official failure to adequately enforce the law.<sup>66</sup>

ARC made no mention of the bill’s enhanced criminal penalty provisions.

These congressional hearings in the fall of 1991 and spring of 1992 did not result in passage of a FIFRA bill. Consequently, FIFRA reform efforts had to await the results of the 1992 presidential and congressional elections. However, these hearings saw the beginning of industry opposition to enhanced penalties, and the diversion of the attention of actual and potential supporters of enhanced FIFRA criminal enforcement, to other, non-criminal enforcement provisions dealing with civil penalties and a citizen suit provision.

In 1993, the baton for FIFRA penalty reform passed to the Clinton Administration. The Clinton Administration significantly modified the previous Bush Administration proposals. Besides adding civil judicial penalty procedures and penalties to FIFRA, the new proposal added criminal negligence penalties to the criminal penalty provisions (up to one year in prison—a misdemeanor—or \$25,000 per day of violation, or both) and significantly heightened the criminal penalty ceilings for knowing felony violations (up to five years in prison or \$50,000 per day of violation, or both). It included a knowing endangerment felony penalty of up to 15 years in prison or a \$250,000 fine, or both, for individuals, and up to a \$1 million fine for organizations.<sup>67</sup> In addition, the proposal included a citizen suit provision, as environmental groups had requested in the 1992 hearings.<sup>68</sup> Hearings on the proposal began in September 1993, the proposal was presented in the form of a House bill in May 1994, and an additional House hearing on the bill was held in June, 1994.<sup>69</sup>

Like the previous administration, the Clinton Administration sent representatives of EPA, the U.S. Department of Agriculture, and the U.S. Food and Drug Administration to testify to Congress in support of the proposal. While repeating the Bush Administration’s explanation that FIFRA’s enforcement provisions are weak even though violations may result in “serious harm to health or the environment,”<sup>70</sup> the testimony also presented new rationales in accord with the Administration’s goal of “reinventing government.” This concept of “reinvented government” included “partnership” with business and consideration of the regulated community as “customers” of the government. Accordingly, one of the rationales for higher FIFRA penalties asserted in the Administration’s testimony was

59. *Id.*

60. The FIFRA “reentry regulations” are part of the “worker protection standards” required by FIFRA, and primarily relate to when it is safe for farm workers to reenter areas where agricultural pesticides have been applied. See 40 C.F.R. §170.112 (2016).

61. *Pesticide Safety Improvement Act of 1991: Hearings on H.R. 3742 Before the Subcomm. on Dep’t Operations, Research, and Foreign Agriculture of the House Comm. on Agriculture*, 102d Cong. 210-11 (1992) (statement of Jay J. Vroom, NACA).

62. *Id.* at 286 (statement of Erik D. Olson, Senior Attorney, NRDC) (“[T]he bill includes some needed improvements to FIFRA’s enforcement and certification and training requirements, although we believe these provisions need to go further to assure pesticide safety.”).

63. *Id.* at 330 (statement of Jay Feldman, Executive Director, NCAMP).

64. *Id.* at 331.

65. *Id.*

66. *Id.* at 467 (statement of Allen Spalt, Director, ARC).

67. Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1994, H.R. 4329, at §17, 103d Cong. (1994).

68. *Id.*

69. *Review of the Administration’s Pesticide Policy: Hearing Before the Subcomm. on Dep’t Operations and Nutrition of the House Comm. on Agriculture*, 103d Cong. 1 (1994); Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1994, H.R. 4329, 103d Cong. (1994); *Review of the Administration’s Pesticide Reform Proposal; Hearing Before the Subcomm. on Dep’t Operations and Nutrition of the House Comm. on Agriculture*, 103d Cong. 1 (1994).

70. *Review of the Administration’s Pesticide Reform Proposal: Hearing Before the Subcomm. on Dep’t Operations and Nutrition of the House Comm. on Agriculture*, 103d Cong. 240 (1994) (statements of Lynn R. Goldman, M.D., Assistant Administrator for Prevention, Pesticides, and Toxic Substances, EPA, James R. Lyon, Assistant Secretary, Natural Resources and Environment, U.S. Department of Agriculture, and Michael R. Taylor, Deputy Commissioner for Policy, U.S. Food and Drug Administration).

that they were necessary in order to protect businesses from unfair competition, as follows:

Separately, we need to update the enforcement provisions of FIFRA. All too often, a small number of FIFRA violators, whether they be manufacturers, applicators, or growers, achieve an unfair competitive advantage over their law-abiding competitors because of FIFRA's weak enforcement authorities. It is time to put the violators at a disadvantage.<sup>71</sup>

In addition, the Administration asserted that increased penalties would enhance government "flexibility" in enforcement:

The Administration proposal will increase the flexibility of FIFRA enforcement, allowing the federal government to seek civil penalties from the courts, in addition to criminal sanctions. Potential civil and criminal penalties for FIFRA violations would be significantly increased, providing EPA and the courts with the flexibility needed to impose penalties commensurate with the nature of the offense.<sup>72</sup>

The Administration's testimony made no mention of the comparative weakness of FIFRA vis-à-vis the criminal penalties in other environmental statutes. Nor did the Administration provide any more detailed rationale in support of the specific criminal penalty changes it proposed, such as the new criminal negligence provisions.

In response to the Clinton Administration proposal, a wide spectrum of industry groups rose in opposition to what they called enforcement overkill. For example, the Grocery Manufacturers of America asserted a failure by the Administration to demonstrate the need for higher penalties, and claimed the enforcement provisions represented a "back door" enforcement power grab.<sup>73</sup> PLCAA returned to testify and this time made no concession that higher criminal penalties would be justified in cases "like" those involving a death. Rather, without mentioning criminal penalties specifically, it pointed to the apparent lack of "societal benefit" from higher penalties: "[w]ithout sufficient proof that increasing the fine amount on applicators will provide some societal benefit, we question whether it is completely arbitrary and unwarranted."<sup>74</sup>

The only expressed industry support for higher criminal penalties was limited to "intentional" or "knowing" crimes, rather than "negligent" ones, and came from NACA:

By far the most troubling aspect is that the standard for any [criminal] violation of FIFRA has changed from a

knowing violation to merely a negligent violation. NACA agrees that EPA should have strong, meaningful authority to punish intentional violators, as well as repeat offenders. But we question, on grounds of fundamental fairness, whether such unprecedented, stringent authority (particularly as applied to smaller, commercial applicators or dealers) is necessary to deter negligence. The proposed scheme establishes virtual strict liability, with severe penalties. We wonder if improved training and education are not better approaches to decreasing actual risk and protecting the environment.<sup>75</sup>

By far, the primary focus of industry opposition to the enforcement provisions, however, was the citizen suit provision. Besides the industry groups already cited above, groups such as the American Farm Bureau, the Chemical Producers and Distributors Association, and Women Involved in Farm Economics arose in strong opposition to the citizen suit provision. Nor was the opposition limited to farmers and industry. Even the lobbying arm of state departments of agriculture, the National Association of State Departments of Agriculture (NASDA), opposed the bill's citizen suit provision. The significance of NASDA's opposition is apparent in its description of its members as the "primary enforcement arm" for FIFRA.<sup>76</sup>

As a result, much of the Administration's oral testimony in support of the bill's enforcement provisions addressed citizen suits, rather than explaining in detail the rationale for enhanced civil or criminal penalties.<sup>77</sup> Environmental group testimony again made no significant effort to support heightened criminal penalties. The hearings did not result in a 1994 bill to amend FIFRA with new felony penalties.

In 1994's congressional election, Republicans advocating a "Contract With America" won control of the House. In 1995, a new FIFRA "reform" bill, the Food Quality Protection Act of 1995, was introduced in the House. The bill contained provisions related to suspension, cancellation, and expediting of pesticide registrations; "minor use" crop protection; and training of "maintenance applicators"; but no civil or criminal penalty enhancements.<sup>78</sup> EPA again sent Assistant Administrator (AA) Lynn Goldman to testify, and to urge revisions to FIFRA's "outdated" penalty provisions to make them commensurate with the nature and severity of the offenses.<sup>79</sup> AA Goldman expressly asserted that under the current FIFRA, "if someone were literally killed by the misuse of a pesticide, the maximum penalty for a first-time, private applicator would be a letter

71. *Id.* at 28 (statement of Lynn R. Goldman, M.D., Assistant Administrator, Office of Prevention, Pesticides, and Toxic Substances, EPA, accompanied by Jim Aidala).

72. *Id.* at 204 (statements of Lynn R. Goldman, M.D., Assistant Administrator for Prevention, Pesticides, and Toxic Substances, EPA, James R. Lyon, Assistant Secretary, Natural Resources and Environment, U.S. Department of Agriculture, and Michael R. Taylor, Deputy Commissioner for Policy, U.S. Food and Drug Administration).

73. *Id.* at 196 (statement of Stephen Ziller, Vice President, Science and Technology, Grocery Manufacturers of America, Inc.).

74. *Id.* at 501 (statement of the PLCAA).

75. *Id.* at 383 (statement of Jay J. Vroom, President, NACA).

76. *Id.* at 161 (statement of Becky Doyle, Director, Illinois Department of Agriculture, on behalf of NASDA).

77. *Id.* at 84 (statement of Lynn R. Goldman, M.D., Assistant Administrator, Office of Prevention, Pesticides, and Toxic Substances, EPA, accompanied by Jim Aidala).

78. 104 Bill Profile H.R. 1627 (1995/1996).

79. *Food Quality Protection Act: Hearing Before the Comm. on Agriculture, Nutrition, and Forestry*, 104th Cong. 779 (1996) (statement of Lynn R. Goldman, Assistant Administrator, Office of Prevention, Pesticides, and Toxic Substances, EPA).



of warning.<sup>80</sup> However, the final version of the bill became law in 1996, without any enhanced penalties. The efforts of Republican and Democratic administrations to bring FIFRA penalties in line with the other major federal environmental laws had come to naught.

Nevertheless, the reasons that supported felonies for the other major environmental statutes, and the reasons for such an upgrade to FIFRA's penalties, are even more applicable today. In contrast, the reasons offered in opposition to felony penalties during that period have been proven, over the subsequent decades of FIFRA enforcement, to be of little merit. It is to that 20-year history of FIFRA enforcement that we now turn.

### III. Twenty Years of FIFRA Criminal Cases

In the 20 years since the 1996 defeat of efforts to enhance FIFRA's criminal penalties, EPA's criminal enforcement program has investigated and assisted DOJ in the prosecution of a wide spectrum of the most serious pesticide violations.<sup>81</sup> All these investigations have been guided by EPA's written guidelines on the exercise of investigative discretion.<sup>82</sup> Similarly, all the prosecutions have been guided by DOJ's written guidelines on the exercise of prosecutorial discretion, which are applicable to all federal crimes.<sup>83</sup>

EPA's investigative guidelines require that EPA's agents and criminal enforcement attorneys select only "the most significant and egregious violators" for investigation. Cases are selected based on two general criteria: (1) significant environmental harm (i.e., actual harm, or *threat of harm*, to human health or the environment), and (2) culpable conduct. In applying these criteria, EPA considers factors such as failing to report harmful releases or emissions of harmful substances, submitting false information, concealing misconduct, or operating a business without required permits or licenses or certifications. Such conduct is important to consider because it undermines the ability of the government to successfully regulate potentially harmful conduct and, therefore, can lead to harmful consequences. In addition, DOJ's own guidelines serve as a "backstop" or secondary assurance that only the most serious violators are prosecuted.

80. *Id.* The statement's legal accuracy is limited to civil rather than criminal penalty authority under FIFRA, and as interpreted and implemented under EPA's FIFRA civil penalty policy. Its greater significance was its general notice to Congress of FIFRA's meager penalty authority in cases of people killed by the misuse of pesticides. This meagerness is a characteristic of FIFRA's criminal penalty authority as well.

81. More information regarding cases cited in this Article can be found by searching by case or defendant's name at U.S. EPA, *Enforcement—Summary of Criminal Prosecutions*, [https://cfpub.epa.gov/compliance/criminal\\_prosecution/](https://cfpub.epa.gov/compliance/criminal_prosecution/) (last updated June 30, 2017).

82. Memorandum from Earl E. Devaney, Director, EPA Office of Criminal Enforcement, to All EPA Employees Working in or in Support of the Criminal Enforcement Program (Jan. 12, 1994) (the Exercise of Investigative Discretion), <https://www.epa.gov/sites/production/files/documents/exercise.pdf>.

83. U.S. ATTORNEYS' MANUAL 9-2.000 (Authority of the U.S. Attorney in Criminal Division Matters/Prior Approvals), available at <https://www.justice.gov/usam/usam-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals>.

EPA's and DOJ's commitment to selecting the most serious cases for criminal investigation and prosecution is borne out by the history of FIFRA cases investigated and prosecuted since 1996. Four general types of cases that have met these criteria during this period also demonstrate the reasons why FIFRA's criminal penalties should be enhanced and brought to a level of parity with the penalties for other federal environmental crimes. These cases involve (1) residential fumigators; (2) agricultural applicators; (3) wildlife poisoners; and (4) knowing subverters of the pesticide registration system.

#### A. Residential Fumigators

The most troubling FIFRA cases have been those involving the poisoning of persons from pesticides misapplied by commercial applicators who knowingly violate FIFRA's safeguards. A typical case of this sort involves pest exterminators hired to fumigate residences ranging from single-family homes to hotels to multiunit condominiums. Three recent cases are good examples of this type of FIFRA criminal case.

##### 1. Bugman (Utah)

In February 2010, Nathan and Brenda Toone and their children resided in a home in Layton, Utah.<sup>84</sup> Nathan and Brenda had arranged with Bugman Pest and Lawn, Inc. to kill voles (small rodents) in the yard of their home. At the time of the Toones' contract with Bugman, the Toones had four children, including two daughters, four-year-old Rebecca and 15-month-old Rachel.<sup>85</sup>

On February 5, 2010, Coleman Nocks, a licensed commercial applicator working for Bugman, applied Fumitoxin pellets to burrows in the Toones' yard. Fumitoxin is a trade name for a registered, restricted use pesticide containing aluminum phosphide. The product releases phosphine gas when it comes into contact with moisture.<sup>86</sup> The effects from exposure to phosphine gas can range from difficulty breathing, vomiting, and diarrhea, to fatal lung and brain edemas.

Nocks placed these pellets about seven feet from the home and even closer to the garage. The applicator's manual and label for Fumitoxin required that it not be applied within 15 feet of any building that may be occupied by animals or humans, and especially residences.<sup>87</sup> Nocks also exceeded the application rate limits, and applied the pesti-

84. For more information on this case, see Video: EPA Criminal Case File: Rebecca and Rachel Toone (EPA 2012), <https://www.youtube.com/watch?v=XzAmkFRGFgc&feature=youtu.be>.

85. Jennifer Dobner, *Utah Extermination Company, Worker Plead Guilty*, ASSOCIATED PRESS, Oct. 11, 2011, [http://archive.boston.com/lifestyle/health/articles/2011/10/11/utah\\_extermination\\_company\\_worker\\_plead\\_guilty/](http://archive.boston.com/lifestyle/health/articles/2011/10/11/utah_extermination_company_worker_plead_guilty/).

86. It is a restricted use pesticide due to the high acute inhalation toxicity of phosphine gas. See U.S. EPA, LABEL AMENDMENT—TO REVISE TEXT FOR CLARITY; UPDATE DEACTIVATION LANGUAGE (2015), [https://www3.epa.gov/pesticides/chem\\_search/ppls/072959-00002-20151124.pdf](https://www3.epa.gov/pesticides/chem_search/ppls/072959-00002-20151124.pdf).

87. EPA banned the use of Fumitoxin in residential areas after the Toone girls died.

cide when temperatures were below 41 degrees Fahrenheit, contrary to the product's EPA-accepted labeling. He also failed to provide the Toones with a material safety data sheet or applicable portions of the applicator's manual, as required by the Fumitoxin label.<sup>88</sup>

As a direct result of the Bugman misapplication, the entire Toone family was hospitalized with flu-like symptoms the next day. Four-year-old Rebecca experienced acute respiratory failure and died that same day. The family returned home, but 15-month-old Rachel became sick again and was rehospitalized in critical condition. She passed away a few days later, on February 9.<sup>89</sup> Both girls died from phosphine exposure.<sup>90</sup>

Dangerous levels of volatile organic compounds consistent with phosphine gas were measured inside the Toone house by chemical weapons specialists with the Utah National Guard. The levels were particularly high in the garage and in the girls' bedrooms. The Utah Office of the Medical Examiner concluded that the girls had "elevated levels of phosphorus" in their bodies and suffered from "lung damage consistent with inhaling a harmful substance."<sup>91</sup>

Nocks and Bugman were charged with three misdemeanor FIFRA counts, one count addressing the misapplication at the Toone residence, and two counts addressing other Bugman misapplications of pesticides. The Toones had not been the only people endangered by Bugman's misuse of Fumitoxin. During the course of the investigation, it was also discovered that Ray Wilson, son of the owner of Bugman Pest and Lawn, had also misapplied Fumitoxin at other locations. Those violations were prosecuted as a separate, but related, case.

Bugman and Nocks each pleaded guilty to one FIFRA count in 2012.<sup>92</sup> While the plea agreement recommended six months in jail and six months of home confinement,<sup>93</sup> the judge deviated from the plea agreement, and sentenced Nocks to three years' probation and 100 hours of community service. The judge ordered Raymond Wilson Sr., for Bugman, to pay a \$3,000 fine and to cease business operations for 36 months, the term of probation.<sup>94</sup> For the similar criminal violations at other locations, the company was sentenced to 36 months of probation, barred from doing pest control for three years, and fined \$600.<sup>95</sup>

88. This was in violation of 7 U.S.C. §§136l(b)(1)(b), 136j(a)(2)(G), and 136l(b)(4).

89. *2 Sisters Apparently Killed by Pesticide*, UNITED PRESS INT'L, Feb. 10, 2010, <http://www.upi.com/2-sisters-apparently-killed-by-pesticide/65691265780901/>.

90. See Judy Fahys, *Bugman, Ex-Worker Plead Guilty in Layton Pesticide Deaths*, SALT LAKE TRIB., Oct. 11, 2011, <http://archive.sltrib.com/story.php?ref=/sltrib/news/52706177-78/nocks-bugman-pesticide-girls.html.csp>; see also Dobner, *supra* note 85.

91. Dobner, *supra* note 85.

92. 7 U.S.C. §136l(b)(1)(B). See News Release, DOJ, Bugman Pest and Lawn, Inc. and Coleman Nocks Plead Guilty to Unlawful Use of Pesticide (Oct. 11, 2011), available at <https://www.justice.gov/archive/usao/ut/news/2011/bugman%20plea.pdf>.

93. News Release, DOJ, *supra* note 92.

94. Dennis Romboy, *Bugman Exterminator Gets Probation for Causing Death of Layton Girls*, DESERET NEWS, Jan. 6, 2012, <http://www.deseretnews.com/article/705396955/Bugman-exterminator-gets-probation-for-causing-death-of-Layton-girls.html?pg=all>.

95. *Id.*

## 2. Terminix (U.S. Virgin Islands)

The Terminix International Co. Ltd. Partnership describes itself as "the leading provider of termite and pest control services in the United States."<sup>96</sup> Terminix is a subsidiary of ServiceMaster Global Holdings, Inc., and a member of ServiceMaster's "Quality Service Network" group of companies. It reports operating 864 locations worldwide,<sup>97</sup> and 2015 revenues exceeding \$1 billion.<sup>98</sup> This is the same Terminix that in 1992 testified in Congress in opposition to the Bush Administration's proposal to strengthen FIFRA's penalty provisions.<sup>99</sup>

In March 2015, Steve Esmond, his wife, Theresa Divine, and their two teenage sons, Ryan and Sean, arrived at the Sirenusa Resort in the U.S. Virgin Islands for a family spring vacation. On March 18, 2015, Terminix fumigated the first floor condominium directly below the Devine-Esmond condo with methyl bromide.

Methyl bromide is a colorless and essentially odorless gas registered with EPA for use primarily in agriculture, and to fumigate products. Since 1984, EPA has banned its use indoors. Overexposure to methyl bromide by inhalation can cause severe lung damage, impaired respiratory function, and neurological effects. Low levels cause headaches, dizziness, fainting, weakness, confusion, speech impairment, twitching, and tremors; higher levels can result in paralysis, convulsions, seizures, blackout, blindness, and death.

Methyl bromide fumes from the Terminix application in the suite below the Devine-Esmond condo traveled through the walls and ceiling into their condo above, resulting in exposure to the family. The odorless methyl bromide fumes were undetectable by the family and resulted in levels in the unit that ranged from 748 to 1,120 parts per billion by volume. By contrast, safe levels for occupancy are 1 part per billion or less. As a result of the exposure, the entire family was poisoned. Ryan and Sean suffered from seizures, and in order to save their lives, doctors placed Steve, Ryan, and Sean in induced comas that lasted weeks. The entire family has continuing, and likely permanent, disabilities as a result of neurological damage. Theresa had the fastest recovery, but is continually caring for the rest of her family. Steve, like Ryan and Sean, still struggles with numbness and paralysis, and must be strapped into a sitting position.<sup>100</sup> He struggles to speak and suffers from severe tremors. The two boys, prior to the incident, were active student athletes. Now, they struggle to eat, walk, and sit up on their own.<sup>101</sup>

96. Terminix, *Corporate Information*, <https://www.terminix.com/corporate> (last visited July 3, 2017).

97. *Id.*

98. *Id.*

99. See *supra* notes 49-51 and accompanying discussion of response to Bush Administration's 1991 proposal to enhance FIFRA penalties.

100. Shawn Weigel, *Terminix Pays Out \$87 Million to Wilmington Family Poisoned on Caribbean Vacation*, DOVER POST, Aug. 3, 2016, <http://www.doverpost.com/news/20160803/terminix-pays-out-87-million-to-wilmington-family-poisoned-on-caribbean-vacation>.

101. Sara Ganim, *New Details on Family Poisoned by Pesticide: Sons Can't Eat or Walk Alone*, CNN, Sept. 18, 2015, <http://www.cnn.com/2015/09/10/us/virgin-islands-pesticide-investigation/>.

The EPA-required labels for methyl bromide products, such as that illegally used by Terminix, inform users that it is a restricted use pesticide and acutely toxic. The labels specify how and where to apply the pesticide, precautions to be taken by applicators, and acceptable air concentration levels for reentry. The labels indicate it is a violation of federal law to use methyl bromide in a manner inconsistent with its labeling.

On March 23, 2017, the U.S. Virgin Islands District Court accepted a plea agreement under an information charge against Terminix International Co. LP, and Terminix International USVI, LLC, with multiple counts of misuse of a pesticide (methyl bromide).<sup>102</sup> As part of the plea agreement, Terminix International Co. LP would pay a fine of \$4 million and serve a three-year term of probation. In addition, Terminix USVI, LLC would pay a fine of \$4 million and serve a three-year term of probation, and make community service and restitution payments totaling another \$2 million. The investigation of potential individual liability is ongoing.

### 3. Sunland/Terminix (Florida)

In 2014 and 2015, Sunland Pest Control Services, Inc. was a Florida-based commercial applicator of pesticides that provided residential fumigation services as a subcontractor of Terminix. During those years, Lori and Carl McCaughey, their nine-year-old son, Peyton, and their seven-year-old daughter, Riley, resided in a house in Palm City, Florida. Peyton enjoyed playing baseball and hockey, and had been learning how to surf.<sup>103</sup>

In 2014, the McCaugheys contracted to have Terminix fumigate their house with sulfuryl fluoride for termites. Sulfuryl fluoride is commonly used in structural fumigations for termites, but is a restricted use pesticide, meaning that only certified applicators may legally apply the pesticide. Structural fumigations involve applying the pesticide, as a gas, through the entire building. To facilitate coverage, all windows and doors of the structure are opened and the building is encased in tenting to allow the pesticide to enter all areas of the structure.

Under the McCaugheys' contract, and without notification to the McCaugheys, Terminix subcontracted the fumigation job to Sunland, and Sunland performed the fumigation without incident. However, the fumigation proved not to be fully successful. Consequently, in August 2015, the McCaugheys arranged to have Terminix return to their home to refumigate, pursuant to Terminix's warranty and the annual maintenance fee the McCaugheys had paid. Terminix again subcontracted the job to Sunland without notifying the McCaugheys. However, four days before the 2015 fumigation, a Terminix employee, rather than a Sunland employee, met with the McCaugheys to

finalize the refumigation. He provided them with written instructions and bags for household items, and conducted a walk-around of the exterior to instruct the McCaugheys on the required preparations for the fumigation.

On Friday, August 14, 2015, the family turned over their house keys and was told they could return that Sunday at 4:00 p.m. On that Saturday, Sunland employees erected tenting around the house, opened some but not all operable doors and windows, and applied the pesticide.

Sunland returned the next day to remove the tenting and otherwise prepare the house for the family's return. However, Sunland failed to open all operable doors and windows, and use fans to help properly aerate the house, as required, before the McCaugheys returned to the home. Sunland also failed to properly test the air inside the house as required, to ensure it was safe for the McCaugheys to reenter. Sunland also did not provide the McCaugheys the required fumigant structure occupant fact sheet when they returned that evening. Additionally, Sunland employees failed to use approved respiratory protection devices to enter the house, endangering themselves and demonstrating their lack of training, or their carelessness, or both.

The family returned to their home Sunday evening, August 16, 2015. Terminix and Sunland had left a clearance tag at the house that falsely indicated to the family that it was safe to enter as of 4:00 p.m. In fact, as noted above, a proper clearance and the crucial required testing had not been performed.<sup>104</sup> Within hours, Peyton began feeling ill, and by 6:00 the next morning, all of the family fell ill. Upon Peyton's worsening condition the family drove to an urgent care center, and were subsequently transferred to a hospital, as the doctor concluded his symptoms were consistent with pesticide poisoning.<sup>105</sup> Peyton's condition continued to worsen that day, as he suffered uncontrollable movements of his extremities and severe brain and neurological damage.<sup>106</sup>

In the EPA criminal investigation that followed, Sunland representatives misrepresented the specific brand of pesticide that was used, and falsely indicated that the fumigation, aeration, and clearance of the home were in accordance with the law. Neither Terminix nor Sunland reported the potential exposure as required by state law, while knowing that a nine-year-old was critically ill in the hospital.

Two Sunland individuals, the owner and an employee, were charged and pleaded guilty as commercial applicators who knowingly used a registered, restricted use pesticide in a manner inconsistent with its labeling.<sup>107</sup> They were both sentenced to 12 months' incarceration and one year of supervised release, with the special condition that they

102. 7 U.S.C. §136j(a)(2)(G).

103. *McCaughey Exclusive: "We're Angry Towards Terminix. Our Son Is the One Who Has to Suffer."* FOX 29 WFLX, Nov. 19, 2015, <http://www.wflx.com/story/30557908/mccaughey-exclusive-were-angry-towards-terminix-our-son-is-the-one-who-has-to-suffer>.

104. Press Release, DOJ, Fumigation Company and Two Individuals Pled Guilty in Connection With Illegal Pesticide Application Resulting in Injuries to a Minor (Mar. 10, 2016), <https://www.justice.gov/usao-sdfl/pr/fumigation-company-and-two-individuals-pled-guilty-connection-illegal-pesticide>.

105. Sara Ganim & David Fitzpatrick, *Boy, 10 Faces Long Recovery After Pesticide Poisoning*, CNN, May 9, 2016, <http://www.cnn.com/2016/05/09/health/pesticide-poisoning-investigation/>.

106. *McCaughey Exclusive*, *supra* note 103.

107. 7 U.S.C. §136l(b)(1)(B).

cannot handle any pesticides during that time. Sunland was also charged, and pleaded guilty to the same crimes, and to making false statements in connection with the investigation, in violation of 18 U.S.C. §1001. The company was sentenced to five years of probation.<sup>108</sup>

## B. Farm Misapplications

The segment of the population most at risk from pesticide poisoning is not the victims of illegal exterminations, but rather farm workers. Between 1998 and 2005, there were approximately 51 pesticide poisonings per every 100,000 agricultural workers, which is 25 times higher than the general population. This figure may be vastly underestimated given systemic underreporting issues and barriers that workers face in accessing health care.<sup>109</sup> Farm misapplications endangering farm workers are a second type of recurring FIFRA crime case demonstrating the need for enhanced FIFRA criminal penalties.

EPA originally promulgated the Worker Protection Standard in 1974 under FIFRA with the goal of protecting agricultural workers and pesticide handlers.<sup>110</sup> The rule requires owners and employers of agricultural operations to notify workers after pesticide applications and limit field reentry immediately following applications, among other requirements. Failure by a farm applicator to comply with these standards is a use of a registered pesticide in a manner inconsistent with its labeling, but only a Class C misdemeanor and “petty offense.”<sup>111</sup>

One EPA criminal case of farm misapplication involved John Clement, the owner/operator of Casa Famoso Packing in California. In 1998, Clement hired farm workers to thin his Asian pear trees. While the workers were in the fields, he ordered the spraying of Agri-Mycin 17, a pesticide. According to the pesticide’s labeling, workers should not have been working during or 12 hours after application, but Clement required them to keep working during and immediately following the application. Workers complained of headaches, rashes, sore throats, and burning eyes. Clement was criminally charged and pleaded guilty to one FIFRA misdemeanor count<sup>112</sup> and was sentenced to a \$1,000 federal fine.

Reckless agricultural pesticide application can also harm the public. In 2012, DLM Farms, located in California, had its employees spray tangerines with the registered use pesticide Kocide 20/20. Kocide 20/20’s label specifically instructs users to avoid contact with other persons either directly or through drift. A DLM Farms’ employee was supposed to keep any passing vehicles away from the area during the application, but he left his post. As a school bus passed, the pesticide was sprayed through the school bus open windows, exposing the bus driver and eight kindergarten-age children. DLM Farms was charged with and pleaded guilty to using a registered pesticide in a manner inconsistent with its labeling.<sup>113</sup> DLM Farms was sentenced to a \$2,500 criminal fine.

## C. Wildlife Poisoning

A third, and the largest, category of recurring criminal FIFRA cases involves the intentional killing of bird and animal wildlife considered “pests,” by means of baiting their food sources with pesticides. This is a dangerous and illegal use of a pesticide. In these cases, defendants use a pesticide illegally, knowing that it is highly toxic to wildlife. As a result, they cause widespread harm and release poison on land where the landowner usually has no knowledge of the application.

For example, Leslie Hardwick Jr. worked at a private hunting preserve in Monroe, Louisiana. Hardwick, motivated to kill coyotes that competed with hunters for the same prey, applied the pesticide Temik to deer carcasses. Temik is a restricted use pesticide properly used to kill insects and nematodes on plants. It is toxic to fish, birds, and other wildlife, and is not approved for use as a poison for animals. Hardwick placed the poisoned meat on hunting property and adjacent private property, neither of which he had permission to be on.

In 2011, investigators found approximately 60 dead mammals and migratory birds, and located carcass remains from past applications. Hardwick admitted to applying the pesticide in this manner for the preceding five years. He was charged with and pleaded guilty to one count of using a restricted use pesticide in a manner inconsistent with its labeling under FIFRA,<sup>114</sup> and one count of violating the Migratory Bird Treaty Act (MBTA).<sup>115</sup> Hardwick was sen-

108. Press Release, DOJ, *supra* note 104.

109. Geoffrey M. Calvert et al., *Acute Pesticide Poisoning Among Agricultural Workers in the United States, 1998-2005*, 51 AM. J. INDUS. MED. 883, 894 (2008). Keith Cunningham-Parmeter, *A Poisoned Field: Farmworkers, Pesticide Exposure, and Tort Recovery in an Era of Regulatory Failure*, 28 N.Y.U. REV. L. & SOC. CHANGE 431, 442 (2004).

110. Proposed changes to the rule to strengthen these standards became effective on Jan. 2, 2017. 40 C.F.R. §170.2 (“Beginning January 2, 2017, the requirements of §170.301 through §170.609 of this part shall apply to any pesticide product that bears the statement ‘Use this product only in accordance with its labeling and with the Worker Protection Standard, 40 CFR part 170.’”) Agricultural employers and handler employers will be required to comply with most of the new requirements on Jan. 2, 2017, as provided in 40 C.F.R. §170.2. *See also* Pesticides; Agricultural Worker Protection Standard Revisions, 80 Fed. Reg. 67495 (Nov. 2, 2015), <https://www.federalregister.gov/articles/2015/11/02/2015-25970/pesticides-agricultural-worker-protection-standard-revisions>.

111. 7 U.S.C. §136j(a)(2)(G).

112. *Id.*

113. *Id.*

114. *Id.*

115. 16 U.S.C. §§701-712. In this case, the MBTA’s criminal penalty is a misdemeanor. Section 704(b)(2) makes it unlawful to “place or direct the placement of bait on or adjacent to an area for the purpose of causing, inducing, or allowing any person to take or attempt to take any migratory game bird by the aid of baiting on or over the baited area.” A violation of this section is a Class A misdemeanor (pursuant to 18 U.S.C. §3559) and “shall be fined under title 18, imprisoned not more than 1 year, or both.” 16 U.S.C. §707(c). For comparison, a defendant faces up to six months imprisonment and/or a fine not to exceed \$15,000 for violating or failing to comply with any regulation under the MBTA (a Class B misdemeanor pursuant to 18 U.S.C. §3559). 16 U.S.C. §707(a). Any person who takes “by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird” is guilty of a felony. *Id.* §707(b).

tenced to 36 months of probation, including six months of home confinement, and a \$5,000 federal fine.

In a similar case, Daryl Michael Fischer and Russell R. Taylor were members of a hunting club leasing Bucksnotrt Plantation, near Fitzpatrick, Alabama. On January 31, 2014, they applied Temik to a deer carcass that they spread around the property, causing a significant loss of animal life, including three dogs. Similar to the property owners in the Hardwick case, the owner of the property was unaware Fischer and Taylor used pesticide on the land. On January 21, 2015, Fischer and Taylor both pleaded guilty to use of a restricted use pesticide in a manner inconsistent with its labeling and were sentenced to 12 months of probation and a \$1,000 federal fine. Taylor was also ordered to pay \$13,250 in restitution.

Due to the high toxicity of such pesticides, the results of their improper use may not be limited to widespread death across species. Their improper use may also result in serious environmental contamination. One such case, in Montana, involved Edward Waldner, Thomas Wipf, and a religious colony named Seville Colony. Wipf was the farm boss and Waldner was the secretary at Seville. Adults and children resided at the colony. In an attempt to kill gophers, Wipf applied a pesticide called Peterson's Pocket Gopher Killer III to oats, which he then spread aboveground on Seville's land. Peterson's Pocket Gopher Killer III is a restricted use pesticide containing strychnine, a highly and acutely toxic pesticide to humans and animals at very low doses.<sup>116</sup> Wipf provided no notice to the owners and their children. A farmer found his horse dead, 75 yards from the Seville Colony property, and nearby a bag of the oats. Three days later, another horse next to the property fell dead.

In April 2010, an EPA pesticide inspector responded to Seville and met with Waldner who stated that he was unaware of the pesticides used by Seville and that there were no pesticides left. Based on the information, the inspector was unable to complete his inspection. Waldner later admitted to EPA agents that he had not told the inspector the truth. His lies endangered the health and safety of others, including the adults and children living at the colony, and delayed EPA's necessary treatment and cleanup of the contamination.

EPA's Emergency Response Team conducted an emergency cleanup of the site, approximately 300 acres, at a cost of \$90,274. On August 19, 2011, Seville Colony and Wipf were each charged with one count of violating FIFRA,<sup>117</sup> for applying a pesticide in a manner inconsistent with its label. Seville Colony pleaded guilty and was sentenced to 12 months' probation, and ordered to pay restitution to EPA for costs incurred in the emergency cleanup of the site. Wipf also pleaded guilty, and was sentenced to six months of probation and assessed a \$1,000 fine. Waldner was charged and pleaded guilty to

one count of making false statements, a violation of 18 U.S.C. §1001. He was sentenced to 12 months of probation and a \$1,000 federal fine.

#### D. Subversion of the FIFRA Regulatory Program

A fourth and final major category of FIFRA criminal cases involves a pattern of blatant subversion or circumventing of the FIFRA regulatory program, such as by falsifying FIFRA-required registrations or registration documents; formulating and selling unregistered pesticides; or consistently or repeatedly disregarding EPA pesticide label requirements or restrictions. Defendants in this type of case can range from multibillion-dollar international corporations to individual entrepreneurial "do-it-yourselfers." The common thread in these cases is the defendants' circumvention of the FIFRA registration process. Through conduct such as the falsification of registration information submitted to the government, or the failure to submit products to EPA to be registered, these violations undermine the pesticide registration process that establishes the restrictions on pesticides and their uses that protect human health and the environment.

One example is the prosecution of the Scotts Miracle-Gro Company. Scotts is part of the multibillion-dollar international corporation that produces and sells lawn care products and bird food, and that in 2010 became the "Official Lawn Care Company of Major League Baseball."<sup>118</sup> In 2008, EPA's pesticide registration office became aware of discrepancies in registration-related documents submitted by Scotts in support of a number of its pesticide products. EPA's civil and criminal investigators subsequently discovered widespread misbranding of pesticide products with misleading and unapproved labels; falsified pesticide registration documents; the distribution of unregistered Scotts pesticide products; and even the illegal application to a Scotts wild bird food product of pesticides that are toxic to birds.

In particular, the investigation discovered that Scotts had submitted false documents to EPA and to state regulatory agencies in an effort to deceive them into believing that numerous pesticides were reregistered with EPA when in fact they were not. These falsified documents were the product of a manager from Scotts who handled federal pesticide registrations. In addition, EPA discovered that Scotts had marketed pesticides bearing labels that had false and misleading claims not approved by EPA. The breadth of Scotts' misfeasance was such that in addition to criminal charges, dozens of civil violations of FIFRA, involving nationwide distribution or sale of unregistered, canceled, or misbranded pesticides, resulted in EPA issuing to Scotts more than 40 civil orders, addressing more than 100 pesticide products.

116. Strychnine is defined as a hazardous substance in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. See 42 U.S.C. §9601(14) (defining hazardous substance).  
117. 7 U.S.C. §136l(b)(1)(B).

118. Press Release, Major League Baseball, Major League Baseball Properties and Scotts Form New Multi-Faceted Relationship (Jan. 20, 2010), [http://mlb.com/news/press\\_releases/press\\_release.jsp?ymd=20100120&content\\_id=7941918&vkey=pr\\_mlb&fext=.jsp&c\\_id=mlb](http://mlb.com/news/press_releases/press_release.jsp?ymd=20100120&content_id=7941918&vkey=pr_mlb&fext=.jsp&c_id=mlb). The Scotts Miracle-Gro Co. is part of the Scotts Co. LLC.

Further, in an effort to protect its bird food products from insect infestation during storage prior to packaging, Scotts had applied the pesticides Actellic 5E and Storcide II to those products. The active ingredients of these pesticides were the organophosphates chlorpyrifos-methyl and pirimiphos-methyl. Organophosphates are capable of killing birds, as well as causing sublethal harm such as endocrine and neurological damage, hypothermia, and changes in reproductive and feeding behavior. EPA had therefore not approved their use on bird food.

Scotts admitted that it used these pesticides contrary to EPA directives, and in spite of the warning label appearing on all Storcide II containers, stating that “Storcide II is extremely toxic to fish and toxic to birds and other wildlife.” Scotts sold illegally treated bird food for two years after it began marketing its bird food line, and for six months after employees specifically warned Scotts management of the dangers of these pesticides. By the time it voluntarily recalled these products in March 2008, Scotts had sold more than 70 million units of bird food illegally treated with pesticides toxic to birds.

In 2012, Scotts pleaded guilty to multiple counts of violating FIFRA. Charges included unlawful distribution or sale of an unregistered pesticide; unlawful distribution or sale of an adulterated or misbranded pesticide; use of a registered pesticide in a manner inconsistent with its labeling; and the knowing falsification of an application for registration.<sup>119</sup> Scotts was sentenced to pay a \$4 million criminal fine and to contribute \$500,000 to organizations that protect bird habitat.<sup>120</sup> The deterrent value of Scotts’ \$4.5 million in criminal fines and payments is questionable in light of an EPA estimate of Scotts’ worth at the time, of approximately \$3 billion.<sup>121</sup> In addition to Scotts, the Scotts manager who filed false registration information on behalf of Scotts pleaded guilty to one felony false statement count under Title 18, §1001, and one misdemeanor false statement count under FIFRA. She was sentenced to three months in prison.

119. 7 U.S.C. §136j(a)(1)(A), (a)(1)(E), (a)(2)(G), (a)(2)(M).

120. The negotiated fine amount for plea agreement purposes was reached under the limits of the Alternative Fines Act by considering factors such as the number of counts charged (11), the number of sales of pesticide-contaminated bird seed, and the financial gain Scotts derived from the offenses. See 18 U.S.C. §3571(a)-(d). The Alternative Fines Act provides higher penalties for felonies than for misdemeanors not resulting in death. See *id.* §3571(c)(3)-(6). The actual legal fine “exposure” of Scotts under the Alternative Fines Act was thus higher than the fines provided directly by FIFRA (and higher than the negotiated fine), but could have been higher had the crimes been classified as felonies. As a legal and practical matter, the misdemeanor status and penalties of FIFRA hinder the ability and enthusiasm of prosecutors and judges to seek or impose higher penalties against larger corporations, which if imposed would act as more effective financial disincentives against committing FIFRA offenses that otherwise offer the prospect of very large financial gain. In short, Scotts likely earned much more financially from its criminal FIFRA offenses than it had to repay in the form of a \$4 million fine. The level of disparity between financial gain and financial penalty could be reduced for such corporate crimes if FIFRA criminal offenses were felonies.

121. EPA’s estimate was not inconsistent with Scotts’ own 2010 public statement, made with Major League Baseball, that its worldwide sales were “nearly \$3 billion.” Press Release, Major League Baseball, *supra* note 118.

While major corporations have therefore been guilty of FIFRA crimes that undermine the FIFRA regulatory program, small businesses have engaged in this type of crime as well. One such case involved Michael McClure, owner and operator of MACZ Enterprises, Inc. (operating under the name SAN-ITY Co.). McClure was hired to treat hotel rooms for a bedbug infestation. He and his wife treated more than 130 rooms at the Magnolia Hotel in Omaha, Nebraska. However, McClure was not a certified applicator in Nebraska. A classic example of a “do-it-yourself” formulator of pesticides, he created and used his own pesticide that he called “Beetlejuice.” This was a mix of carbon tetrachloride and water, packaged in two-liter soda bottles bearing a plain label with no EPA registration number or establishment number.

McClure had previously been the subject of civil enforcement action by Virginia for similar FIFRA-related violations, which did not deter his Nebraska crime. As a result of EPA’s criminal investigation, McClure pleaded guilty in July 2011 to one count of violating FIFRA’s prohibition against distributing or selling an unregistered pesticide.<sup>122</sup> He was sentenced to 24 months of probation and ordered to pay \$5,800 in restitution to the Omaha Magnolia Hotel.

Another example of a violation undermining FIFRA’s protections involved the sale of pesticides in South Dakota for purposes other than those accepted through FIFRA’s registration process. In that case, a Native American tribe, purchasing a sanitizer to use on children’s toothbrushes, relied on the claims and representations of a salesperson for Friendly Systems, Inc. The salesperson told the tribe that the pesticides Tisan and DDS-164 could be used for this purpose when, in fact, it was a use inconsistent with their EPA registrations.

As a result, more than 100 children were exposed to the pesticide, and many of them developed medical problems, including blisters and burns in their mouths. Friendly Systems, Inc. was indicted on three counts of violating FIFRA and convicted by a jury on all counts on July 12, 1999.<sup>123</sup> Friendly was sentenced to 60 months of probation, ordered to pay \$10,657 in restitution, and assessed a federal fine totaling \$150,000.

A final example of the subversion of the FIFRA regulatory program by “do-it-yourself” pesticide formulators demonstrates the extent and seriousness of exposure that can occur as a result of circumventing the FIFRA regulatory program. Cheng Yan Huang was selling a pesticide at his store in Chinatown (Manhattan), New York, that he had obtained from a person named Jai Ping Chen. The pesticide was not registered with EPA or properly labeled as required by state and federal law. It contained almost 61 times the amount of brodifacoum, its active ingredient, than is allowed by EPA.

122. 7 U.S.C. §136j(a)(1)(A).

123. *Id.* §136j(a)(1)(B) (stating it is unlawful to distribute or sell “any registered pesticide if any claims made for it as a part of its distribution or sale substantially differ from any claims made for it as a part of the statement required in connection with its registration”).

Brodifacoum is not approved for direct consumer use and may only be used by licensed professionals. The pesticide's packaging and appearance increased the danger posed by the chemical: it was a small vial of blue-green liquid, labeled primarily in Chinese with the words "The Cat Be Unemployed." Because of its appearance, one individual mistook it for medicine, ingested the contents, and became gravely ill. Without proper FIFRA labeling, she had no way of knowing what it was, or how dangerous it was.

Between July and August 2011, Huang and Chen distributed and sold more than 4,500 individual packages of this and other unregistered and misbranded pesticide products to undercover agents. None of these pesticides had been approved by EPA for commercial sale, or contained the required ingredient statement. In addition, many of the packages misrepresented the amount of chemicals the pesticide contained.

Huang was arrested and charged in September 2011, as part of a multiagency investigation that resulted in 12 arrests, and the seizure of thousands of packages of unregistered and misbranded pesticides that were sold out of multiple locations in Manhattan. He pleaded guilty to violating FIFRA by distributing and selling at least 2,010 packages of unregistered and unauthorized pesticides.<sup>124</sup> He was sentenced to 12 months of probation and restitution of \$1,200 toward the cost of disposal of the unregistered and unauthorized pesticides seized. Chen also pleaded guilty and was sentenced to 12 months of probation, 200 hours of community service, restitution of \$1,200 for disposal costs, and a \$3,000 fine.

#### IV. Evaluating 20 Years of FIFRA Enforcement

The preceding examples from 20 years of EPA and DOJ FIFRA criminal cases offer a strong rebuttal to the arguments raised by the 1990s opponents of higher FIFRA civil and criminal penalties. A review of those opponents' rationales for maintaining FIFRA's misdemeanor penalty structure clearly shows that their justifications were unfounded. FIFRA's misdemeanor penalties are not successfully deterring and adequately punishing pesticide crimes.

##### A. The 1990s Rationales for Misdemeanor Penalties

As we have seen, one of the first rationales opposing higher FIFRA penalties was that presented to Congress by Terminix in 1992.<sup>125</sup> Terminix argued that commercial applicators of pesticides were (1) trained and certified users of pesticide products, and (2) end-users of pesticide products, "like 'do-it-yourselfers' and farmers."<sup>126</sup> The underlying

claim of the first argument seems to be that training and certification of commercial applicators made it unlikely that they would engage in criminal violations. However, the FIFRA crimes committed by Terminix in the U.S. Virgin Islands case disproved its own theory. Further refutation came from the crimes committed in the Sunland case by Terminix's commercial application subcontractor, and from the commercial applicator crimes in the Bugman case. In all these cases, trained and certified commercial applicators caused death or severe harm to children or adults through the knowing misapplication of pesticides. Neither their training nor their certification deterred criminal behavior, but in fact made that behavior more inculpatory. Training and certification gave them the knowledge of the law that should have deterred their crimes.

Terminix's second argument appears to have been that commercial applicators should not be subject to higher misdemeanor penalties than private applicators, since commercial applicators are "end-users," just as are private applicators. However, as EPA's history of FIFRA enforcement demonstrates, pesticide misuse by a commercial applicator "end-user," by a farm "end-user," and by a do-it-yourself "end-user," have all resulted in sufficient harm or risk of harm to warrant felony penalties.<sup>127</sup> Terminix's suggestion that commercial applicators be grouped with other end-users under the same penalty structure is not an argument for retaining inadequate misdemeanor penalties for FIFRA crimes committed by "end-users." Rather, it supports subjecting all end-users who commit FIFRA crimes to felony penalties.

Conceivably, the underlying claim of Terminix's "end-user" argument could have been that "end-users" of pesticides are motivated enough by the prospect of harming themselves if they misapply pesticides, to make higher penalties unnecessary. If so, the subsequent history of FIFRA enforcement again proves the claim unfounded. The commercial applicator "end-users" in the Sunland case knowingly ignored risks to themselves in their misapplications, such as by failing to wear respiratory gear. Similarly, farm workers were not deterred from their crimes by the risk of harming themselves in the DLM Farms case.<sup>128</sup> Moreover,

Goldenberg, Director of Government Affairs, ServiceMaster Consumer Services L.P).

127. For example, the Bugman, DLM Farms, and "Cat Be Unemployed" cases discussed in Parts III.A.1., III.B., and III.D., above. In addition, in January 2017, a "do-it-yourselfer" in Amarillo, Texas, misapplied an aluminum phosphide-based pesticide under his family's home. As a result of his misapplication, four of his children died, the youngest aged seven, and his wife was hospitalized in critical condition. The father and his other four children were also hospitalized but later released. The Amarillo Police Department is currently investigating the case. See Holly Yan et al., *Texas Pesticide Deaths: Chemical May Have Sickened, but Cleanup Was Fatal*, CNN, Jan. 3, 2017, <http://www.cnn.com/2017/01/03/health/texas-pesticide-deaths/>, and Claudia Lauer, *Police Investigating Accidental Poisoning That Killed 4 Kids*, ASSOCIATED PRESS, Jan. 3, 2017, <http://www.usnews.com/news/us/articles/2017-01-03/texas-woman-critical-after-accidental-poisoning-kills-kids>.

128. The one scenario in which the argument that the criminal violator is "punished enough" by misdemeanor penalties has superficial force, is where a homeowner obtains a restricted use pesticide and misuses it in a way that unintentionally injures or kills a member of his or her own family or household. In such a scenario, all might agree that the defendant

124. 7 U.S.C. §136j(a)(1)(A) (making it unlawful for any person in any state to distribute, or sell to any person, any product that is not registered).

125. See *supra* Part I.E.

126. *Pesticide Safety Improvement Act of 1991: Hearings on H.R. 3742 Before the Subcomm. on Dep't Operations, Research, and Foreign Agriculture of the House Comm. on Agriculture*, 102d Cong. 369 (1992) (statement of Norman

even apart from the enforcement history of FIFRA, the risk of self-harm has not been used to justify low criminal penalties for other environmental crimes that endanger the criminal “end-user.” For example, hazardous waste “dumpers” and asbestos-removal contractors may endanger themselves as well as others when illegally disposing of hazardous wastes or demolishing or removing asbestos. However, both the Resource Conservation and Recovery Act (RCRA) and the CAA have made such crimes felonies.

Another argument by a 1990s opponent of heightened FIFRA criminal penalties claimed that “knowing endangerment” of other people by pesticide misuse should not be subject to felony penalties if it occurred “on farms, or in homes or private institutions.”<sup>129</sup> NACA’s concern seemed to be that such felony penalties would criminalize allegedly trivial misconduct, as NACA pointed to the prospect of prosecuting someone for violating a “standard label warning” on pesticide products that warns against using the product in a manner inconsistent with the labeling.<sup>130</sup> NACA also feared that felony penalties might be “far beyond” the financial means of farmers.<sup>131</sup>

None of these arguments are supported by the record of FIFRA criminal enforcement. Some of the most serious FIFRA criminal violations have been for misapplication of pesticides on farms, in homes, and in private institutions, as exemplified in the DLM Farms, Bugman, and McClure cases. Moreover, FIFRA’s pesticide label use instructions are not “standard” warnings, if by that is meant “commonplace” or “trivial.” EPA-accepted pesticide labeling is specifically tailored to each pesticide, informs the user that it is illegal to use the pesticides contrary to the instructions, and is among the most significant protections FIFRA provides to non-licensed “end-users” like farmers, “do-it-yourselfers,” and “private institutions.” It provides the safety warnings and instructions that are specific to that pesticide and make application of such products safe for users and bystanders. To apply a pesticide contrary to its labeling is not to “violate” a trivial warning on a label, but is an act that jeopardizes the applicator and others, or the environment. This was demonstrated clearly in the Bugman, DLM Farms, and Scotts cases, among others.

Moreover, fears about the “financial means” of farmers or others to pay felony penalties have proven unfounded. In setting fines, judges routinely consider the ability of a defendant to pay the fine. Further, farming is increasingly conducted by wealthy agribusiness, and commercial applicators can be billion-dollar companies, such as Terminix. “Private institutions” can certainly be well-funded and profitable entities as well. The \$10,000 penalty limit of

FIFRA’s one existing felony penalty (for illegal disclosure of information) is not an amount that in 2017 is likely to be beyond the “financial means” of farmers or these other entities, even in the extremely unlikely event that such a maximum were applied by judges in every case. The existing levels of FIFRA criminal fines are simply ineffective, especially for larger growers who would prefer to incur the small cost of noncompliance.

NACA also argued that felony penalties should not apply to violations that do not involve injury, or to negligent rather than “intentional,” “knowing,” or repeat violations. NACA’s argument that felony penalties should only apply if harm has occurred has been repeatedly and rightfully rejected by Congress in every federal environmental statute. As the Scotts case demonstrated, the false registration of pesticides prohibited by FIFRA may not be accompanied by injury to humans, but is still worthy of serious criminal penalties. Title 18 makes false statements to the U.S. government a felony offense, and it sends the wrong and conflicting signal for FIFRA to have lesser penalties for false statements made to EPA regarding pesticides.

NACA’s argument that felonies should not apply to “negligent” violations does not militate against FIFRA felony penalties. FIFRA felonies would not be based upon a “negligence” standard of *mens rea*, but instead involve “knowing” violations. A “knowing” mental standard for FIFRA felony penalties would be the same standard used in the felony provisions of almost all of the other federal environmental statutes.<sup>132</sup> NACA acknowledged that “strong, meaningful authority” should exist to punish “intentional violators,” but did not expressly argue that only “intentional violators,” or those who willfully seek to break the law, should be subject to felonies. If that was NACA’s suggestion, such a standard for FIFRA would again set a higher bar for FIFRA prosecutions than for most other environmental crimes, despite equally or more serious actual or potential harms from pesticide crimes.

Similarly, while NACA acknowledged that “repeat offenders” should be subject to “strong, meaningful” penalties, if it was thereby proposing to limit felony penalties to repeat offenders, it again was setting an unjustifiably higher—and unprecedented—bar for FIFRA prosecutions than for other environmental crimes. None of the other federal environmental statutes limit felony penalties to “repeat offenders.” Sunland’s and Terminix’s first criminal offenses were no less criminal or injurious for being their first offenses. Pesticide use instructions, and the ability to comply with them, are not so complex or difficult that fairness requires leniency for first-time knowing violators.

Other 1990s opponents of higher FIFRA penalties claimed that the need for, and “societal benefit” from, higher FIFRA penalties had not been shown, and that higher penalties would be enforcement overkill.<sup>133</sup> The

has “suffered enough” from the loss or injury, and that felony (or even misdemeanor) penalties would be “piling on.” However, in such a case, if a criminal case was even warranted, “all” would likely include the sentencing judge, who has full authority to tailor a fine, or term of imprisonment, to fit such circumstances. On the other hand, felony penalties might be fully appropriate where a homeowner’s misuse that kills or injures a family member was egregiously reckless or recidivist.

129. See *supra* note 58.

130. *Id.*

131. See *supra* note 61.

132. The CAA, CWA, and RCRA have a “knowing” standard. 42 U.S.C. §7413(c)(5)(A), 33 U.S.C. §1319(c)(3)(A), and 42 U.S.C. §6928(e). TSCA has a “knowing and willful” *mens rea* standard. 15 U.S.C. §2615(b)(2)(A).

133. See *supra* notes 73-74.



20-year history of FIFRA cases discussed above, however, does demonstrate the need for, and “societal benefit” from, higher penalties. Deaths or injuries to children caused by pesticide misuse by commercial applicators occurred in Sunland, Terminix, and Bugman.<sup>134</sup> Environmental harm and damage to animals and real property, and the environment, occurred in the Fischer, Seville Colony, and Hardwick cases.

The Scotts case revealed a major pesticide corporation’s pervasive pattern of FIFRA violations, including falsification of registration information submitted to EPA. Farm practices involve recurrent violations that put farm workers at high risk of pesticide poisoning. Effective deterrence of egregious conduct that can injure or kill children and adults, and harm the environment, wildlife, and domestic animals requires felony penalties. The penalties imposed in EPA’s FIFRA criminal cases have been so low, even when death has resulted, that it cannot reasonably be claimed that establishing low-level felony penalties would be “overkill.”

Finally, some of the environmental community’s testimony in the 1990s reform efforts in Congress appears in effect to have unjustifiably minimized the importance of felony penalties in enforcement of FIFRA. While perhaps correctly lamenting the “limited public resources devoted to pesticide enforcement,” and perhaps less correctly alleging “official failure to adequately enforce the laws,”<sup>135</sup> such testimony certainly failed to accurately predict EPA’s subsequent 20-year history of criminal FIFRA enforcement efforts. That history represents a commitment of EPA and DOJ “officials” to FIFRA criminal enforcement, notwithstanding varying levels of “public resources” Congress appropriated for such efforts.

In addition, that history demonstrates the inadequacy of FIFRA’s criminal penalties more than the inadequacy of official efforts to enforce the law. Criminal penalties of a few hundred or thousand dollars, or sentences of simple probation or a few months, in cases like those discussed above, will not deter individuals, small businesses, or megacorporations from evading FIFRA’s requirements, when the possibility of either saving or earning higher amounts by not complying seems clear. Moreover, the Holy Grail of citizen suit powers that these groups pursued in the 1990s would likely not have assisted FIFRA criminal enforcement.<sup>136</sup>

## B. Today’s Need for FIFRA Felony Penalties

Though the 1990s arguments opposing felony penalties have been proven unfounded by the subsequent 20-year history of FIFRA criminal enforcement cases, old and new arguments for opposing more effective FIFRA crimi-

nal penalties are likely to be raised by the same or similar industry groups. The common underlying thread of all such arguments will be that higher penalties are simply not needed, either for one set of potential defendants, or for all. We believe, to the contrary, that the facts clearly show the need for felony penalties, now more than ever.

First, the predominance of misdemeanor violations under FIFRA reflects and signals perversely unbalanced values and priorities that discourage effective deterrence and punishment. The highest value and priority of FIFRA (or any federal law) is reflected by what it subjects to its highest penalty. Conversely, what FIFRA subjects to lower penalties must logically be considered relatively less serious misconduct, the deterrence and punishment of which has a lower value or priority. FIFRA has only one “unlawful act” that receives a felony penalty, and it is for disclosing the confidential information of a pesticide registrant.<sup>137</sup> In contrast, all other violations of FIFRA, including misuse of pesticides that results in death or severe medical injury, are misdemeanor violations.

The penalty structure of FIFRA therefore sets the highest value and priority on protecting a pesticide registrant’s confidential product formula from being disclosed to the public. Because disclosing such information to the public would potentially allow competitors to create and market the same product, and potentially deprive the registrant of sales and profits, FIFRA’s sole felony penalty is primarily intended to protect a pesticide registrant’s profits. FIFRA therefore makes it a more serious offense to threaten pesticide registrant profits than to commit any other FIFRA violation, including misusing a pesticide in a way that incapacitates or kills someone. In short, FIFRA perversely values profits more highly than life or health, and prioritizes its criminal penalties accordingly.

This imbalance in values and priorities is reflected within FIFRA’s misdemeanor penalty structure as well. Under FIFRA, it is a Class A misdemeanor for a federal employee to disclose confidential FIFRA information such as trade secrets or financial information.<sup>138</sup> Presumably, Congress believed that disclosure of trade secrets or financial information would risk harm to the financial health of the rightful owners of that information. In contrast, it is a lower, Class C misdemeanor, and a “petty offense,” for a private applicator of restricted use pesticides to knowingly violate FIFRA’s “restricted use” pesticide restrictions in a way that injures or kills someone.<sup>139</sup> Once again, protecting the financial position of business is perversely valued more highly under FIFRA’s penalty structure than protecting people from harm to their health and the environment.

The addition of felony penalties under FIFRA is needed to correct this imbalance in values and priorities. It should be made obvious in the penalty structure that knowing violations resulting in the death of a 15-month-old baby and her four-year-old sister, or the permanent brain damage to

134. Nor are such deaths limited to misuse from commercial applicators. See *supra* note 127.

135. See *supra* note 66.

136. As a matter of official “parallel proceedings” policy, EPA’s criminal and civil enforcement programs coordinate the timing of their separate enforcement actions against a common offender, so that civil investigations do not unwittingly jeopardize a criminal investigation in some way. EPA would not have a similar ability to preserve its criminal enforcement capability with a “citizen suit” plaintiff.

137. 7 U.S.C. §136l(b)(3).

138. 7 U.S.C. §136h(f)(1); 18 U.S.C. §3559(a).

139. 7 U.S.C. §136l(b)(2); 18 U.S.C. §3559(a).

a nine-year-old boy, from “trained and certified” pesticide misusers, merits more than a misdemeanor penalty.

The needed change is not a radical one. It would be reasonable for FIFRA to value human health and the environment *more highly* than registrant profits. It could do this by authorizing felony penalties for the many FIFRA violations that harm or threaten harm to people or the environment, or that undermine FIFRA’s regulatory protections, that are *higher* than FIFRA’s felony penalty for jeopardizing profits. That means authorizing imprisonment of up to four or five years for such crimes, which would be more than the three-year maximum term for jeopardizing profits, but still within FIFRA’s current Class E felony ceiling.

Failing that, it would also count for some progress to establish simple equivalency in FIFRA’s penalty structure. That is, FIFRA, at a minimum, could authorize the same felony penalty (up to three years’ imprisonment) for violations that harm or threaten human health or the environment, or undermine FIFRA’s regulatory program,<sup>140</sup> as its felony for threatening business profits. That equivalency in potential punishment would signal to citizens, prosecutors, and judges that the law at least values human health and the environment *just as much as* business profits and financial well-being. It would properly signal that pesticide crimes are serious offenses. The maximum sentence should reflect that importance, and be measured in years, not months.

Second, there is now more than ever a need for FIFRA felony penalties, as the past 20 years of FIFRA criminal enforcement have proven that the Bush and Clinton Administrations were correct in asserting that there is no good justification for treating FIFRA crimes differently from the felonies established under the other major environmental statutes. Just as the RCRA felony of illegal storage or disposal of hazardous waste can result in the death of two young boys overcome after falling into an illegally disposed-of hazardous waste bin,<sup>141</sup> the FIFRA crime of illegal use of a pesticide can result in the death of a 15-month-old baby and her four-year-old sister (the Bugman case). Just as CAA felonies can involve a megacorporation like Volkswagen that knowingly and willfully undermines the air pollution regulatory program by evading emission detection, FIFRA crimes can involve a megacorporation like Scotts that knowingly and willfully undermines the FIFRA registration program by evading proper registration of pesticides. Just as a Clean Water Act (CWA) felony can cause significant environmental damage from water pollution, a FIFRA crime by wildlife poisoners

like Wipf and Waldner at Seville Colony can cause enough environmental damage to require the creation of an EPA hazardous substance site under the federal “Superfund” statute to clean up the pesticidal “hazardous substance.”<sup>142</sup> There is no good reason why such FIFRA crimes should be punished as misdemeanors, while similarly harmful CAA, RCRA, or CWA crimes are punished as felonies.

Certainly, the enforcement record shows that the Bush and Clinton Administrations were also correct in their underlying assumption that misdemeanor penalties would not adequately deter FIFRA crime. It is clear now more than ever that FIFRA’s misdemeanor penalties are not working as a deterrent. The threat of jail time is one of the principal deterrents of crime; the financial impact of significant criminal fines is another. FIFRA’s criminal penalty limits for imprisonment and monetary penalties have not deterred “small business” commercial and farm applicators, or wildlife poisoners, or “do-it-yourselfers,” let alone major corporations, from committing serious FIFRA crimes. In particular, the financial motives of these defendants are strong. FIFRA criminal penalties must be equally strong in the costs they inflict for violating FIFRA, if they are to work as effective deterrents.

Finally, the government’s 20-year record of FIFRA enforcement makes it clear, now more than ever, that industry lobbyists’ fears of a criminal enforcement “power grab” by an “out-of-control” EPA, and fears of penalty “overkill” from the imposition of felony penalties, are without merit. Instead, EPA and DOJ have demonstrated their ability and commitment to appropriately distinguish FIFRA crimes from FIFRA civil violations when selecting cases for prosecution, but face disincentives to prosecute because FIFRA’s penalties are so low. Moreover, as quoted at the beginning of this Article, federal judges in FIFRA criminal cases are now publicly lamenting FIFRA’s inadequate penalties.<sup>143</sup> This is a recognition that FIFRA defendants are not pulling the trigger of a gun, and may not be acting with the intent to hurt a specific person, but that their knowing violations can nevertheless warrant significant punishment. It echoes the 1999 sentiments of Representative Stenholm: “if you are responsible, clearly proven under a court of law that what you have done with a chemical has killed a person . . . , not much difference between that and a bullet, right?”<sup>144</sup>

In short, misdemeanors today are not enough. A misdemeanor should not be the maximum penalty when two little girls die due to an applicator’s failure to take essential safety precautions as stated on the pesticide’s label and instructions. A misdemeanor is insufficient when a whole family is hospitalized and suffers neurological

140. Many of the cases outlined above and prosecuted under FIFRA involve some form of fraud, deceit, or lying. In the context of pesticide poisoning, false statements can have devastating consequences. For example, it may be essential to immediately know the pesticide involved and how it was applied, in order to save lives. Congress has recognized this interest in other environmental statutes and, as a result, created felony criminal provisions to deter and criminalize such behavior. The same needs to be done for FIFRA.

141. See James Martinez, *Company, Former Employees Indicted in Trash Bin Deaths*, ASSOCIATED PRESS, Apr. 20, 1994, <http://www.apnewsarchive.com/1994/Company-Former-Employees-Indicted-in-Trash-Bin-Deaths/id-4fc8de7cf0ef6752eda07a7e2393c98a>.

142. The “Superfund” statute, also known as CERCLA, is the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§9601-9675.

143. See, e.g., *supra* note 1.

144. *Pesticide Safety Improvement Act of 1991: Hearings on H.R. 3742 Before the Subcomm. on Dep’t Operations, Research, and Foreign Agriculture of the House Comm. on Agriculture*, 102d Cong. 163 (1992) (statement of Rep. Charles Stenholm).

damage from improper and illegal pesticide fumigation. A misdemeanor is insignificant to a multimillion-dollar corporation that continues to sell a misbranded pesticide, or misapplies pesticides, or lies to the government during the pesticide registration process. A misdemeanor does not deter a farmer who continues to spray pesticide on laboring farm workers, ignoring the pesticide label's warning and

the health consequences. A misdemeanor is not enough for defendants attempting to cover up their crimes by making false statements to law enforcement, even though a young child lies in the hospital and doctors need to know the specific pesticide that poisoned him in order to treat him. Felony penalties for FIFRA crimes are needed today, more than ever.