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## **An Agricultural Law Research Article**

# **Interagency Race to Regulate Pesticide Exposure Leaves Farmworkers in the Dust**

by

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## NOTES

# INTERAGENCY RACE TO REGULATE PESTICIDE EXPOSURE LEAVES FARMWORKERS IN THE DUST

*Elise M. Burton\**

*When it comes to pesticides, there are really two worlds. One is the tangible world of crops and pests and cancer cases. . . . The other is the abstract world of documents and regulations.<sup>1</sup>*

## I. INTRODUCTION

Agricultural workers suffer the highest rate of chemical-related illness of any occupational group in the United States.<sup>2</sup> Each year in this country, 800 to 1000 people die and 80,000 to 300,000 are injured as the direct result of occupational exposure to agricultural pesticides.<sup>3</sup> While this serious problem has not gone unnoticed by the federal government, an appropriate remedy has yet to be achieved. Both the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) have issued regulations designed to protect farmworkers from the hazards of contact with dangerous pesticides. The very fact that both agencies appear to have regulatory authority in this area, however, has resulted in jurisdictional conflict that is preventing the development of a single effective scheme for worker protection.

EPA, using its authority under the Federal Insecticide Fungicide and Rodenticide Act (FIFRA),<sup>4</sup> has issued Worker Protection

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<sup>1</sup> Fulton, *Fruit of the Poisonous Vine*, 7 Cal. Law. 23, 24 (July 1987).

<sup>2</sup> Bureau of Labor statistics data show a rate of 5.5 illnesses per 1,000 workers. OSHA Field Sanitation; Final Rule, 52 Fed. Reg. 16,010, 16,059 (1987) (to be codified at 29 C.F.R. § 1928.110) [hereinafter Field Sanitation Standard].

<sup>3</sup> R. Wassertom & R. Wiles, *Field Duty: U.S. Farmworkers and Pesticide Safety* 3 (1985), cited in Davis, *Testimony of Migrant Legal Action Program, Inc. Concerning OSHA's Hazard Communication Standard*, at 1 [Copy on file in the offices of the Virginia Environmental Law Journal].

<sup>4</sup> 7 U.S.C. §§ 136-136y (1982). FIFRA generally prohibits the sale, shipment, and delivery of a pesticide which is not registered with the EPA. *Id.* § 136j(a)(1)(A). The statute precludes EPA from registering a pesticide unless the product, as labeled, will not "generally

Standards (WPS) governing the pesticide-related occupational safety and health of field workers.<sup>5</sup> In 1988, it proposed significant revisions to these WPS, enlarging their scope and adding new provisions concerned with monitoring and training.<sup>6</sup> The proposed regulations extend protection to workers who are incidentally exposed to pesticides, as well as to workers whose jobs involve pesticide handling.<sup>7</sup>

OSHA recently promulgated its own rules regarding worker exposure to pesticides<sup>8</sup> in response to a judicial directive, in *United Steelworkers of America, AFL-CIO-CLC v. Aucter*,<sup>9</sup> that it expand its Hazard Communication Standard (HCS)<sup>10</sup> to include employees in the non-manufacturing sector of industry, including agriculture.<sup>11</sup> OSHA's authority to issue an expanded HCS is partly premised on the goals of the Occupational Safety and Health Act of 1970 (OSH Act).<sup>12</sup> A principal goal of the OSH Act is to assure that "no employee will suffer material impairment of health or functional capacity" from a lifetime of exposure to occupational hazards,<sup>13</sup> and the HCS strives to reduce the incidence of chemically-related occupational illnesses and injuries. OSHA's broad mandate, however, is limited by Section 4(b)(1) of the OSH Act, which precludes OSHA from regulating substantive areas of worker safety already regulated by another federal agency.<sup>14</sup> Although EPA's Standards are frequently and justifiably criticized as

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cause unreasonable adverse effects on the environment." *Id.* § 136a(c)(5). "Unreasonable adverse effects on the environment" is defined as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of [the] pesticide." *Id.* § 136(bb).

<sup>5</sup> Worker Protection Standards for Agricultural Pesticides, 40 C.F.R. § 170 (1988).

<sup>6</sup> 53 Fed. Reg. 25,970 (1988) [hereinafter EPA Proposed Rule].

<sup>7</sup> *Id.*

<sup>8</sup> Hazard Communication; Final Rule, 52 Fed. Reg. 31,852 (1987) [hereinafter OSHA Final Rule].

<sup>9</sup> 763 F.2d 728 (3d Cir. 1985).

<sup>10</sup> The Hazard Communication Standard "requires employers to establish hazard communication programs to transmit information about the hazards of chemicals to their employees by means of labels on containers, material safety data sheets, and training programs." 53 Fed. Reg. 29,822 (1988). The goal of the programs is to reduce the incidence of chemically-related occupational illnesses and injuries. *Id.*

<sup>11</sup> *Steelworkers*, 763 F.2d at 739.

<sup>12</sup> 29 U.S.C. §§ 651-678 (1982).

<sup>13</sup> *Id.* § 655(b)(5).

<sup>14</sup> Section 4(b)(1) provides that "[n]othing in this [Act] shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1) (1982).

inadequate to protect farmworkers from the hazards of pesticide exposure,<sup>15</sup> past judicial decisions suggest that the mere existence of the EPA regulations may be sufficient to preempt OSHA's recent efforts at farmworker protection.<sup>16</sup>

Both EPA and OSHA have acknowledged that their proposals for regulatory expansion have resulted in a jurisdictional overlap, and both recognize the need for communication and cooperation in order to reach some form of an understanding.<sup>17</sup> The expressed willingness of the two agencies to work together places EPA and OSHA in the unique position of being able to work together to formulate complementary<sup>18</sup> rules that exploit each agency's statu-

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<sup>15</sup> See Davis, *supra* note 3, at 1-14. Davis, the staff attorney for Migrant Legal Action Program, Inc., argues that although EPA has standards regulating pesticide labeling and worker certification and training, those rules are primarily intended to ensure that applicators handle and apply pesticides properly. They do not require the provision of specific information concerning the health hazards associated with exposure to the particular pesticides in the workplace. Furthermore, the pesticides' labels are inaccessible or incomprehensible to the "overwhelming majority of farmworkers." *Id.* at 7-8.

<sup>16</sup> See, e.g., *Organized Migrants in Community Action, Inc. v. Brennan*, 520 F.2d 1161 (D.C. Cir. 1975) (OSHA lacked jurisdiction to regulate farmworkers' exposure to pesticides since EPA had already promulgated rules regarding such exposure).

<sup>17</sup> OSHA has stated that an "area of potential conflict . . . involves employees exposed to pesticides." Hazard Communication: Notice of Proposed Rulemaking and Notice of Public Hearing, 53 Fed. Reg. 29,822, 29,827 (1988). OSHA will, however, "continue to have discussions with the other Agencies involved to more clearly delineate the scope of the respective regulatory requirements in these areas." *Id.* at 29,828.

EPA also "acknowledges that concurrent jurisdiction exists over the agricultural sector with regard to responsibility for health and safety. . . . The Agency agrees that coordination of the agencies' enforcement efforts in the agricultural sector would be desirable. EPA plans to continue its consultations with OSHA to clarify these matters." EPA Proposed Rule, 53 Fed. Reg. 25,970, 26,003.

<sup>18</sup> The regulations of both agencies are still malleable. EPA's WPS are proposed rather than final, and include a number of regulatory options on which the EPA has specifically solicited comment. See, e.g., 53 Fed. Reg. 25,970, 25,976 (exemptions for smaller establishments; inclusion of nonagricultural pesticide handling).

OSHA's expanded HCS, although issued as a Final Rule, 52 Fed. Reg. 31,852 (1987), was followed by a Notice of a Proposed Rulemaking to amend the "final" rule, 53 Fed. Reg. 29,822 (1988). Since the 1988 Notice provided an opportunity for public comment and agency response, the OSHA provisions have, in some respects, been returned to the status of a proposal. OMB did attempt to invalidate some aspects of the HCS in *United Steelworkers of America, AFL-CIO-CLC v. Pendergrass (Steelworkers III)*, 855 F.2d 108 (3d Cir. 1988). The Third Circuit, however, held that substantive policy decisions entrusted to OSHA did not come within OMB authority. The court also stated that "our prior orders represent our considered view that OSHA must cease abdicating its responsibility with respect to employees outside of the manufacturing sector . . . . The August 24, 1987 promulgation of a hazard communication standard applicable to all employees was a good faith compliance with those orders." *Id.* at 114. OSHA, like any regulatory agency, is free to amend its regulations, but pressure by the Third Circuit may make the agency less inclined to change its HCS. EPA, on the other hand, is not currently subject to such judicial scrutiny.

tory authority,<sup>19</sup> producing a regulatory regime that is concurrent rather than duplicative.

Regardless of any implicit or explicit understanding between EPA and OSHA, however, the historical context of pesticide regulation and the powerful lobbies having a stake in the outcome of this jurisdictional overlap make it almost inevitable that any final regulations will be subjected to judicial review.<sup>20</sup> The major issue facing courts will be OSHA's possible preclusion under Section 4(b)(1) of the OSH Act. That inquiry, in turn, will most likely focus on the definition of the term "working conditions" as it is used in the preemption section: "[n]othing in this [Act] shall apply to *working conditions* of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."<sup>21</sup> Although existing court constructions of this language have been imprecise and unpredictable,<sup>22</sup> current case law could be interpreted as allowing negotiation and cooperation between EPA and OSHA to protect the health and safety of farmworkers.<sup>23</sup> Given the incomplete nature of EPA's Worker Protection Stan-

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<sup>19</sup> The areas of authority of the two agencies are not identical. For example, OSHA's annual appropriations legislation precludes it from regulating small farms, 53 Fed. Reg. 29,822, 29,828 (1988). EPA is not similarly restricted.

<sup>20</sup> The bureaucratic machinations of both agencies are affected by various lobbies, including agricultural growers, workers, and pesticide manufacturers. It is therefore not surprising that the issue of which agency should regulate, and to what extent, appears to have become more of a battle between OSHA and EPA to define the limits of their authority, and less of an attempt to protect workers from needless exposure to toxic pesticides. Many agricultural growers, for example, would prefer that EPA have sole jurisdiction. In part, this is because EPA enforcement, via FIFRA, uses state agricultural departments in 43 states, and state penalties for non-compliance are perceived as less onerous. OSHA, on the other hand, has its own, much stronger, enforcement mechanisms.

Farmworker lobbies are split as to their preference. Under the EPA scheme, states such as California and Texas that have strong worker protection laws would be allowed to keep their more protective regulations. Workers in such states therefore favor EPA regulation. OSHA's HCS, however, would preempt state and local regulations, so worker organizations from states with weaker laws would prefer the imposition of OSHA standards.

The pressures being exerted on both agencies have resulted in a sort of bureaucratic gridlock that serves no real protective ends.

<sup>21</sup> 29 U.S.C. § 653(b)(1) (1982) (emphasis added).

<sup>22</sup> See *infra* notes 110-121 and accompanying text, discussing *Southern Pac. Transp. Co. v. Uery*, 539 F.2d 386 (5th Cir. 1976) and *Southern Ry. Co. v. Occupational Safety & Health Review Comm'n*, 539 F.2d 335 (4th Cir. 1976).

<sup>23</sup> See, e.g., *Baltimore & O. R.R. v. Occupational Safety & Health Review Comm'n*, 548 F.2d 1052 (D.C. Cir. 1976). "An industry caught in the middle [of overlapping assertions of authority by competing federal agencies] has, at the least, every right to expect that, until the final boundaries are defined, there will be sensible cooperation and mutual adjustment between the various agencies involved." *Id.* at 1055.

dards<sup>24</sup> and a flexible interpretation of "working conditions," OSHA could be adjudged to have jurisdiction to expand its HCS program to fill the interstices of the EPA regime.

Part II of this Note reviews the history of the EPA-OSHA conflict over regulation of occupational exposure to pesticides. It describes the peculiar chain of events, beginning in the early 1970's, that led to EPA being vested with authority to regulate the occupational safety and health of agricultural workers exposed to pesticides, and then discusses the circumstances under which OSHA was recently compelled to issue an expanded Hazard Communication Standard that extends into territory already occupied, albeit insufficiently, by EPA.

Part III discusses the regulations that have been issued by both agencies, as well as recently proposed modifications. An understanding of the extent to which EPA currently regulates in the area is essential for understanding the extent to which OSHA's efforts may be preempted. Part IV then examines existing case law relating to the possibility of preemption. The Note concludes with the suggestion that OSHA and EPA work together to formulate a regulatory framework that uses the agencies' complementary statutory capacities in order to fulfill the goal that both organizations share — protection of individuals from unnecessary hazards.

## II. HISTORICAL BACKGROUND

The current jurisdictional overlap is not the first time that OSHA's and EPA's authorities have collided over pesticide regulation in agriculture. The way in which the earlier conflict in this area was resolved sheds some light on the probable outcome of the current dispute.

The Occupational Safety and Health Act of 1970<sup>25</sup> established the Occupational Safety and Health Administration (OSHA) to protect workers from occupational health hazards. As OSHA began to federalize worker safety standards in the early 1970's, its attention was initially directed to industries where the need for protection was deemed to be the most compelling.<sup>26</sup> Neither the agricul-

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<sup>24</sup> See *infra* notes 65-85 and accompanying text.

<sup>25</sup> 29 U.S.C. §§ 651-678 (1982).

<sup>26</sup> Section 6(g) of the OSH Act, 29 U.S.C. § 655(g), directs OSHA to prioritize its regulation of workplace hazards based on the needs of specific "industries, trades, crafts, occupations, businesses, workplaces, or work environments." See also Conf. Rep. No. 1765, H.R. Rep. No. 1291, and S.Rep. No. 1282, 91st Cong., 2d Sess. (1970).

tural industry nor agricultural chemicals were included in this "worst first" system for developing regulations.<sup>27</sup> The decision to delay regulation of the agricultural sector was due not to ignorance of the hazards of pesticide exposure but, at least in part, to the absence of any enforcement standards for such exposure. OSHA simply elected to overlook the hazards of pesticide exposure until the necessary standards were developed.<sup>28</sup>

EPA, established in December of 1970,<sup>29</sup> was assigned a number of functions previously controlled by other governmental departments, including the registration of pesticides and the development of the types of standards needed by OSHA. EPA inherited the Pesticides Division from the Department of Agriculture and, in 1972, was charged by FIFRA<sup>30</sup> with the responsibility of establishing a comprehensive scheme for registering and regulating pesticides in order to "protect man and his environment."<sup>31</sup>

FIFRA created a preregistration requirement for pesticides, prohibiting the sale, shipment, and delivery of any pesticide not registered with EPA.<sup>32</sup> The statute precludes EPA from authorizing the sale of a pesticide unless the product, as labeled, will not cause "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of [the] pesticide."<sup>33</sup> To register a pesticide under FIFRA, chemical manufacturers must submit names, labeling information and directions for use to EPA. The Administrator of EPA then determines what supporting data are required for each product<sup>34</sup> and decides whether to authorize the product for

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<sup>27</sup> Dep't of Labor, Occupational Safety & Health Review Comm'n, and Dep't of Health, Educ. & Welfare, *The President's Report on Occupational Safety and Health* 34-35 (1973).

<sup>28</sup> Lindelef, *California Farmworkers: Legal Remedies For Pesticide Exposure*, 7 *Stan. Envtl. L.J.* 72, 86 (1987-88), (citing Oversight Hearing on Farmworker Occupational Safety & Health: Before the Subcomm. on Agric. Labor of the House Comm. on Educ. & Labor, 92d Cong., 2d Sess. 218 (1972) (statement of Miriam Guido, Migrant Legal Action Program)).

<sup>29</sup> Reorg. Plan No. 3 of 1970, 116 *Cong. Rec.* H6,523 (July 9, 1970), *reprinted in* 1970 *U.S. Code Cong. & Admin. News* 6322-6325.

<sup>30</sup> 7 *U.S.C.* §§ 136-136y (1982).

<sup>31</sup> S. Rep. No. 838, 92d Cong., 2d Sess. 4, *reprinted in* 1972 *U.S. Code Cong. & Admin. News* 3993, 3995.

<sup>32</sup> *Id.* § 136j(a)(1)(A).

<sup>33</sup> *Id.* § 136(bb).

<sup>34</sup> 40 *C.F.R.* §§ 158.20-.740 (1988). Supporting data includes chemical composition, physical and chemical characteristics, and studies of teratogenicity, mutagenicity, and effects on metabolism. *Id.* §§ 158.105, 158.202.

“general” or “restricted” use.<sup>35</sup> “Restricted” use pesticides are those chemicals that may only be used under the direct supervision of a “Certified Applicator.”<sup>36</sup> It is unlawful “to make available for use, or to use, any registered pesticide classified for restricted use for some or all purposes other than in accordance with” EPA requirements.<sup>37</sup>

By 1973, EPA had begun to implement its pesticide registration system. Thus, when numerous farmworker organizations began to pressure OSHA to expand its HCS into the agricultural realm,<sup>38</sup> the absence of enforceable standards was no longer a viable justification for inaction. In May of 1973, OSHA issued temporary emergency standards governing field reentry times for twenty-one pesticides.<sup>39</sup> The outcry from representatives of agricultural growers, however, was so immediate and forceful that OSHA amended the emergency standard.<sup>40</sup> On June 29, it published a weaker version of the standard covering only twelve pesticides.<sup>41</sup> The validity of the amended emergency standard was soon questioned by farmworker organizations seeking reinstatement of the earlier, more stringent version. Pressure for the stronger standard, however, backfired on the farmworker advocates when the U.S. Court of Appeals for the Fifth Circuit vacated the Emergency Standard entirely in *Florida Peach Growers Association, Inc. v. United States Department of Labor*.<sup>42</sup> The court found that OSHA had failed to show “by substantial evidence that agricultural workers are exposed to grave danger from exposure to organophosphorus pesticide residues on treated plants that must necessarily be protected by an emergency temporary standard.”<sup>43</sup> It is important to note that the OSHA regulations were not rejected on jurisdictional grounds, since EPA had not yet entered the regulatory field.<sup>44</sup> While OSHA was in court

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<sup>35</sup> 7 U.S.C. §136a(d)(1)(A) (1982).

<sup>36</sup> *Id.* § 136a(d)(1)(C)(i).

<sup>37</sup> *Id.* § 136j(a)(2)(F). Violations of these restrictions can result in fines of up to \$25,000 and prison terms up to one year. *Id.* § 136l(b)(1).

<sup>38</sup> *Florida Peach Growers Ass'n, Inc. v. United States Dep't of Labor*, 489 F.2d. 120, 125 (5th Cir. 1974).

<sup>39</sup> 38 Fed. Reg. 10,715 (1973). Field reentry times are the periods of time which must elapse before workers are allowed to reenter fields that have been treated with pesticides.

<sup>40</sup> Comment, *Farmworkers in Jeopardy*, 5 Ecology L.Q. 69, 79 (1975).

<sup>41</sup> 38 Fed. Reg. 17,214 (1973).

<sup>42</sup> 489 F.2d 120, 132 (5th Cir. 1974).

<sup>43</sup> *Id.*

<sup>44</sup> The *Peach Growers* decision was issued in January of 1974. The EPA did not issue Final Standards until May 10, 1974. 39 Fed. Reg. 16,888 (1974).

unsuccessfully defending its emergency standards, however, EPA announced its intent to regulate farmworker pesticide exposure.<sup>45</sup>

After *Peach Growers*, OSHA abandoned all attempts at enforcing pesticide safety and health standards for farmworkers, effectively ceding authority to formulate pesticide regulation to EPA.<sup>46</sup> Many farmworker advocates, however, viewed the EPA's regulatory scheme as woefully inadequate for the protection of farmworkers. In *Organized Migrants in Community Action, Inc. v. Brennan*<sup>47</sup> (*OMICA*), a coalition of farmworker advocates sought a mandatory injunction compelling OSHA's parent, the Department of Labor, to promulgate permanent standards for agricultural employee pesticide exposure based on the temporary standards vacated by the *Peach Growers* decision. As the *OMICA* case was being litigated, however, EPA issued proposed new pesticide standards governing agricultural workers, which became effective June 10, 1974.<sup>48</sup> Two days later the Department of Labor moved to dismiss the *OMICA* case on the ground that EPA's previous exercise of authority preempted any further Department of Labor action pursuant to the OSH Act's Section 4(b)(1) preemption requirement.<sup>49</sup> The court agreed, holding that OSHA lacked jurisdiction to regulate farmworker exposure to pesticides since EPA had already promulgated rules regarding such exposure.<sup>50</sup> *OMICA* seemed to settle the issue of regulatory jurisdiction over worker exposure to pesticides: EPA had the authority because it had issued regulations before OSHA.<sup>51</sup> Fifteen years later, how-

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<sup>45</sup> EPA's proposal was not issued entirely without consultation between the two agencies. A number of hearings and meetings were held by both OSHA and EPA and the two agencies agreed that EPA would assume sole jurisdiction over the formulation and enforcement of pesticide standards. Draft Memorandum of Agreement: EPA and OSHA (Feb. 22, 1974) [copy on file in the offices of the Virginia Environmental Law Journal]. At the same time, however, EPA independently pursued possible expansion of its regulation of pesticide registration requirements to include field reentry, protective clothing, and related agricultural worker protection for all pesticides and their uses. Occupational Safety Requirements for Pesticides; Hearings and Proposed General Standards, 38 Fed. Reg. 20,362 (1973).

<sup>46</sup> One author has described the situation as "an informal excising of farmworkers from [OSHA] protection. . . . By quietly ceding authority to formulate pesticide regulations to [EPA], an agency which lacks sufficient authority to protect worker interests, OSHA decided that 'every working man and woman in the Nation' simply did not include some 2.8 million farmworkers." Comment, *supra* note 40, at 72.

<sup>47</sup> 520 F.2d 1161 (D.C. Cir. 1975).

<sup>48</sup> Worker Protection Standards for Agricultural Pesticides; Proposed Rule, 39 Fed. Reg. 9,457 (1974).

<sup>49</sup> Comment, *supra* note 40, at 82.

<sup>50</sup> *OMICA*, 520 F.2d at 1166.

<sup>51</sup> *Id.* at 1169. The court stated, "[w]e are cognizant that exposure to pesticides presents a

ever, the apparently settled<sup>52</sup> jurisdictional issue was thrown into question by the Third Circuit Court of Appeals. In *United Steelworkers of America, AFL-CIO-CLC v. Auchter*<sup>53</sup> (*Steelworkers I*), the court held that OSHA's Federal Hazard Communication Standard, requiring that manufacturing employees be informed of potential hazards in the workplace, was preemptive of similar state hazard disclosure laws. The court went on to hold that, although Section 6(g) of the OSH Act<sup>54</sup> "clearly permits the Secretary to set priorities for the use of agency resources," it was not sufficient to merit the exclusion of non-manufacturing employers from the requirement of the standard.<sup>55</sup> The Secretary of Labor was therefore directed to explain either "why coverage of workers outside of the manufacturing sector would have seriously impeded the rulemaking process" or "why it is not feasible for the same standard to be applied in other sectors where workers are exposed to similar hazards."<sup>56</sup>

In response to the court's order, OSHA embarked upon a two year solicitation of comments and opinions regarding expansion of the HCS into previously exempt areas. Exasperated by OSHA's slow progress, the petitioners in *Steelworkers I* sought to have the judgment enforced and OSHA held in contempt.<sup>57</sup> On May 29, 1987, the Third Circuit declined to hold OSHA in contempt but did order the agency to issue, within sixty days, "a hazard communication standard applicable to all workers covered by the OSH Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a

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serious health hazard to the nation's farmworkers and believe that they are entitled to the full measure of protection. We do not hold today that farmworkers are without protection from the hazards posed by pesticide exposure, but rather that Congress . . . endowed the EPA with the authority to provide that protection. Once the Administrator exercised EPA's authority, the Secretary [of Labor] could not duplicate his efforts." *Id.*

<sup>52</sup> Although the wording of the *OMICA* decision seems clear, the extent to which that opinion disallows OSHA regulation in the area of pesticide exposure is still being disputed. Some advocates of OSHA regulation argue that *OMICA* should be read narrowly to limit the jurisdiction of EPA. Telephone interview with Shelley Davis, Staff Att'y, Migrant Legal Action Program (Mar. 2, 1989).

<sup>53</sup> 763 F.2d. 728, 736 (3d Cir. 1985).

<sup>54</sup> 29 U.S.C. § 655(g) (1982).

<sup>55</sup> 763 F.2d at 738.

<sup>56</sup> *Id.*

<sup>57</sup> *United Steelworkers of America, AFL-CIO-CLC v. Pendergrass (Steelworkers II)*, 819 F.2d 1263 (3d Cir. 1987).

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hazard communication standard is not feasible."<sup>58</sup>

In accordance with the court order, OSHA published on August 24, 1987, an expanded HCS covering "all employers with employees exposed to hazardous chemicals in their workplaces."<sup>59</sup> Although this rule was officially "final," the hurried circumstances of its promulgation led OSHA to establish a sixty-day comment period during which comments were solicited regarding the rule's feasibility or practicality.<sup>60</sup> The agency responses to these comments were then published as a Notice of a Proposed Rulemaking (NPRM) and a Notice of Public Hearing.<sup>61</sup>

As matters now stand, both OSHA and EPA have initiatives, issued within a year of each other, for increased regulation of farmworker exposure to pesticides. In each case there are indications of a tendency to protect or expand the agency's power. OSHA, for example, could have avoided the current jurisdictional clash with EPA by citing, as it did in response to *OMICA*<sup>62</sup> in the 1970's, the preclusion requirements of Section 4(b)(1) of the OSH Act.<sup>63</sup> The Third Circuit in *Steelworkers II* gave OSHA the option of either expanding the HCS or issuing a statement of reasons why such an HCS was not feasible.<sup>64</sup> Since OSHA had opted out of the agricultural realm in 1974 by citing EPA's previous exercise of authority, and had dragged its feet for two years after *Steelworkers I*, its failure to take the "not feasible" option might be viewed as an effort to exploit the opportunity given it by the Third Circuit to

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<sup>58</sup> *Id.* at 1270. The court indicated that, despite the brief 60-day promulgation period, the non-manufacturing industry had been given adequate notification during earlier rounds of rulemaking. *Id.* at 1265-66, 1269. See also 53 Fed. Reg. 29,823 (1988).

<sup>59</sup> OSHA Final Rule, 52 Fed. Reg. 31,852 (1987).

<sup>60</sup> 53 Fed. Reg. 29,822 (1988).

<sup>61</sup> The comments received by OSHA included considerable criticism from agricultural representatives expressing surprise and concern over the "regulatory burden" that they will be expected to bear. See, e.g., Letter to the Director of Health Standards Programs from Robert Frederick of the National Grange, on file at the OSHA Docket Office #5-50 ("This sudden and unexpected final rule . . . came as a shock to U.S. agriculture. . . . We are not opposed to protecting the health of agricultural employees but we believe that present regulations are sufficient to alert both employers and employees of the Health risks that are involved . . ."); Letter to the Directorate of Health Standards from Paul Leimbach of the Ohio Vegetable & Potato Growers Ass'n, on file at the OSHA Docket Office #L-5-131 ("The probability of massive confusion resulting from three different sets of regulations (OSHA, EPA, ODA) being imposed on agricultural employers, particularly those who hire migrant workers, boggles the mind!").

<sup>62</sup> 520 F.2d 1162 (D.C. Cir. 1975). See *supra* notes 47-51 and accompanying text for a brief discussion of *OMICA*.

<sup>63</sup> 29 U.S.C. § 653(b)(1) (1982). See *supra* note 14 for the text of § 4(b)(1).

<sup>64</sup> *Steelworkers II*, 819 F.2d 1263, 1270 (3d Cir. 1987).

expand or further define its jurisdictional power. While the well-being of farmworkers must certainly be a motivating force, history suggests that it may not have been OSHA's sole or even major concern. In the same vein, it could be argued that EPA ignored the inadequacy of its own regulations until OSHA moved into the field. EPA's proposal for stricter rules could be seen, not as an acknowledgment that its earlier provisions gave insufficient protection, but as an attempt to retain the exclusive responsibility for farmworker exposure to pesticides that it had enjoyed since 1974.

### III. REGULATORY FRAMEWORK

#### A. EPA's Worker Protection Standards

Despite EPA's authority to regulate pesticides in order to protect "man and the environment,"<sup>65</sup> the bulk of its regulatory efforts have been directed at determining which pesticides may be sold ("registered") and who may apply them, rather than at protecting those who are actually exposed in the workplace.<sup>66</sup> OSHA's statutory mandate "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . ."<sup>67</sup> is more specifically directed at worker protection than is EPA's somewhat nebulous objective of protecting man and the environment. OSHA's role is to inform workers about hazards; EPA, on the other hand, need only determine that a pesticide has been adequately labeled such that, in a perfect world, no hazards would be visited on those who read the label and act accordingly.

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<sup>65</sup> 7 U.S.C. § 136(bb) (1982).

<sup>66</sup> See generally 7 U.S.C. §§ 136-136y (1982 & Supp. 1988). Under FIFRA, a pesticide should be registered with the EPA once the Administrator finds that:

A) its composition is such as to warrant the proposed claims for it;

B) its labeling and other material required to be submitted comply with the requirements of [the Act];

C) it will perform its intended function without unreasonable adverse effects on the environment; and

D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

*Id.* § 136a(c)(5).

The term "unreasonable adverse effects on the environment" is defined to include "any unreasonable risk to man or the environment taking into account the economic, social and environmental costs and benefits of the use of any pesticide." *Id.* § 136(bb). If the pesticide is restricted because of a potential unreasonable adverse effect on the environment, a certified applicator must apply or supervise the pesticide's application, and the Administrator may impose additional restrictions by regulation. *Id.* § 136a(d)(1)(C)(ii).

<sup>67</sup> 29 U.S.C. § 651 (1982).

Due to what may be deemed historical happenstance, EPA developed Worker Protection Standards as an adjunct to its labeling power. These WPS currently govern the pesticide-related occupational safety and health of workers who perform hand labor operations in fields during and after the application of restricted or unrestricted pesticides.<sup>68</sup> The regulations themselves are scant. In a recent legislative attempt to amend FIFRA, former Senator William Proxmire (D-Wis.) commented that “[a]gricultural labor is now the single most hazardous occupation in the United States. Yet in the last two decades the sum total of EPA’s actions to protect agricultural workers amounts to the adoption of one-half page of now antiquated and meaningless regulations.”<sup>69</sup>

The existing Worker Protection Standards contain four basic requirements: 1) a prohibition against spraying workers; 2) specific reentry intervals for twelve pesticides and a general reentry interval for all agricultural pesticides, prohibiting reentry into treated fields until the sprays have dried and the dusts have settled; 3) a requirement for protective clothing for any worker entering treated fields before the expiration of the specified reentry period, and 4) a requirement for “appropriate and timely” warnings.<sup>70</sup> Pesticides cannot be applied in a way that will expose workers who are not knowingly involved in the application, and an area being treated must be vacated by unprotected persons.<sup>71</sup> The regulations also provide that, notwithstanding the other requirements, a worker “should not be permitted to enter treated fields if special circumstances exist that would lead a reasonable man to conclude that such entry would be unsafe.”<sup>72</sup>

Although the EPA regulations are premised on the goal of worker protection, they have been largely ineffective.<sup>73</sup> The standards strive to protect workers from the dangers of pesticides by means of pesticide labeling. Workers who do not have access to the

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<sup>68</sup> See 40 C.F.R. § 170 (1988).

<sup>69</sup> 132 Cong. Rec. S15,290 (daily ed. Oct. 7, 1986).

<sup>70</sup> 40 C.F.R. §§ 170.3, 170.5 (1988); see also EPA Proposed Rule, 53 Fed. Reg. 25,970, 25,971 (1988).

<sup>71</sup> 40 C.F.R. § 170.3(a) (1988).

<sup>72</sup> *Id.* § 170.3(b)(3).

<sup>73</sup> See, e.g., EPA’s own concern about the adequacy of its regulations, *infra* note 76 and accompanying text; criticisms by EPA’s own Scientific Advisory Panel, *infra* note 77 and accompanying text; statistics showing the high rate of chemical-related illnesses in farmworkers, *supra* notes 2-3 and accompanying text; former Sen. William Proxmire’s remarks on the paucity of EPA farmworker protection provisions, *supra* note 69 and accompanying text.

labeled container are therefore dependent on their employers<sup>74</sup> for information regarding the safe use and application of these substances. The current WPS do not provide agricultural workers with information about the health effects of the pesticides to which they are exposed.

Until the *Steelworker* cases propelled OSHA into the area of agriculture, EPA seems to have been oblivious to the inadequacies of its regulations. EPA did acknowledge the need for a comprehensive revision of the WPS in 1984,<sup>75</sup> but it took four years *and* the suggestion that OSHA was about to expand its HCS into the realm of agriculture before EPA acted. In 1988, citing its concern "about the adequacy of the present regulations to protect agricultural workers from occupational exposure to pesticides,"<sup>76</sup> EPA did propose significant changes to its WPS. Although the revised standards would significantly expand the coverage of the current regulations and address some of the inadequacies, they have been criticized as "inappropriate" by EPA's own Scientific Advisory Panel because they do not sufficiently protect agricultural workers from the dangers of pesticide exposure.<sup>77</sup>

The EPA proposal extends the WPS coverage to include forest, nursery or greenhouse workers who handle, or may otherwise be exposed to, agricultural pesticides.<sup>78</sup> Pesticide "handlers"<sup>79</sup> must

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<sup>74</sup> 40 C.F.R. § 170.3 (1988).

<sup>75</sup> 49 Fed. Reg. 32,605, 32,606 (1984) ("EPA intends to revise Part 170 for two reasons: To make the regulation reflect new information on the use of pesticides and their effects upon occupational safety and health, and to facilitate compliance with and enforcement of the regulation.").

<sup>76</sup> EPA Proposed Rule, 53 Fed. Reg. 25,970, 25,970 (1988).

<sup>77</sup> 12 Chem. Reg. Rep. (BNA) 325 (June 10, 1988).

<sup>78</sup> EPA Proposed Rule, 53 Fed. Reg. 25,970, 26,012 (1988). The regulations also require that facilities for washing off pesticides and their residues be provided for those who may be incidentally exposed to the hazards of pesticides, as well as for pesticide handlers. *Id.* at 26,015-16. Prompt transportation to an appropriate medical facility must be provided to any worker who has been poisoned or injured by a pesticide, or when pesticide exposure is expected to lead to poisoning or injury. *Id.* at 26,016.

Although the proposal strengthens the requirements for personal protective equipment for handlers and early reentry workers, the whole concept of allowing early reentry to treated areas is disturbing. Small family farms are especially likely to abuse or neglect such rules, yet EPA has stated it will not conduct routine inspections on small farms. *Id.* at 25,975; *see also* Wilk, *The EPA Proposed Worker Protection Regulations: A Critique*, *Migrant Health Clinical Supplement* 3 (Aug./Sept. 1988).

<sup>79</sup> A "handler or pesticide handler" is defined as "any worker who: mixes, loads, transfers, transports, applies or disposes of pesticides; acts as a flagger; or cleans, adjusts, or repairs contaminated parts of mixing, loading, or application equipment." EPA Proposed Rule, 53 Fed. Reg. 25,970, 26,013 (1988). The term does not include any worker who transports pesticides in containers that have never been opened. *Id.*

be trained by a certified commercial or private applicator.<sup>80</sup> The majority of farmworkers, however, are "nonhandlers" who do not handle pesticide concentrate and who are not required to enter fields before the reentry time has expired.<sup>81</sup> The expanded regulations do not require pesticide safety training for these nonhandlers.<sup>82</sup> Instead, the employer need only display pesticide safety information in a prominent location.<sup>83</sup> If workers are illiterate, it is their responsibility to get someone to explain the information to them.<sup>84</sup> If nonhandling workers, who do not have access to labeling, want to know what specific pesticides are being used, they must ask their supervisor or employer.<sup>85</sup>

### B. OSHA's Hazardous Communication Standard

OSHA's Hazardous Communication Standard, in contrast to EPA's regulations, is designed to inform both handlers and non-handlers about potential pesticide exposure in their work environment.<sup>86</sup> OSHA's Final Rule expanding the HCS into the non-manufacturing sector requires non-manufacturing employers using hazardous chemicals to 1) develop a written hazard communication program, that includes a list of all hazardous chemicals in the workplace; 2) maintain material safety data sheets (MSDS) on

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<sup>80</sup> A "certified applicator" is one who is certified under FIFRA as authorized to use or supervise the use of a restricted pesticide. 7 U.S.C. § 136(e)(1) (1982).

<sup>81</sup> Wilk, *supra* note 78, at 1.

<sup>82</sup> EPA Proposed Rule, 53 Fed. Reg. 25,970 (1988).

<sup>83</sup> *Id.* at 26,015. The information that must be displayed includes the location of emergency medical care facilities; a facsimile of the warning sign used for posting treated areas; information on pesticide hazards and recommended safety practices, and information on the rights and duties of employers, supervisors, and workers. *Id.* at 26,015-16.

All information has to be in English. Where workers can only read a language other than English, the information must either be put into that language, or a note must be added in that language recommending that the worker have someone explain the information. *Id.* at 26,015.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 26,016.

<sup>86</sup> Although the HCS is directed at informing workers, especially non-handlers, of the hazards to which they may be exposed so that unnecessary dangers may be avoided, OSHA's judicially compelled and therefore hasty expansion into the non-manufacturing realm has not resulted in a perfect regulatory structure. The agricultural work force encounters different "working conditions" from the manufacturing work force. Merely expanding the HCS, without modification, into the agricultural sector will not necessarily result in agricultural workers receiving adequate health and safety information. This leaves OSHA vulnerable to the same criticism to which EPA is already open: that its regulations are inadequate to protect agricultural workers who do not have access to pesticide labeling and who are unaware of how to avoid exposure.

each hazardous chemical in the work area and make them available to employees or their representatives upon request; 3) maintain labels on containers of hazardous chemicals *other than pesticides* that state the name of the product and appropriate hazard warnings, and 4) provide employees with information and training regarding hazardous chemicals in their work areas.<sup>87</sup> An MSDS must include information concerning the health and physical hazards posed by the chemicals as well as precautions for safe handling.<sup>88</sup> Employers must train employees in methods of detecting dangerous chemical releases, the use of personal protective equipment, and emergency procedures.<sup>89</sup>

OSHA's Notice of Proposed Rulemaking (NPRM) proposes classifying agricultural workers according to their access to EPA-approved labeling: 1) applicators of restricted use pesticides, 2) applicators of non-restrictive use pesticides, and 3) workers incidentally exposed to pesticides.<sup>90</sup> In its NPRM, OSHA acknowledges that "EPA has clearly exercised statutory authority in the area of hazard communication over the applicators of restricted use pesticides [group one] who receive training and certification under FIFRA."<sup>91</sup> In contrast, OSHA claims that the third group, "those workers who are incidentally exposed . . . to pesticide residues,"<sup>92</sup> is clearly under OSHA jurisdiction since such workers have no access to label information and are therefore unprotected under the current EPA standards.<sup>93</sup>

In OSHA's view, the jurisdictional area still in dispute revolves around the group two workers: those who apply non-restricted or general use pesticides. In order to use these products safely, workers in this group must read and act upon EPA-approved labeling. OSHA indicated that these workers might not bother, or be in a position, to instruct themselves on the safe use of pesticides, and that additional sources of information are necessary in order to provide adequate protection.<sup>94</sup> OSHA suggested that its regula-

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<sup>87</sup> OSHA Final Rule, 52 Fed. Reg. 31,852, 31,877, 31,880-82 (1987). The OSHA Rule exempts pesticides from its labeling requirements since pesticide labeling is regulated under FIFRA, 7 U.S.C. §§ 136-136y (1982).

<sup>88</sup> OSHA Final Rule, 52 Fed. Reg. 31,852, 31,881 (1987).

<sup>89</sup> *Id.* at 31, 882.

<sup>90</sup> 53 Fed. Reg. 29,822, 29,827-28 (1988).

<sup>91</sup> *Id.* at 29,827.

<sup>92</sup> *Id.* at 29,828.

<sup>93</sup> *Id.* EPA merely approves the specific label language and requires that pesticides be applied in accordance with the labels' instructions. *Id.*

<sup>94</sup> *Id.*

tions regarding MSDSs and training would communicate hazards and protect such workers more effectively than the EPA labeling provisions.<sup>95</sup>

### C. Jurisdictional Conflict and the Preemption Issue

On May 1, 1987, OSHA issued a Field Sanitation Standard that requires agricultural employers to provide hand laborers with toilets, drinking water, and handwashing facilities in the field.<sup>96</sup> In its discussion of the Standard, OSHA acknowledged that statutory action by another federal agency can preempt OSHA from exercising its own regulatory authority.<sup>97</sup> It also acknowledged that EPA "has long regulated the environmental impact and human health effects of pesticide application and field reentry" under FIFRA.<sup>98</sup> However, OSHA maintained that its Field Sanitation Standard was not preempted:

OSHA in this standard is not regulating the application or use of pesticides. Rather, OSHA seeks to protect hand laborers in the field from, among other things, the adverse health effects caused by toxic residues and dusts from all agrichemicals that have dried and settled on plants and soil after their application. OSHA seeks to reduce such occupational exposures by requiring the availability of handwashing facilities to cleanse the skin and flush the eyes of such substances. . . . OSHA believes it is not preempted in this regard by EPA.<sup>99</sup>

OSHA's acknowledgement of EPA's historical authority over the health effects of pesticide application and use may indicate that OSHA itself, prior to the Third Circuit's instructions in *Steelworkers II*,<sup>100</sup> considered itself to be preempted from enacting more specific protections.

EPA, on the other hand, made no reference in its proposed regulations to OSHA's expanded Hazard Communication Standard, despite the fact that the OSHA rule was issued in August, 1987, and EPA did not issue its proposals until July of 1988. In response to a comment by Congressman George E. Brown, Jr. (D-Cal.), sug-

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<sup>95</sup> *Id.*

<sup>96</sup> Field Sanitation; Final Rule, 52 Fed. Reg. 16,050 (1987).

<sup>97</sup> *Id.* at 16,071, referring to the preemption provision of the OSH Act, 29 U.S.C. § 653(b)(1) (1982).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> 819 F.2d 1263 (3d Cir. 1987).

gesting that there might be a conflict between EPA and OSHA enforcement actions, EPA answered:

The Agency acknowledges that concurrent jurisdiction exists over the agricultural sector with regard to responsibility for health and safety. The Agency has consulted with OSHA in an attempt to ensure that no duplication or conflict among regulations will occur, especially with regard to EPA's proposed decontamination requirements and the OSHA Field Sanitation Standard. The Agency agrees that coordination of the agencies' enforcement efforts in the agricultural sector would be desirable. EPA plans to continue its consultations with OSHA to clarify these matters.<sup>101</sup>

EPA's specifically stated desire to avoid conflict with OSHA's Field Sanitation Standard implies that it recognizes OSHA's authority to regulate in this area and, arguably, to regulate all aspects of Hazard Communication except insofar as it pertains to pesticides. The absence of any reference to OSHA's expanded HCS, however, may indicate that EPA intends to retain broad authority over the occupational safety and health of agricultural workers in relation to pesticides. This suggestion is further supported by the inclusion within the expanded WPS of individuals who are incidentally exposed to pesticides.<sup>102</sup>

#### IV. JUDICIAL INTERPRETATIONS OF PREEMPTION

As discussed above, EPA's Worker Protection Standards are primarily directed towards the registration, labeling and application of pesticides, while OSHA's Hazard Communication Standard aims to protect workers who come into contact with pesticides in any way while performing their jobs. The unresolved issue in this regulatory overlap focuses on Section 4(b)(1) of the OSH Act,<sup>103</sup> under which OSHA's regulatory authority can be displaced whenever another federal agency begins to regulate occupational safety in the same area:

Nothing in this [Act] shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 2021 of Title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting

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<sup>101</sup> EPA Proposed Rule, 53 Fed. Reg. 25,970, 26,003 (1988).

<sup>102</sup> See *id.* at 25,970, 25,973. Christopher Bashor, EPA Office of Pesticide Control, has said of individuals who might be incidentally exposed: "these are the people that we are really concerned about." Telephone interview (Sept. 24, 1988).

<sup>103</sup> 29 U.S.C. § 653(b)(1) (1982).

occupational safety or health.<sup>104</sup>

Unfortunately, the meaning of the Section 4(b)(1) prohibition is not particularly clear; the Fifth Circuit, for example, refers to the provision's "Delphic terms."<sup>105</sup> At one extreme, it is settled that OSHA has no regulatory jurisdiction where another federal agency is actually exercising its authority to regulate safety conditions.<sup>106</sup> The converse is also undisputed: "Congress obviously wanted . . . health and safety conditions to be regulated forthwith by *some* agency since it took the unusual step of requiring an actual exercise of authority to forestall OSHA coverage."<sup>107</sup> OSHA cannot therefore be precluded from acting when another Agency has regulatory authority but has failed to exercise it.<sup>108</sup> In the area of pesticide exposure, however, EPA has not failed to regulate. It has only failed to regulate sufficiently, and the OSH Act "does not require that another agency exercise its authority in the same manner or in an equally stringent manner."<sup>109</sup>

Because of the statute's ambiguity and the strong, partisan interests on both sides of the controversy, it is almost inevitable that a court decision will be required to settle the question of whether or to what extent OSHA's expanded Hazard Communication Standard is preempted by EPA's Worker Protection Standards. Two of the main issues that will arise in such litigation are the meaning of the term "working condition" in Section 4(b)(1), and the question of how comprehensive agency action must be in order to trigger preemption.

### A. Meaning of "Working Condition"

Much of the discussion of OSHA's possible preemption will focus on the definition of "working conditions." In *Southern Railway Co. v. Occupational Safety & Health Review Commission*,<sup>110</sup> the Fourth Circuit was concerned with possible OSHA preemption

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<sup>104</sup> *Id.*

<sup>105</sup> *Southern Pac. Transp. Co. v. Usery*, 539 F.2d 386, 389 (5th Cir. 1976).

<sup>106</sup> *See, e.g., Marshall v. Northwest Orient Airlines, Inc.*, 574 F.2d 119, 122 (2d Cir. 1978) (Federal Aviation Administration regulations); *Southern Ry. Co. v. Occupational Safety & Health Review Comm'n*, 539 F.2d 335, 339 (4th Cir. 1976) (Federal Railroad Administration).

<sup>107</sup> *Usery*, 539 F.2d at 392 (emphasis in original).

<sup>108</sup> *Southern Ry.*, 539 F.2d at 336.

<sup>109</sup> *Secretary v. Mushroom Transp. Co.*, OSAHRC Docket No. 1588, 5 O.S.H. Cas. (BNA) 1964 (1973).

<sup>110</sup> 539 F.2d 335 (4th Cir. 1976).

by Federal Railroad Administration (FRA) regulations concerning safety in railway operations. According to the court, “[t]he crux of the controversy is the phrase ‘working conditions’ in Section 4(b)(1).”<sup>111</sup> The railway company maintained that the correct approach was an industry-wide exemption from OSHA coverage because FRA had exercised some authority over railway safety.<sup>112</sup> The Commission, on the other hand, maintained that the only areas which should be exempted were those where FRA had expressly exercised its authority.<sup>113</sup>

The Fourth Circuit chose an interpretation of “working conditions” that fell between the extremes suggested by the parties: “the term ‘working conditions’ as used in Section 4(b)(1) means the environmental area in which an employee customarily goes about his daily tasks.”<sup>114</sup> It includes two factors: “surroundings,” defined as elements, such as toxic chemicals or fumes, regularly encountered by a worker, and “physical hazards” such as machinery or furnaces.<sup>115</sup> The Fifth Circuit adopted the same surroundings/hazards definition in *Southern Pacific Transportation Co. v. Usery*,<sup>116</sup> a similar case concerning OSHA preemption by FRA regulations. That court then applied the surrounding/hazard definition to Section 4(b)(1) of the OSH Act and found that “any FRA exercise directed at a working condition—defined either in terms of a ‘surrounding’ or a ‘hazard’—displaces OSHA coverage of that working condition.”<sup>117</sup>

In applying the definition, both the Fourth and Fifth Circuits found that surroundings and hazards for workers involved in transportation operations were different from the working conditions of employees in other areas such as railroad offices or shop and repair facilities.<sup>118</sup> FRA safety regulations for transportation operations<sup>119</sup> did not, therefore, preclude OSHA from regulating

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<sup>111</sup> *Id.* at 339.

<sup>112</sup> *Id.* at 336.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 339.

<sup>115</sup> *Id.* The court adopted the surroundings/hazards definition from *Corning Glass Works v. Brennan*, 417 U.S. 188, 202 (1974), which considered the meaning of “working conditions” in the Equal Pay Act of 1963 and found that the surroundings/hazards definition was well accepted across a wide range of industry.

<sup>116</sup> 539 F.2d 386, 390 (5th Cir. 1976).

<sup>117</sup> *Id.* at 391.

<sup>118</sup> *Southern Ry. Co.*, 539 F.2d. at 338; *Usery*, 539 F.2d. at 391.

<sup>119</sup> In *Southern Ry.*, the regulations were confined almost entirely to areas of the industry affecting “over-the-road” operations, such as locomotives and signalling equipment. 539

employee health and safety in other areas. In view of the goal of the OSH Act to assure every working man and woman safe and healthful working conditions,<sup>120</sup> the Fifth Circuit found it "unlikely that Congress would wish the ubiquitous OSHA regulations in question here to be displaced by the FRA's limited operating-equipment and accident-reporting activities."<sup>121</sup>

Exposure to agricultural chemicals such as pesticide residues is part of an agricultural worker's surroundings and is therefore a "working condition" as that term is defined by the courts. Under a broad construction of the term, produce harvesters and those who apply pesticides could be considered to labor in the same working conditions, and EPA's regulation would preempt action by OSHA. "Working condition" could be construed more narrowly, however, by looking at separate job categories. Since different types of agricultural workers face distinct sets of hazards from pesticides, existing EPA regulations that are directed solely at pesticide handlers and labeling would not, under this construction, reach the exposure-related working conditions of other types of workers. The proposed WPS, however, include those incidentally exposed to pesticides<sup>122</sup> and might therefore be deemed to reach working conditions generally. If they do, they could displace OSHA coverage of pesticide exposure.<sup>123</sup>

### *B. The Extent of EPA's Preemptive Regulation*

Even if "working condition" is construed broadly to cover the pesticide exposure of any agricultural worker, it is not clear whether EPA's regulation has to pass a threshold of comprehensiveness before it triggers preemption. The Fifth Circuit's refusal to displace ubiquitous OSHA regulations with limited FRA activities<sup>124</sup> implies that the extent of protection provided by an agency's regulations may be a factor in determining whether OSHA has been preempted. In an example, that court said that comprehensive FRA treatment of the general problem of railroad fire protection would replace all OSHA fire protection regulations,

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F.2d at 338. The regulations at issue in *Usery* were for specific items of operating equipment and development of an accident-reporting and record-keeping system. 539 F.2d at 390.

<sup>120</sup> 29 U.S.C. § 651(b) (1982).

<sup>121</sup> *Usery*, 539 F.2d at 391.

<sup>122</sup> See EPA Proposed Rule, 52 Fed. Reg. 25,970, 25,970, 25,973 (1987).

<sup>123</sup> See *Usery*, 539 F.2d at 391 ("Section 4(b)(1) means that any FRA exercise directed at a working condition . . . displaces OSHA coverage of that working condition.").

<sup>124</sup> *Id.*

but that FRA regulation of one aspect of fire protection (portable fire extinguishers) would not displace an unrelated OSHA fire regulation dealing with fire alarm signals.<sup>125</sup> EPA's regulation of pesticide application and labeling could be compared in the same way to OSHA's provisions for worker education and the transfer of information about potential hazards. Since EPA's new regulations do not provide training or health and safety information to workers without access to pesticide labels, OSHA may not be preempted with regard to these individuals, despite the fact that EPA's worker protection standards do cover some aspects of the environment in which workers are exposed to pesticides.

The theory that regulation by another agency must have some degree of comprehensiveness before OSHA can be preempted might also be extrapolated from comments by the D.C. Circuit in *Public Citizen Health Research Group v. Auchter*.<sup>126</sup> The case concerned an overlap in OSHA and EPA jurisdiction over the regulation of workplace exposure to ethylene oxide (EtO), a sterilizing agent used in the health care industry. The district court had directed OSHA to issue an emergency temporary standard, replacing a ten year old OSHA standard that had been shown to allow a dangerous level of exposure. The Secretary of Labor challenged the district court order, claiming, among other things, that there was a serious question of OSHA's jurisdiction because of EPA's regulation of chemicals under FIFRA. The D.C. Circuit, however, rejected the Secretary's claim of preemption: "OSHA is not disabled from issuing an EtO standard in 'areas—such as the health care industry—where EPA has apparently exercised minimal, if any, regulatory authority in an overlapping manner'."<sup>127</sup>

In *Public Citizen*, the minimal overlap standard was easy to apply, especially since OSHA had been regulating ethylene oxide exposure for ten years and had committed itself to the eventual replacement of an outdated standard.<sup>128</sup> EPA had exercised "minimal, if any" regulatory authority in the entire health care industry, whereas it has exercised considerable authority in the agricultural industry. However, the "minimal" standard might be applied not to an industry as a whole, but to working conditions within the industry. This would be consistent with the courts' re-

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<sup>125</sup> *Id.*

<sup>126</sup> 702 F.2d 1150 (D.C. Cir. 1983)(per curiam).

<sup>127</sup> *Id.* at 1156 n.23 (quoting from the district court's opinion).

<sup>128</sup> *Id.* The court found the preemption issue "[a]n easy question to resolve." *Id.*

jection of an industry-wide interpretation of Section 4(b)(1) preemption.<sup>129</sup> A court would first have to determine whether the "working conditions" at issue differed depending on job category, and then examine the extent of EPA's regulation of each working condition thus defined. Comprehensive regulation of a working condition would preempt OSHA activity under the Fifth Circuit's *Usery* analysis.<sup>130</sup> Minimal regulation would not preempt such action, based on the *Public Citizen* standard.<sup>131</sup> The courts, of course, will still have the difficult tasks of defining "comprehensive" and "minimal," and determining the treatment of regulatory schemes falling between these two extremes.

The existence of these "comprehensive" and "minimal" standards may explain why OSHA, in its Notice of Proposed Rulemaking for the expanded HCS, emphasized EPA's role as a regulator of pesticide labeling: "EPA requires pesticides to be labeled, approves the specific label language, and requires the pesticides to be applied in accordance with the labeling instructions."<sup>132</sup> Since the *OMICA* decision,<sup>133</sup> EPA has been criticized as being unable to protect agricultural workers appropriately because its enforcement authority is derived from the FIFRA labeling provisions.<sup>134</sup> Emphasizing EPA's role as an identifier, classifier, and labeler of pesticides, and the consequent limited reach of the Worker Protection Standards, strengthens the argument that EPA's exercise of authority over farmworker protection is "minimal." However, no court has ruled that EPA regulations pertaining to farmworker pesticide exposure are minimal, and a possible showing of minimal regulation will become more difficult once the proposed, expanded EPA standards are promulgated.

## V. CONCLUSION

OSHA has acknowledged that EPA is already involved in the certification and training of workers who apply restricted use pesticides.<sup>135</sup> OSHA's new HCS, however, is clearly intended as a comprehensive regulation of agricultural workers' exposure to pesti-

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<sup>129</sup> See *Southern Ry.*, 539 F.2d 335; *Usery*, 539 F.2d 386.

<sup>130</sup> 539 F.2d at 391.

<sup>131</sup> 702 F.2d at 1156 n.23.

<sup>132</sup> 53 Fed. Reg. 29,822, 29,827 (1988).

<sup>133</sup> 520 F.2d 1161 (D.C. Cir. 1975); see *supra* notes 47-51 and accompanying text for a discussion of *OMICA*.

<sup>134</sup> See, e.g., Comment, *supra* note 40, at 72.

<sup>135</sup> Fed. Reg. 29,822, 29,827 (1988).

cides.<sup>136</sup> The agency has expressed its intention to "continue to have discussions with the other Agencies involved to more clearly delineate the scope of the respective regulatory requirements in these areas."<sup>137</sup>

EPA's existing regulations under FIFRA may have already preempted OSHA's expanded HCS, depending on the definition of "working conditions" and the level of comprehensiveness required to trigger preemption. EPA's proposed Worker Protection Standards, which include provisions for workers who are inadvertently exposed to pesticides, are even more likely to be preemptive.

Even if OSHA has not been preempted, EPA, as the dominant agency in the area of pesticide control, could displace OSHA regulations at any time by clearly stating "a formal position that a given working condition should go unregulated or that certain regulations—and no others—should apply to a defined subject."<sup>138</sup> The fact that EPA has not announced an intention to totally displace OSHA from pesticide regulation may indicate its willingness to share the field.

Since both agencies are still in a position to alter their regulations, and have claimed a willingness to confer with other agencies, it is still possible that they may be able to cooperate to produce mutually supporting regulations. Given the respective mandates of EPA and OSHA, and each agency's statutory shortcomings in trying to regulate workers' pesticide exposure, such a cooperative effort would provide agricultural workers with better protection than either agency acting alone. A cooperative package supported by both agencies would also be more likely to be approved by courts as satisfying Congress's desire for safe and healthy working conditions.

Even without interagency cooperation, similar protection would result from a judicial finding that EPA's regulations only cover the

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<sup>136</sup> The expanded HCS "is intended to address comprehensively the issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, and to preempt any legal requirements of a state, or political subdivision of a state pertaining to the subject." OSHA Final Rule, 52 Fed. Reg. 31,852, 31,877 (1987). It further provides that "any State or local government provision requiring the . . . labeling of chemicals and identification of their hazards, development of written hazard communication programs including lists of hazardous chemicals present in the workplace, . . . [is] preempted by the HCS unless it was established . . . under the authority of an OSHA-approved State plan." *Id.* at 31,861.

<sup>137</sup> 53 Fed. Reg. 29,822, 29,828 (1988). The other agency with a recognized claim over workplace hazard regulation is the Department of Transportation. *See id.* at 29,827.

<sup>138</sup> *Southern Pac. Transp. Co. v. Utery*, 539 F.2d 386, 392 (5th Cir. 1976).

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working conditions of pesticide handlers. This would leave OSHA free to fill the voids in EPA's scheme by enacting those portions of its HCS that are designed to protect workers who have no contact with pesticide labeling.

If, however, EPA is found to have preempted OSHA from any regulation of farmworkers' exposure to pesticides, EPA must assume the responsibility of being the sole agency in charge of protecting farmworkers' health. Its current regulations are totally inadequate to fulfill this responsibility, and even its proposed new standards are not sufficient to protect non-handlers. EPA regulations must require that all workers receive information on possible pesticide exposure and training in precautionary and emergency measures. Without such a rigorous program, the high death and injury rate of American agricultural workers will stand as an indictment of interagency politicking and callousness.