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## Life is Better in the Land Down Under: Australian Treatment of GM Contamination and Why It Should Be Followed in the United States

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# LIFE IS BETTER IN THE LAND DOWN UNDER: AUSTRALIAN TREATMENT OF GM CONTAMINATION AND WHY IT SHOULD BE FOLLOWED IN THE UNITED STATES

## INTRODUCTION

In 1996, Monsanto introduced the herbicide-tolerant Roundup Ready soybean. Since then, the growth and production of genetically modified (“GM”) food in the United States has remained a controversial topic.<sup>1</sup> Although GM crops have been widely adopted by farmers in the United States,<sup>2</sup> many private citizens and lawmakers remain unconvinced of their safety.<sup>3</sup> This combination of widespread adoption and public concern is

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1. See CTR. FOR FOOD SAFETY, *MONSANTO VS. U.S. FARMERS* (2005), available at <http://www.centerforfoodsafety.org/files/cfsmontantovsfarmerreport11305.pdf> (outlining the rise of Monsanto GM products and the legal battles that have taken place through 2005); Marian Burros, *Shoppers Unaware of Gene Changes*, N.Y. TIMES, July 20, 1998, at A8; Jimmy Carter, Op-Ed., *Who’s Afraid of Genetic Engineering?*, N.Y. TIMES, Aug. 26, 1998, at A21; Barnaby J. Feder, *As Science Gathers Speed, Monsanto Leads Pack: Biotechnology Is Set to Hatch, Led by Monsanto*, N.Y. TIMES, May 2, 1998, at D1; Bill Lambrecht, *Biotechnology Foes From Around the World Plan New Tactics to Tout Cause; Protesters Who Met Here Target Monsanto Projects*, ST. LOUIS POST-DISPATCH, July 20, 1998, at B4; Mike Toner, *Consumers Not Concerned About Genetic Tinkering*, ATL. J. & CONST., May 14, 1995, at 4N.

2. In 2003, 84% of canola acreage in the United States was made up of GM crops. CTR. FOR FOOD SAFETY, *supra* note 1, at 8–9. By 2004, 85% of US soy acreage, 45% of corn acreage, and 76% of all cotton acreage was made up of GM crops, produced by a variety of companies, including Monsanto. *Id.*

3. Several advocacy groups, including Greenpeace, have publicly opposed GM foods. *Genetic Engineering*, GREENPEACE INT’L, <http://www.greenpeace.org/international/en/campaigns/agriculture/problem/genetic-engineering/> (last visited Feb. 6, 2015). In 2014, legislation was passed in Vermont that requires the labeling of all GM food. Peter Moskowitz, *In GMO Labeling Fight, All Eyes on Vermont*, AL JAZEERA AM. (Dec. 1, 2014, 5:00 AM), <http://america.aljazeera.com/articles/2014/12/1/in-gmo-labeling-fightalleyesonvermont.html>. Similar labeling initiatives were narrowly rejected by voters in Washington and Oregon in 2013 and 2014 respectively. Amrutha Gayathri, *Initiative 552: Washington State Throws Out GM Food Labeling Measure*, INT’L BUS. TIMES (Nov. 6, 2013, 4:48 AM), <http://www.ibtimes.com/initiative-522-washington-state-throws-out-gm-food-labeling-measure-1457318> (noting that the Washington initiative failed by a vote of 54.8% opposed to 45.2% in favor of labeling); Tracy Loew, *Oregon GMO Labeling Campaign Admits Defeat*, USA TODAY (Dec. 11, 2014, 8:44 PM), <http://www.usatoday.com/story/news/nation/2014/12/11/oregon-gmo-labeling-campaign-admits-defeat/20275987/> (noting that the Oregon initiative failed to pass by a margin of 837 votes). In 2013, advocates secured the passage of a ban on the growth and use of GM crops on the Hawaiian islands of Kauai and Maui. Jacob Bunge, *U.S. Judge Overturns GMO Crop Curbs in Hawaii*, WALL ST. J. (Aug. 25, 2014, 8:37 PM), <http://www.wsj.com/articles/u-s-judge-overturns-gmo-crop-curbs-in-hawaii-1409009260> (explaining that the Kauai ban was adopted in late 2013 but was later struck down on the grounds of state law preemption); Anita Hofschneider, *1,000 Votes: Maui GMO Farming Ban Squeaks By*, HONOLULU CIVIL BEAT (Nov. 4, 2014), <http://www.civilbeat.com/2014/11/1000-votes-maui-gmo-farming-ban-squeaks-by/>. All of these instances are indicative of an underlying distrust of GM foods and products by the American public.

one factor contributing to the growth and expansion of organic farming in the United States.<sup>4</sup> One major concern for organic farmers is the possibility of crop contamination by neighboring GM crops.<sup>5</sup> Many commentators have suggested that US law remains underdeveloped and fails to provide uniform remedies for organic farmers who might experience any number of contamination events.<sup>6</sup> Some recently published articles have examined the common law claims of nuisance, trespass, and negligence and concluded that these claims fail to provide sufficient remedies for farmers.<sup>7</sup> However, this Note concludes, by relying on the recently decided Australian case *Marsh v. Baxter*,<sup>8</sup> that organic farmers may find adequate protection within current US common law. Therefore, further statutory revisions are completely unnecessary to protect the US agricultural industry.

This Note proceeds in four parts, arguing that current US law has the ability to efficiently remedy any damages resulting from GM contamination of organic crops. Part I provides background on organic agriculture in the United States and examines the current fear of contamination of organic crops by their GM counterparts. Part II looks at

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4. See Dan Flynn, *Report: Organic Food Industry Achieved 25 Years of Fast Growth Through Fear and Deception*, FOOD SAFETY NEWS (Apr. 22, 2014), <http://www.foodsafetynews.com/2014/04/report-fast-growing-organics-industry-is-intentionally-deceptive/#.VLm5uorF8mU>.

5. See Carey Gillam, *Organic Farm Supporters Say GMO Contamination Needs USDA Controls*, REUTERS (Mar. 3, 2014, 9:00 AM), <http://www.reuters.com/article/2014/03/03/usa-gmo-contamination-report-idUSL1N0LX1OU20140303> (noting one survey of farmers reported that up to 30 percent of farmers who seek to grow organic crops found or suspected unintended GMO presence on their farms); *Survey: Organic Farmers Pay the Price for GMO Contamination*, FOOD AND WATER WATCH (Mar. 3, 2014), <http://www.foodandwaterwatch.org/news/survey-organic-farmers-pay-price-gmo-contamination> (discussing the financial repercussions of GM contamination and the problems facing organic farmers seeking to coexist with GM crops).

6. See, e.g., A. Bryan Endres & Lisa Schlessinger, *Pollen Drift: Reframing the Biotechnology Liability Debate*, 118 PENN ST. L. REV. 815, 848 (2014) (“[U]nder the current tort regime, there is no predictable protection or redress for an organic farmer to shield their investment and livelihood should a GM farmer start farming on neighboring land.”); Shené Mitchell, *Organic Crops, Genetic Drift, and Commingling: Theories of Remedy and Defense*, 18 DRAKE J. AGRIC. L. 313, 332 (2013) (“Until Congress sees fit to overlay a federal scheme for common law property claims . . . organic farmers cannot widely depend on these traditional arguments to protect their investments.”).

7. These authors suggest that statutory revisions be made to establish efficient liability rules, such as the implementation of a federal scheme, state adoption of a uniform methodology for addressing GM contamination, or the implementation of coexistence regulations. The suggested affirmative defense would protect farmers from being held liable for breaches of IP law in the case of unintentional genetic drift. Endres & Schlessinger, *supra* note 6, at 853–57; Mitchell, *supra* note 6, at 320–21, 331–33. See also Adam W. Jones, Note, *What Liability of Growing Genetically Engineered Crops?*, 7 DRAKE J. AGRIC. L. 621, 643–44 (2002) (concluding that an alternative regulatory system is necessary to protect organic farmers).

8. [2014] WASC 187 (Austl.), available at <http://decisions.justice.wa.gov.au/supreme/supdcnsf/PDFJudgments-WebVw/2014WASC0187/%24FILE/2014WASC0187.pdf>.

the unsatisfactory precedent that exists in the United States and argues that state-controlled tort claims can provide farmers with satisfactory recovery. Part II.A provides background on the current state of federal regulation of GM crops in the United States, which provides no recovery for contaminated farmers. Part II.B, through analysis of the leading GM contamination case in the United States, *In re StarLink Corn Products Liability Litigation*,<sup>9</sup> shows why the state remedies currently available to organic farmers provide for full recovery, especially the tort claim of private nuisance.

Part III looks to Australian regulation and its recent handling of contamination cases in order to highlight the strengths of the US common law system currently available to contaminated farmers. Part III.A discusses current Australian regulation of both GM and organic products, which is remarkably similar to the US system, thus allowing the drawing of useful parallels. Part III.B then presents the recently decided *Marsh v. Baxter*, which dealt with a private claim for recovery following alleged GM contamination of organic crops. *Marsh* shows that a farmer facing GM contamination can rely on common law tort claims in order to recover for economic losses. Even though the plaintiff-farmer Marsh had his claims dismissed by the Australian court, the case gives meaningful insight into possible routes for recovery in the case of actual contamination.

Finally, Part IV provides a discussion of the *Marsh* decision against the background of existing US precedent, including *StarLink*. This Note concludes that existing state and federal law can provide reasonable and fair relief for a farmer—organic or conventional—who experiences GM contamination. Additional statutory revisions would only further complicate the system, potentially placing burdens on GM farmers and upsetting the balance of the entire agriculture industry. Organic farmers seeking recovery can find satisfactory relief through a dual system of common law claims of private nuisance against contaminating parties and contract claims against non-governmental certifying organizations for wrongful decertification. This system allows for the most productive use of farmland in the United States while simultaneously protecting farmers from any actual damage caused by contamination.

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9. 212 F. Supp. 2d 828 (N.D. Ill. 2002).

## I. ORGANIC AGRICULTURE AND CONTAMINATION IN THE UNITED STATES

An investigation into the possible avenues of recovery available to organic farmers facing a contamination event is important given the recent growth of the organic market and the pervasive fear of contamination within the organic agriculture industry.<sup>10</sup> Between 2000 and 2012, sales of organic food products in the United States grew an average of fifteen percent annually.<sup>11</sup> As of 2008, over 4.1 million acres in the United States alone were devoted to organic production.<sup>12</sup> Organic food products are now available in three out of every four conventional stores in the United States and make up over four percent of total US food sales annually.<sup>13</sup> With consumer interest in organic foods rising annually,<sup>14</sup> the health of this industry is an important and worthwhile topic of study.

Contamination of organic foods can occur in a variety of ways. Not only can the introduction of GM material cause contamination, but the exposure of crops to pesticides or fungicides not approved for use on certified organic products may constitute contamination.<sup>15</sup> GM contamination occurs when GM material is introduced into a non-GM

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10. Recently, some farmers have pushed for further regulation of GM crops over fears that coexistence is not possible without widespread genetic drift. See Carey L. Biron, *U.S. Farmers Report Widespread GM Crop Contamination*, INTER PRESS SERV. NEWS AGENCY (Mar. 3, 2014), <http://www.ipsnews.net/2014/03/farmers-address-u-s-data-gap-gm-crop-contamination/>. Studies have shown that food sales represent over ninety-two percent of the organic sales in the United States. See J. D. Heyes, *Record Growth of Organic Food Consumption in the U.S. and India*, NATURAL NEWS (July 27, 2014), [http://www.naturalnews.com/046188\\_organic\\_food\\_consumption\\_record\\_growth\\_international\\_markets.html](http://www.naturalnews.com/046188_organic_food_consumption_record_growth_international_markets.html).

11. *Organic Food Sales Growth in the United States from 2000 to 2012*, STATISTA, <http://www.statista.com/statistics/196962/organic-food-sales-growth-in-the-us-since-2000/> (last visited Sept. 15, 2015). In 2013, the value of the organic food market exceeded \$35 billion, which represented a twelve percent increase over the previous year. Heyes, *supra* note 10.

12. Marsha Laux, *Organic Food Trends Profile*, AGRIC. MKTG. RES. CTR., [http://www.agmrc.org/markets\\_industries/food/organic-food-trends-profile/](http://www.agmrc.org/markets_industries/food/organic-food-trends-profile/) (last updated Nov. 2013).

13. *Organic Market Overview*, U.S. DEP'T OF AGRIC., <http://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture/organic-market-overview.aspx> (last updated Apr. 7, 2014).

14. "National surveys conducted by the Hartman Group and Food Marketing Institute during the early 2000s found that two-thirds of surveyed shoppers bought organically grown foods." *Id.*

15. Farmers can experience contamination when chemicals sprayed over conventional or GM crops drift through the air and land on organic crops or grazing land. See JIM RIDDLE, UNIV. OF MINN., *GMO CONTAMINATION PREVENTION: WHAT DOES IT TAKE?* 4 (2012), available at [http://www.extension.umn.edu/garden/master-gardener/volunteers/teaching-tools/docs/minimizing\\_gmo\\_contamination.pdf](http://www.extension.umn.edu/garden/master-gardener/volunteers/teaching-tools/docs/minimizing_gmo_contamination.pdf). Even farmers who have established windbreaks or hedgerows to prevent drift cannot completely protect themselves from overspray. *Id.* Recent studies have found that nearly fifty percent of all organic produce in Canada has been contaminated with pesticides. Joanne Levasseur & Vera-Lynn Kubinec, *Pesticide Residue Found on Nearly Half of Organic Produce*, CBC NEWS (Jan. 8, 2014, 4:00 AM), <http://www.cbc.ca/news/canada/manitoba/pesticide-residue-found-on-nearly-half-of-organic-produce-1.2487712>.

food source. This can occur when particles of GM crops are mixed with those of non-GM crops after harvest or through cross-breeding in the field prior to harvest. For example, the use of rented farm equipment on organic crops following their use in the harvest of GM crops can introduce enough GM material to warrant decertification of the harvested organic products.<sup>16</sup> Additionally, there are several avenues for GM genes or plants to introduce themselves into an organic crop, including wind-driven pollen drift,<sup>17</sup> the movement of cut plant matter leading to ‘volunteers,’<sup>18</sup> and animal transportation of seeds and other genetic material.<sup>19</sup>

While contamination events are not unique to organic producers and handlers,<sup>20</sup> such events can arguably have a much larger impact on the organic food industry due to a number of unique factors. Organic produce is generally sold in the marketplace for a sizable premium over both conventional and GM produce.<sup>21</sup> This premium helps farmers offset the

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16. See RIDDLE, *supra* note 15, at 5.

17. See *id.* at 3. See also R.L. Nielson, *Minimizing Pollen Drift & Commingling of GMO and non-GMO Corn Grain*, PURDUE UNIV. (Mar. 7, 2000), available at [http://www.agry.purdue.edu/ext/corn/news/articles.00/gmo\\_issues-000307.html](http://www.agry.purdue.edu/ext/corn/news/articles.00/gmo_issues-000307.html).

18. Volunteers are plants that grow without being deliberately planted, whether from dormant seeds left from previous harvests or from migrating seeds. In the 2014 decision of *Marsh v. Baxter*, swaths of canola plants were moved via wind into an organically-certified, non-canola field. This incursion led to numerous GM volunteers establishing themselves. *Marsh v. Baxter* [2014] WASC 187, at 29 (Austl.). While this incursion of GM material might be considered a contamination event, had the GM canola volunteers invaded an organic canola field, cross pollination could have led to a much more destructive contamination.

19. The *Marsh* court noted that viable non-GM seeds were transported by wild rabbits a considerable distance from one farmer’s field into organic-certified farmland. *Id.* at 91. It is also well established that birds can play a role in transporting viable seeds over extremely large areas. See, e.g., Liba Pejchar et al., *Birds as Agents of Seed Dispersal in a Human-Dominated Landscape in Southern Costa Rica*, 141 BIOLOGICAL CONSERVATION 536 (2008), available at <https://www.nceas.ucsb.edu/~ranganathan/publications/pejchar%20et%20al%202008,%20biological%20conservation.pdf>.

20. Theoretically, crops or products may be non-GM and also non-organic. Organic refers to the process used to grow and process crops in the absence of synthetic or GM materials. See *infra* notes 34–37 and accompanying text. Non-GM, on the other hand, refers only to the absence of genetically modified material. Amy Levine, *The Difference Between USDA Organic and Non-GMO Verified Seal*, BOS. ORGANICS (Oct. 24, 2013, 9:22 AM), <http://blog.bostonorganics.com/wordpress/2013/10/24/avoid-gmos-the-difference-between-organic-and-non-gmo-labels>. The status of these non-GM products, similar to that of organic products, could be placed in jeopardy by the introduction of GM material.

21. The USDA provides detailed organic price tables based on research provided by the Agriculture Marketing Service (“AMS”) *Market News* to show monthly and annual pricing for a number of major commodities. *Organic Prices*, U.S. DEP’T OF AGRIC., <http://www.ers.usda.gov/data-products/organic-prices.aspx> (last updated Aug. 28, 2014). These tables show that both organic vegetables and organic fruit were sold at a healthy premium in Atlanta and San Francisco. *Wholesale Vegetable Prices, Organic and Conventional, Monthly and Annual, 2012–13*, U.S. DEP’T OF AGRIC., available at <http://www.ers.usda.gov/data-products/organic-prices.aspx> (last updated Aug. 28, 2014). For example, in 2012, cartons of organic romaine lettuce sold for an average of \$22.95 more than their conventional counterparts in Atlanta. *Id.* This premium was \$14.16 in San Francisco. *Id.* These

increased cost of production that is required by some organic crops.<sup>22</sup> Even when the costs of growing organic crops are equivalent to those of similar GM crops, organic farmers expect to receive a premium for their efforts.<sup>23</sup> While regulation and certification is covered in depth in Part II.A, it should be stated here that a contamination event could lead to decertification of organic produce and organic farmland. This decertification could force organic farmers to sell produce for a lower price, effectively erasing any expected profit for that growing season and beyond.<sup>24</sup>

Therefore, in order to ensure the health and continued success of the organic food industry, organic farmers must have efficient and satisfactory legal avenues for recovering damages following a contamination event.<sup>25</sup> However, as GM products are grown on 169 million acres of land in the United States and make up a large portion of the US food supply, any recovery must avoid placing an unnecessary burden on GM producers.<sup>26</sup> As this Note argues, satisfactory avenues already exist in the current tort

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premiums for organic produce, while not completely static, remained relatively constant over the entirety of 2012. *Id.*

22. See generally Karen Klonsky, *Comparison of Production Costs and Resource Use for Organic and Conventional Production Systems*, 94 AM. J. AGRIC. ECON. 314, 319–21 (2012).

23. One researcher found that weed, pest, and disease management costs for some organic crops were actually lower than their conventional counterparts. *Id.* at 319. For example, while \$1627 was spent per conventional acre of lettuce grown, only \$1258 was spent per acre of organic lettuce. *Id.* Importantly, a number of different calculations are required in determining the total cost of producing any crop, including total cost of disease and pest management, labor costs, fuel costs, and water use. *Id.* at 315, 320. Additionally, organic crops tend to have lower yield expectancies than their conventional and GM counterparts. *Id.* at 318. Some research shows that, even with lower yields, organic corn has a much higher profit per acre than GM corn. See Endres & Schlessinger, *supra* note 6, at 823–24.

24. Producers may face future lost profits for up to three years following contamination due to federal and private party regulations for organic certification. See discussion *infra* Part II.A.

25. Given recent fears regarding contamination of organic crops by GM or other sources, it is important that organic producers not only actually have an avenue for relief, but also that they subjectively believe that this avenue is satisfactory and efficient. This subjective belief is paramount in order to ensure that organic producers will continue to invest in their organic endeavors and therefore contribute to the continued health of the organic food industry. For insight into the current mindset of some organic farmers, see Shicana Allen, *Crop Contamination Takes its Toll on non-GM and Organic Farmers*, INST. FOR RESPONSIBLE TECH. (Apr. 13, 2014), <http://www.responsibletechnology.org/posts/crop-contamination-takes-its-toll/>; Press Release, Food and Water Watch, Survey: Organic Farmers Pay the Price for GMO Contamination (Mar. 3, 2014), available at <http://www.foodandwaterwatch.org/pressreleases/survey-organic-farmers-pay-the-price-for-gmo-contamination/>.

26. JOSE FERNANDEZ-CORNEJO ET AL., U.S. DEP'T OF AGRIC., GENETICALLY ENGINEERED CROPS IN THE UNITED STATES 9 (2014), available at <http://www.ers.usda.gov/publications/err-economic-research-report/err162.aspx>. This number accounts for over half of the total area used to grow crops in the United States. *Id.* Compare that with the 4.1 million acres devoted to organic crops in 2008. Marsha Laux, *Organic Food Trends Profile*, AGRIC. MKTG. RES. CTR., [http://www.agmrc.org/markets\\_industries/food/organic-food-trends-profile/](http://www.agmrc.org/markets_industries/food/organic-food-trends-profile/) (last updated Nov. 2013).

and contract law of the United States that strike a healthy balance between GM and organic farmers.

## II. *STARLINK* AND THE STATE OF US LAW

In the United States, the federal government has established a complicated system that regulates the growth and labeling of organic and GM products. However, these regulations do not establish liability for contamination events. This is left to the common law systems of individual states. Importantly, while the intent element required for many common law tort claims creates barriers to recovery when applied to cases of GM contamination, private nuisance appears to provide an avenue of relief. *In re StarLink Corn Products Liability Litigation* provides limited insight into the applicability of these state law claims to a case of widespread GM contamination. Unfortunately, both *StarLink* and analogous non-GM contamination cases serve as insufficient predictors of recovery for organic farmers facing GM contamination. Therefore, questions remain in the United States as to the applicability of tort claims to GM contamination.

### A. *US Regulation of GM and Organic Agriculture*

In the United States, various state and federal agencies regulate GM agriculture and GM food products. Under a policy set out in the Coordinated Framework for Regulation of Biotechnology in 1986, the USDA, the FDA, and the EPA assess and regulate genetically modified organisms (“GMOs”), including GM crops.<sup>27</sup> The involvement and scope of regulation by each agency is dependent upon the intended use of the plant.<sup>28</sup> The Animal and Plant Health Inspection Service (“APHIS”), an agency within the USDA, regulates and monitors the risk that a GMO may become a weed or another risk to plant health.<sup>29</sup> The FDA, in regulating the safety of food and food products from plant sources, ensures that GM plants meet the same standards as traditionally-bred plants.<sup>30</sup> The EPA

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27. Coordinated Framework for Regulation of Biotechnology, 51 Fed. Reg. 23,302 (June 26, 1986).

28. *Id.*

29. Authority is given to the USDA through the Plant Protection Act, 7 U.S.C. §§ 7701-7786 (2013), and agency regulations under Animal and Plant Health Inspection Service, 7 C.F.R. § 340.1 (2015). For an overview of the USDA program and management of GMOs, including GM crops, see *Animal and Plant Health Inspection Service*, U.S. DEP’T OF AGRIC., <http://www.aphis.usda.gov/wps/portal/aphis/ourfocus/biotechnology> (last visited Sept. 16, 2015).

30. The FDA regulates most food under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C.

regulates GMOs with pesticide properties under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”)<sup>31</sup> and the Federal Food, Drug, and Cosmetics Act (“FFDCA”).<sup>32</sup> While these laws do not establish specific remedies for farmers experiencing GM contamination, the regulatory power of the federal government may establish some instances of liability for producers and growers of GM crops, as illustrated by *StarLink*.<sup>33</sup>

The federal government also regulates organic agriculture and products. Modern regulation of organic food production and labeling in the United States began with the passage of the Organic Foods Production Act of 1990.<sup>34</sup> This statute established the National Organic Program (“NOP”), which sets minimum standards for all producers or handling operations that intend to “sell, label, or represent agricultural products” as “organic.”<sup>35</sup> The NOP covers land management, nutrient management standards, weed and pest control, and seed and planting stock standards.<sup>36</sup> It also prohibits the use of fertilizers, herbicides, pesticides that contain synthetic materials, and GM seeds.<sup>37</sup> While the NOP establishes certain minimum standards, the certification process is carried out by accredited third-party certifiers.<sup>38</sup> Additionally, the NOP minimum standards can be raised and fully supplanted by local and state certification requirements or

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§§ 301–399f (2013) (“FFDCA”). The FDA has established a voluntary consultation process for developers of GMOs to help ensure the safety of these products. *FDA’s Role in Regulating Safety of GE Foods*, U.S. FOOD AND DRUG ADMIN., <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm352067.htm> (last updated Mar. 20, 2015). For more information on FDA regulation of GM products and their role in the larger regulatory framework, see *Questions & Answers on Food from Genetically Engineered Plants*, U.S. FOOD AND DRUG ADMIN., <http://www.fda.gov/Food/FoodScienceResearch/Biotechnology/ucm346030.htm> (last updated Jun. 22, 2015).

31. 7 U.S.C. § 136 (2013).

32. 21 U.S.C. §§ 301–399f. For further discussion of federal regulation of GM products, see also *EPA’s Regulation of Biotechnology for Use in Pest Management*, U.S. ENVTL. PROTECTION AGENCY, [http://www.epa.gov/opp00001/biopesticides/reg\\_of\\_biotech/eparegofbiotech.htm](http://www.epa.gov/opp00001/biopesticides/reg_of_biotech/eparegofbiotech.htm) (last updated May 14, 2014).

33. See *infra* note 60 and accompanying text.

34. Organic Foods Production Act of 1990, 7 U.S.C. §§ 6501–6523 (2013).

35. National Organic Program, 7 C.F.R. § 205.200 (2015).

36. *Id.* §§ 205.202–206.

37. *Id.* The NOP provides very limited exemptions to these strict standards for producers who sell less than \$5000 worth of agricultural products per year. *Id.* § 205.101.

38. There are currently eighty USDA certifying agents, forty-eight of which reside in the United States. *Accredited Certifying Agents*, U.S. DEP’T OF AGRIC., <http://preprod.ams.usda.gov/services/organic-certification/certifying-agents> (last visited Oct. 19, 2015). The certification process requires that farms or handling facilities provide a wide range of information, including a description of the facility seeking certification, a history of land use over the previous three years, a list of organic products raised or handled, and a written “Organic Systems Plan” detailing the practices and substances used. *FAQ: Becoming a Certified Operation*, U.S. DEP’T OF AGRIC., <http://www.ams.usda.gov/AMSV1.0/NOPFAQsHowCertified> (last modified Jan. 28, 2014).

by requirements set by the third-party certifiers.<sup>39</sup> Regarding organic contamination by GM material, NOP standards do not require decertification of organic producers who have a detectible amount of GM contamination. These rules were intended to be “process based.”<sup>40</sup> Therefore, as long as producers do not use prohibited methods and take “reasonable steps” to avoid contamination, the unintentional presence of prohibited materials “should not affect the status of an organic product or operation.”<sup>41</sup> No private organization, however, will currently certify a crop in the United States that contains any detectible level of contamination.<sup>42</sup>

While the federal government regulates the production and sale of both GM and organic products, it has not established remedies for the contamination of organic crops by GM materials. To date, the USDA, FDA, and EPA have all uniformly held that liability for damage resulting from GM contamination is a state issue, not a federal one.<sup>43</sup> The FDA does not differentiate between GM and non-GM crops in the enforcement of its food safety regulations.<sup>44</sup> Furthermore, NOP standards promulgated by the USDA do not establish liability for either contamination events or any resulting decertification.<sup>45</sup> The NOP rules only regulate the organic certification of crops and products.<sup>46</sup> Therefore, the standards do nothing to regulate the activities of non-organic farmers growing GM products.<sup>47</sup> This leaves non-GM farmers who experience GM contamination reliant upon state law for remedies to any damages that may occur. While some commentators have suggested that such a result leaves farmers without a viable means of recovery against either GM farmers or producers of GM seed,<sup>48</sup> this Note argues that existing common law provides reasonable and

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39. 7 U.S.C. § 6503.

40. National Organic Program, 65 Fed. Reg. 80,548, 80,556 (Dec. 21, 2000).

41. *Id.*

42. See Jones, *supra* note 6, at 626.

43. *Id.* at 639. See also Anthony Shadid, *Blown Profits: Genetic Drift Affects More than Biology—US Farmers Stand to Lose Millions*, BOS. GLOBE, Apr. 8, 2001, at G1.

44. See Jones, *supra* note 6, at 639; Frederick H. Degnan, *The Food Label and the Right-to-Know*, 52 FOOD & DRUG L.J. 49, 49 (1997).

45. See Jones, *supra* note 6, at 639 (citing National Organic Program, 7 C.F.R. pt. 205 subpt. B (2001)). While the NOP rules openly consider the many problems faced by pollen drift, including transfer of genetic material to organic crops, the rules provide that “such concerns are ‘outside the scope of [the] regulation by definition.’” *Id.* at 625–26 (quoting National Organic Program, 65 Fed. Reg. 80,548, 80,556 (Dec. 21, 2000) (codified at 7 C.F.R. pt. 205)).

46. See *supra* notes 34–42 and accompanying text.

47. See Jones, *supra* note 6, at 625–26.

48. See Mitchell, *supra* note 6, at 332 (stating that the coexistence of organic fields and GM crops is a “myth” and that organic farmers are left “without redress” after genetic drift occurs); Amanda Smith, Note, *Sowing Wild Oats: Bystander Strict Liability in Tort Applied to Organic Farm*

satisfactory remedies for contaminated farmers.

### B. *The StarLink Case and Common Law Claims*

As most GM contamination cases in the United States have ended in settlements, *In re StarLink Corn Products Liability Litigation* (“Starlink”) is significant in providing some precedent in the form of pretrial rulings.<sup>49</sup> *StarLink* involved a specific strain of GM corn known as StarLink. From 1998 through 2000, defendant Aventis produced and distributed StarLink corn, which produced a protein that was toxic to certain insects.<sup>50</sup> The EPA and FDA noted that the corn exhibited certain characteristics of human allergens and therefore only allowed limited production for animal feed.<sup>51</sup> Furthermore, the agencies required physical segregation of the StarLink corn from other strains.<sup>52</sup> Aventis failed to inform farmers of the EPA instructions and reports of the presence of StarLink in the food supply led to a wave of recalls.<sup>53</sup> In the wake of these recalls, numerous countries stopped importing US corn.<sup>54</sup> Plaintiffs then filed a class action suit against Aventis for damages on behalf of a nationwide class of corn farmers.<sup>55</sup> In a ruling on the defendant’s motion for summary judgment, the district court for the Northern District of Illinois granted the motion in part.<sup>56</sup>

The district court’s ruling contained four major holdings pertinent to the liability of growers and distributors of GM products. First, the court upheld the Economic Loss Doctrine, stating that while injuries to property are compensable, purely economic injuries are not.<sup>57</sup> Absent physical

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*Contamination by Genetically Modified Seed*, 51 U. LOUISVILLE L. REV. 629, 643–46 (2013) (arguing that common law claims available to farmers are too slow-moving to provide effective relief and suggesting that state legislatures develop new tests for products liability claims).

49. 212 F. Supp. 2d 828 (N.D. Ill. 2002). While class action litigation emerged following a 2006 contamination incident involving LibertyLink rice, the case was settled by the defendant Bayer for around \$750 million. Andrew Harris & David Beasley, *Bayer Will Pay \$750 Million to Settle Gene-Modified Rice Suits*, BLOOMBERG BUS. (July 1, 2011, 11:01 PM), <http://www.bloomberg.com/news/articles/2011-07-01/bayer-to-pay-750-million-to-end-lawsuits-over-genetically-modified-rice>. Therefore, while the LibertyLink outcome might suggest that producers face some liability for their GM products, there is no formal ruling that emerged from the incident.

50. *StarLink*, 212 F. Supp. 2d at 834–35.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 833.

56. *Id.* The case was eventually settled in 2003 for \$110 million plus interest. Jim Paul, *Deadline Looms for StarLink Claims*, MCCOOK DAILY GAZETTE, July 29, 2003, at 3.

57. *StarLink*, 212 F. Supp. 2d at 838–43.

injury, farmers cannot recover for the expectations of return on crop.<sup>58</sup> The court concluded that the contamination of corn crops by the StarLink gene constituted injury to property. As a result, recovery was contingent on proving direct harm to property, which the defendant failed to prove.<sup>59</sup> Second, regarding the plaintiff's negligence claim, the court found that due to the limited approval of StarLink by agencies, Aventis had a duty to prevent the introduction of the StarLink genes into the human food supply.<sup>60</sup> Third, the court found that "[r]esidue from a product drifting across property lines presents a typical nuisance claim," and Aventis could be found liable for private nuisance if it was proven that they "substantially contributed" to the alleged nuisance.<sup>61</sup> Fourth, the court found that a commercial farmer might maintain a separate claim for public nuisance if the commercial farmer was "affected differently than the general public."<sup>62</sup>

Although the holding in *StarLink* addresses several areas of GM contamination, it ultimately represents unsatisfactory precedent for predicting recovery by organic farmers in the United States. *StarLink* and analogies to other non-GM cases are unsatisfactory because (1) the *StarLink* holding is limited by the unique position of both the defendant and the product in question<sup>63</sup> and (2) analogies to non-GM cases contain elements of intent and strict negligence that do not exist in GM cases.<sup>64</sup> The holding does, however, correctly recognize the possibility of recovery by the defendants through a nuisance claim. Furthermore, as *StarLink* was settled out of court, this claim was never fully litigated and therefore provides insufficient precedent for US courts.<sup>65</sup>

Several commentators have suggested that, in the wake of *StarLink*, both producers and growers of GM crops might be held liable for the contamination of non-GM crops, including organic-certified crops.<sup>66</sup>

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58. *Id.* The court cited this well-established doctrine in holding that lost profits are "frequently speculative" and therefore not sufficient to establish a basis for recovery. *Id.*

59. *Id.* at 843. The court expressed doubt that the plaintiffs could successfully prove direct harm, but it allowed the claim to proceed. *Id.* This will have a great deal of importance in future suits by individual farmers against possible contaminators, as establishing direct harm is a necessary element of recovery in an action for trespass.

60. *Id.* The court chose to resolve a number of ambiguities in favor of the plaintiff, who worded the claim in such a way as to allege a remote duty to preserve the market price of corn by preventing contamination. *Id.*

61. *Id.* at 847.

62. *Id.* at 847-48.

63. *See infra* notes 66-73 and accompanying text.

64. *See infra* notes 74-92 and accompanying text.

65. *See Paul, supra* note 56, at 3.

66. *See Endres & Schlessinger, supra* note 6, at 841 ("[*StarLink*] although not identical to the

However, these same commentators acknowledged the limitations of the *StarLink* holding in establishing liability for manufacturers and growers of GM crops.<sup>67</sup> Unlike current commercially-grown crops, *StarLink* was only approved for limited use by the USDA.<sup>68</sup> These limited uses did not include human consumption.<sup>69</sup> Additionally, Aventis did not act to affirmatively prevent the product from being added to the US grain supply.<sup>70</sup> While these unique factors led the *StarLink* court to conclude that Aventis had a duty to prevent *StarLink* from entering the food supply, they are unlikely to reoccur. All GM crops on the market in the United States since 2000 have been approved for human consumption, with the exception of non-consumable GM cotton.<sup>71</sup> Furthermore, Aventis was the producer of the GM product that caused the contamination.<sup>72</sup> It is questionable whether this limited standard of liability could be applied to a defendant farmer growing a similar GM crop without the requisite knowledge of federal regulations and the probability of contamination.<sup>73</sup>

Additionally, common law tort claims are not easily applicable to contamination cases. The court in *StarLink* declined to impose liability on defendants for conversion, even if they were negligently liable for “cross-pollination and comingling,” because a conversion claim requires intent.<sup>74</sup> This ruling has implications beyond claims for conversion and could potentially prevent organic farmers from relying on other common law

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farmer-versus-farmer contamination situation . . . hint[s] at the potential for an organic farmer to successfully prove more than pure economic loss for pollen drift based on the concept that GM contamination is a form of physical injury.”); Jones, *supra* note 6, at 633–34; Mitchell, *supra* note 6, at 324–25 (suggesting that a forward thinking court may find that the patent holder/licensee relationship between manufacturers and farmers may give rise to an affirmative duty to exercise control similar to *StarLink*).

67. See *infra* notes 71–72 and accompanying text.

68. The USDA required special handling procedures for *StarLink* corn that were not followed by either the defendant or most of the farmers growing the product. *In re StarLink Corn Prods. Liab. Lit.*, 212 F. Supp. 2d 828, 834–35 (N.D. Ill. 2002).

69. *Id.* at 833–34.

70. *Id.* at 834–35. The court found that in addition to failing to follow or inform farmers of the USDA handling procedures, Aventis also suggested to affected farmers that EPA approval was imminent. *Id.* at 835.

71. Jones, *supra* note 6, at 634.

72. *StarLink*, 212 F. Supp. 2d at 829.

73. Jones, *supra* note 6, at 634 (stating that the holding in *StarLink* is distinguishable from future cases due to the unique circumstances surrounding the limited approval of the *StarLink* product as well as the duty held by the defendants to prevent *StarLink* corn from entering the human food supply which lead to a unique situation of strict liability). *But see* Mitchell, *supra* note 6, at 324–25 (suggesting that in the wake of *StarLink*, a court may find that manufacturers have an affirmative duty to exercise control due to a licensee relationship with farmers).

74. *StarLink*, 212 F. Supp. 2d at 844.

claims for relief, such as trespass.<sup>75</sup> Furthermore, commentators have raised questions as to the applicability of traditional negligence standards for organic crops, given the “sensitive” nature of organic farming.<sup>76</sup>

Other commentators have attempted to draw comparisons between contamination of organic crops via pollen and seed drift and liability for pesticide drift; however, these comparisons remain tenuous and problematic.<sup>77</sup> In such pesticide drift cases, unlike *StarLink*, courts have ruled that the intent element required for a claim of trespass was fulfilled when a farmer sprayed his land.<sup>78</sup> These rulings were based in part on the finding that the spraying of pesticides constituted an “abnormally dangerous” activity.<sup>79</sup> The intent held by a farmer spraying his land with pesticides to kill or affect life in that area is different from that of a farmer

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75. The Restatement (Second) of Torts § 158, adopted in a majority of states, clearly contemplates an intentional entry by a person or thing as a necessary element to establish liability for trespass. *See* RESTATEMENT (SECOND) OF TORTS § 158 (1965). Such an understanding is further supported by the presence of § 166, which establishes non-liability for accidental intrusions, even if the intrusion causes harm to the possessor. *Id.* § 166. While § 166 contains an exception for accidental entry by actors engaged in “abnormally dangerous activities,” the growing of GM crops currently does not fall into such a category. *See* Jones, *supra* note 6, at 635 n.115. Some case law suggests that it is enough that a trespasser intend the act which eventually produces entry. *See, e.g.*, Phillips v. Sun Oil Co., 121 N.E.2d 249, 250–51 (N.Y. 1954). However, it is tenuous to suggest that the act of planting corn in and of itself causes the wind to carry pollen or other organic matter into the field of another. *See* *Marsh v Baxter* [2014] WASC 187, at 133–35 (Austl.).

76. “There is no strict liability for harm caused by an abnormally dangerous activity if the harm would not have resulted but for the abnormally sensitive character of the plaintiff’s activity.” RESTATEMENT (SECOND) OF TORTS § 524A (1977). At least one author recognized that it would be possible for a court to find organic farming, governed by a “myriad of regulations and restrictions, to be an activity of ‘abnormally sensitive character.’” Mitchell, *supra*, note 6, at 327. This would act to limit the recovery of an organic farmer to the amount a conventional farmer would suffer from the same genetic drift. *Id.* As the damages sought by an individual organic farmer after a contamination event would likely consist of the difference between market price for organic and conventional crops, such a ruling could have the effect of wiping out any monetary relief.

77. One author relies upon a Minnesota decision, *Johnson v. Paynesville Farmers Union Coop. Oil Co.*, 802 N.W.2d 383 (Minn. Ct. App. 2011), in which a defendant was found liable for damages occurring when pesticide spray drifted into an adjacent field owned by the plaintiff-farmer. Mitchell, *supra* note 6, at 322. This decision was later affirmed in part and reversed in part by the Minnesota Supreme Court in *Johnson v. Paynesville Farmers Union Coop. Oil Co.*, 817 N.W.2d 693 (Minn. 2012).

78. Mitchell suggests that GM contamination by pollen or seed drift fulfills both elements for trespass established by the *Johnson* case: “(1) ‘that the liquid chemicals . . . drifted, landed, and remained on the Johnsons’ organic crops in detectable form, contaminating them,’ and (2) that the ‘pesticide or herbicide being sprayed for agricultural purposes will [affect the composition of the land].” Mitchell, *supra* note 6, at 322 (quoting *Johnson*, 802 N.W.2d at 388). This comparison is flawed due to the fact that pollen drift is not inherently dangerous, unlike spray drift. Therefore, the intent element is not waived. While a farmer spraying his crops intends for the pesticide dispersed to make contact and affect plants in the area, there is no analogous intent present when pollen or seeds move across field borders.

79. *See, e.g.*, Langan v. Valicopters, Inc., 567 P.2d 218, 220–23 (Wash. 1977) (applying a strict liability standard for the hazardous use of pesticides).

planting GM crops which later release some amount of pollen into the air that is blown by wind into a neighboring field. Additionally, these courts have required pesticide drift to occur in “discernable and consequential” amounts.<sup>80</sup> As a minority of jurisdictions still require that a trespass include unlawful entries to satisfy a physical size requirement element, such a comparison between pesticide and pollen drift is far from universally applicable.<sup>81</sup>

While a simple negligence claim failed to address the complex concerns associated with growing organic crops in the presence of GM crops, a private nuisance claim has the ability to address these concerns. In a claim for private nuisance, the court must balance the rights of both parties to the quiet “use and enjoyment of their land.”<sup>82</sup> The court in *StarLink* allowed a private nuisance claim to proceed against Aventis.<sup>83</sup> This claim did not rely on the unique factors present in the Aventis case, but instead on the causal relationship between the actions taken by the defendant and the harm suffered by the plaintiff. Therefore, a private nuisance claim might even be available to a plaintiff-farmer in a suit against a fellow GM-growing farmer.<sup>84</sup> Some commentators have argued that “right-to-farm” laws create barriers for farmers wishing to bring a private nuisance claim.<sup>85</sup> However, these laws, for the most part, codify existing common law, and therefore do nothing to prevent the filing of legitimate lawsuits.<sup>86</sup>

While jurisdictions differ, a claim for private nuisance often requires a plaintiff to prove unreasonable interference by the defendant with the

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80. *Johnson*, 802 N.W.2d at 389.

81. *See, e.g.*, *John Larkin, Inc. v. Marceau*, 959 A.2d 551 (Vt. 2008) (recognizing the historic precedent for visible entrance for trespass and the modern momentum towards allowing trespass for invisible particles but rejecting trespass claim on other grounds); *Adams v. Cleveland-Cliff Iron Co.*, 602 N.W.2d 215 (Mich. Ct. App. 1999) (holding that law of trespass did not cover airborne particulate). *But see* *Stevenson v. E.I. DuPont De Nemours & Co.*, 327 F.3d 400 (5th Cir. 2003) (holding that airborne particulate may constitute trespass under Texas law); *Kornoff v. Kingsburg Cotton Oil Co.*, 288 P.2d 507 (Cal. 1955) (en banc) (holding that near continuous dust produced by defendant’s cotton gin which covered plaintiff’s property in a thick coat constituted trespass to land which could be remedied in a court of law).

82. *See* RESTATEMENT (SECOND) OF TORTS §§ 826–831 (1979).

83. *In re StarLink Corn Prods. Liab. Lit.*, 212 F. Supp. 2d 828, 847-48 (N.D. Ill. 2002).

84. *See id.*

85. *Endres & Schlessinger*, *supra* note 6, at 839-40.

86. There are two types of “right-to-farm” laws. One codifies the “coming to the nuisance defense” which exists at common law. Neil E. Harl, *Biotechnology Policy: Global Economic and Legal Issues* 21 (Jan. 28, 2004) (unpublished manuscript), available at [http://www.econ.iastate.edu/~harl/BiotechnologyPolicy\\_California.pdf](http://www.econ.iastate.edu/~harl/BiotechnologyPolicy_California.pdf). The other prevents local governments from placing restrictions on farming practices. *Id.* Neither would create restrictions on the maintenance of a nuisance claim that do not already exist in most jurisdictions.

peaceful enjoyment and use of plaintiff's land.<sup>87</sup> Generally, a court determines unreasonableness by a balancing test which weighs the severity of the harm caused by the action against the interests of the actor.<sup>88</sup> This action does not require entry or an intent element and, therefore, may be pursued by farmers in cases where trespass might not be available due to both the invisible nature of the pollen and the mindset of the farmer.<sup>89</sup> Unlike trespass, this right of action requires actual injury to the plaintiff.<sup>90</sup> However, this element would likely not prevent recovery for a farmer experiencing GM contamination, who presumably suffers losses from the depression of crop value following the contamination.<sup>91</sup> Thus, the requirement of an actual injury should not prevent recovery unless the court determines that organic farming is an activity of "sensitive" nature.<sup>92</sup>

Accordingly, both *StarLink* and analogies to non-GM contamination cases offer unsatisfactory precedent for predicting recovery by organic farmers in the United States. Questions remain as to whether a farmer experiencing GM contamination may find full recovery through US common law. While these questions continue to go unanswered in the United States, courts abroad have been forced to deal with these difficult issues of adequacy and the applicability of standards of care. The Supreme Court of Western Australia addressed these questions in *Marsh v. Baxter*

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87. See RESTATEMENT (SECOND) OF TORTS § 821D (1979).

88. See, e.g., *Dobbs v. Wiggins*, 929 N.E.2d 30, 39 (Ill. App. Ct. 2010) ("[T]he circuit court must balance the harm done to the plaintiffs against the benefit caused by the defendant's use of the land and the suitability of the use in that particular location."); *Hendricks v. Stalnaker*, 380 S.E.2d 198, 202 (W.Va. 1989) ("Unreasonableness is determined by balancing the competing landholders' interests.").

89. See RESTATEMENT (SECOND) OF TORTS § 822 (1979) (requiring either intentional and unreasonable invasion or unintentional invasion but otherwise with results reasonably foreseen). See also *Leaf River Forest Prods., Inc. v. Ferguson*, 662 So. 2d 648, 662 (Miss. 1995) (stating that "an actual invasion of the property in question is not required for recovery for nuisance"). But see *Endres & Schlessinger*, *supra* note 6, at 836–37 (describing the subtle knowledge requirement necessary for a nuisance claim and the difficulties that might arise in proving a defendant's knowledge of a plaintiff's organic status).

90. See RESTATEMENT (SECOND) OF TORTS § 821E (1979). In order to receive monetary compensation or a court-ordered injunction, a plaintiff must prove unreasonable interference with the quiet enjoyment of land. See, e.g., *Leaf River*, 662 So. 2d at 648 (holding discoloration of water and sludge on river bank from paper mill did not support damages for public nuisance); *Wernke v. Halas*, 600 N.E.2d 117, 121–22 (Ind. Ct. App. 1992) (holding yard decorations that included toilet seat and graffiti, while vulgar and unattractive, were merely tasteless and not a nuisance).

91. Organic farmers facing a contamination event would likely lose the premium price captured by organic products. See *Organic Prices*, *supra* note 19, for a table demonstrating the premiums captured by organic products. The private nuisance requirement for actual interference could help to ensure that any suit brought was not for frivolous reasons, arguably like the *Marsh* case where no actual damages occurred besides decertification. See generally *Marsh v. Baxter* [2014] WASC 187 (Austl.). Additionally, the causation element ensures that any damages were proximately caused by the alleged nuisance.

92. See *supra* note 76 and accompanying text.

and showed that (1) common law contract and tort claims can adequately protect farmers, and (2) analogies to non-contamination examples are unnecessary and unhelpful.

### III. *MARSH V. BAXTER* AND AUSTRALIAN REGULATIONS

In May 2014, the Supreme Court of Western Australia ruled on *Marsh v. Baxter*,<sup>93</sup> a case concerning contamination of an organic-certified farm by drifting GM material. The case provides guidance to US courts and commentators on how farmers experiencing GM contamination might successfully find a remedy through common law tort claims. Furthermore, the *Marsh* court introduces the possibility of recovery in contract law against certifiers for improper decertification. Australian and US law share many similarities regarding regulation of organic and GM produce, which makes the *Marsh* ruling useful to a US audience.<sup>94</sup> Therefore, this Note will first briefly explore Australian regulation of organic and GM crops to the extent it is relevant to US law. Next, this Note will analyze the *Marsh* ruling, especially in contrast to the statutory remedies offered by critics of the current treatment of GM contamination cases in the United States.

#### A. *Australian Organic Regulation*

The regulation and certification of organic products in Australia bears a strong resemblance to that of the United States. Like the United States,<sup>95</sup> the Australian federal government, through the National Standard for Organic and Bio-Dynamic Produce (the “National Standard”), regulates many aspects of the food sold in Australia that is labeled “organic.”<sup>96</sup> The National Standard is promulgated and enforced by the Australian Department of Agriculture (“ADA”).<sup>97</sup> However, unlike the US NOP, the National Standard is an export standard, regulating only those crops and products that are sold outside of Australia.<sup>98</sup> Ultimately this difference is a

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93. [2014] WASC 187 (Plaintiffs appeal dismissed in *Marsh v Baxter* [2015] WASCA 169).

94. See *infra* Part III.A.

95. See discussion *supra* Part I for a discussion of US regulation of organic foods.

96. See generally ORGANIC INDUS. STANDARDS AND CERTIFICATION COMM., AUSTRALIAN GOV'T DEP'T OF AGRIC. & WATER RES., NAT'L STANDARD FOR ORGANIC AND BIO-DYNAMIC PRODUCE (3.5d ed. 2013), available at <http://www.agriculture.gov.au/export/food/organic-bio-dynamic/exporting> [hereinafter NAT'L STANDARD].

97. *Organic and Bio-Dynamic Produce*, AUSTRALIAN GOV'T DEP'T OF AGRIC. & WATER RES., <http://www.agriculture.gov.au/ag-farm-food/food/organic-biodynamic> (last updated Aug. 28, 2015). At the time of the contamination event in *Marsh*, the National Standard was enforced by the Australian Quarantine and Inspection Service (“AQIS”), a department of the ADA. Since that time, AQIS was rebranded as the Department of Agriculture, Fisheries, and Forestry and then finally absorbed into several departments of the ADA. *Marsh v Baxter* [2015] WASCA 169, at 101, 101 n.59 (Austl.); Colin Bettles, *DAFF Name Shortened*, THE LAND (Sept. 19, 2013, 3:18 PM), <http://www.theland.com.au/news/agriculture/agribusiness/general-news/daff-name-shortened/2672073.aspx>.

98. NAT'L STANDARD, *supra* note 96, at 1.

minor one, as Australia exports around 60% of all farm products annually, giving the National Standard a wide reach.<sup>99</sup> Additionally, domestically-marketed organic products are routinely certified by private certifiers in accordance with the National Standard.<sup>100</sup> Finally, the voluntary Australian Standard for Organic and Biodynamic Products, which governs domestic organic produce, was based primarily on the National Standard.<sup>101</sup> Like the NOP, the National Standard establishes only a minimum standard for organic products.<sup>102</sup> However, the National Standard sets a much higher bar for organic products than the NOP, banning any and all traces of “genetically modified organisms or their derivatives.”<sup>103</sup> Though it establishes a higher standard, the National Standard also does not mandate automatic decertification for every instance of GM contamination.<sup>104</sup>

The National Standard, like the rules promulgated in the NOP, is not enforced by the Australian government but by accredited third-party certifiers.<sup>105</sup> Growers and producers, referred to in the National Standard as “operators,” may obtain certification from one of six organizations approved by the ADA.<sup>106</sup> Due to the fact that the National Standard only

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99. NAT'L FARMERS' FED'N, NFF FARM FACTS: 2012 5 (2012), available at <http://www.nff.org.au/farm-facts.html>. Australian organic crops have a dominant presence in the eastern Asian market due to the fact that, unlike Europe, Japan, or the United States, the National Standard does not allow even trace amounts of GM products in crops or the resulting food products. See Jon Entine, 'No Such Thing As GMO Contamination' Rules Australian Court in Landmark Decision, Rebuffing Organic Activists, FORBES (May 28, 2014, 12:39 PM), <http://www.forbes.com/sites/jonentine/2014/05/28/no-such-thing-as-gmo-contamination-rules-australian-court-in-landmark-decision-rebuffing-organic-activists/>.

100. *Organic and Biodynamic Produce*, AUSTL. GOV'T DEP'T OF AGRIC. & WATER RES., <http://www.agriculture.gov.au/ag-farm-food/food/organic-biodynamic> (last updated Nov. 3, 2015).

101. ROBYN NEESON, STATE OF NEW SOUTH WALES, PRIMEFACT 1047, ORGANIC STANDARDS AND CERTIFICATION IN AUSTRALIA 1–2 (2010) available at [http://www.dpi.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0011/353297/Organic-Standards-and-certification-in-Australia.pdf](http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0011/353297/Organic-Standards-and-certification-in-Australia.pdf).

102. NAT'L STANDARD, *supra* note 96, § 1.1.

103. The National Standard states: “The use of genetically modified organisms or their derivatives is prohibited. This includes but is not limited to, animals, seed and farm inputs such as fertilizers, soil conditioners, vaccines, crop production materials, food additives or processing aids.” *Id.* § 3.3.1. This is much wider language than the NOP, which only requires that growers use an “organic” process rather than requiring that they attain an organic (GM-free) outcome. Jones, *supra* note 6, at 623–24. However, it is questionable whether the difference in the minimum standard should be considered at all, due to the fact that no third-party certifier will grant certified organic status to a producer or grower whose products contain any trace amounts of GM contamination. See Jones, *supra* note 6, at 626.

104. NAT'L STANDARD, *supra* note 96, § 6.3.

105. Section 6 of the National Standard sets out the inspection and certification requirements for growers and producers of organic products. It states: “Inspection and certification is the process used by an approved certifying organisation to confirm the operator’s activities comply with this Standard.” *Id.* § 6(i).

106. *Id.* As of December, 2014, the organizations approved by the ADA were: AUS-QUAL Pty Limited, Australian Certified Organic, Bio-Dynamic Research Institute, NASAA Certified Organic, Organic Food Chain, and Safe Food Production Queensland. *Department of Agriculture Organic*

establishes minimum standards for organic status, these certifiers have the ability to supplement and even replace the guidelines offered by the National Standard.<sup>107</sup>

Furthermore, the National Standard deals exclusively with the regulation of the production and labeling of organic products.<sup>108</sup> The growing and selling of GM products in Australia is regulated by the Commonwealth Gene Technology Act 2000, which established the Office of the Gene Technology Regulator (“OGTR”).<sup>109</sup> While the OGTR must consult with the ADA and other Australian Government agencies in approving the environmental release of a GMO, this consultation process hardly constitutes a sharing of the regulatory burden.<sup>110</sup> In all, aside from establishing an absolute ban on the existence of GM elements in organic products, the Australian system of GM regulation and organic certification bears a striking resemblance to the one currently established and followed in the United States.<sup>111</sup>

## B. Marsh v. Baxter

### 1. Facts and Proceedings

Marsh, an Australian farmer, owned an organic-farming produce business, Eagle Rest, where he grew a variety of crops, including wheat, oats, spelt, and rye.<sup>112</sup> In November 2008, Marsh discovered twelve conventional canola plants that self-planted in his fields.<sup>113</sup> He pulled these

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*Approved Certifying Organisations*, AUSTL. DEP’T OF AGRIC. & WATER RES., <http://www.agriculture.gov.au/about/contactus/phone/aco> (last updated Jul. 14, 2015).

107. “Individual certifying organizations **may stipulate additional requirements** to those detailed here. ([Judge’s] emphasis in bold.)” *Marsh v Baxter* [2014] WASC 187, at 54 (Austl.) (quoting NAT’L STANDARD, *supra* note 96, at 1).

108. See NAT’L STANDARD, *supra* note 96, §§ 1.1, 1.3.

109. *Regulatory Framework in Australia*, AUSTL. GOV’T DEP’T OF AGRIC. & WATER RES., <http://www.agriculture.gov.au/agriculture-food/biotechnology/framework> (last updated Feb. 25, 2015). The Act differentiates between GMOs (live and viable) and GM products (dead). *Id.* OGTR acts to regulate only the use of GMOs in the Australian Commonwealth, not GM products. *Id.* The regulation of GM products is handled by a number of other regulatory agencies. Most importantly, the Food Standards Australia New Zealand (“FSANZ”) regulates the use of GM products in food. *Id.* This divided and somewhat scattered regulatory system bears a close resemblance to the system of US regulations set up under the Coordinated Framework for Regulation of Biotechnology, in which the USDA, EPA, and FDA have exclusive roles in the regulation of GM products and GMOs. See *supra* Part II.A.

110. *Regulatory Framework in Australia*, *supra* note 109.

111. Compare *supra* Part II.A with *supra* Part III.A.

112. *Marsh*, [2014] WASC 187 at 7. For a depiction of the properties of the plaintiff and defendant farmers, see *id.* at 9.

113. *Id.* at 20–21.

plants and spoke with his neighbor, Baxter, as he believed these came from Baxter's farm, Sevenoaks (the "2008 Event").<sup>114</sup> In both 2010 and 2011, Marsh began to post notices around his property and in the paper that Eagle Rest was a "GMO free area."<sup>115</sup> In 2010, Baxter chose to grow GM canola on his property due to problems with weed infestation.<sup>116</sup> On the suggestion of a fellow farmer, Baxter chose to swath his fields<sup>117</sup> and cut and stack the stalks early to allow them to dry, thereby reducing loss from wind or rain and preventing weed infestation.<sup>118</sup> During the drying of the swaths, approximately one hundred swaths blew from Baxter's property to Marsh's Eagle Rest, resulting in nine 'volunteer' plants taking root (the "2010 Contamination").<sup>119</sup> In November 2010, Marsh noticed these canola swaths and volunteer plants on his property and notified the organic certification agency, NASAA.<sup>120</sup> NASAA chose to decertify a large part of Eagle Rest after testing concluded that the swaths and volunteer plants were GM canola.<sup>121</sup>

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114. *Id.*

115. *Id.* at 23–24. Marsh attempted to use these postings along with the previously discovered conventional canola volunteers to establish that Baxter was on notice of both the possibility of drift between the two fields and any lawsuit that would ensue if the drift contained GM materials. *Id.* Additionally, it should be noted that the notices stated that there was strict liability for anyone who might disturb the "GMO free" nature. *Id.* The judge found that this statement had no basis in Australian common or statutory law and was based on a misreading of overturned precedent. *Id.* at 85.

116. *Id.* at 10. Marsh chose to grow GM canola within months of the lifting of a previous ban on the crop in Western Australia. *Id.* at 10, 35.

117. Grain crops, including soy, must reach an optimal level of moisture before they can be harvested. While many farmers cure their crops by allowing them to stand in the field and harvest them directly with a combine, this process can be accelerated through swathing. Farmers who swath fields cut the stalk and allow these "swaths" to cure in the field for up to three weeks before gathering them for harvest. For further discussion of the swathing process, see *Canola Swathing Guide*, CANOLA COUNCIL OF CAN., [http://www.canolacouncil.org/media/530966/canola\\_swathing\\_guide.pdf](http://www.canolacouncil.org/media/530966/canola_swathing_guide.pdf) (last visited Mar. 23, 2015).

118. *Marsh*, [2014] WASC 187, at 10. Baxter's original decision to grow GM canola was also informed primarily by a desire to control weed infestation on his land that had drastically reduced crop yield in years past. *Id.* at 92–93. This fact was given great weight by the judge as establishing a rational pattern of behavior on Baxter's part which contradicted the plaintiff's claim that Baxter acted in a negligent or wanton manner in choosing to both grow GM canola and to swath his fields instead of harvesting the canola in a traditional manner. *Id.* at 99.

119. *Id.* at 29. For an explanation of volunteer plants, see *supra* note 18.

120. *Id.* at 25.

121. *Id.* at 27–28. The judge discussed a number of unique and questionable judgment calls by the plaintiff and certifiers in the months leading up to the decision to decertify Eagle Rest. First, Marsh chose to wait over four months between discovering the swaths on his land and removing them from the region. *Id.* at 25–28. NASAA guidelines went beyond the language of the National Standard, stating that, "[o]rganic certification shall be withdrawn where NASAA considers there is an unacceptable risk of contamination from GMOs or their derivatives." *Id.* at 49 (quoting NAT'L ASS'N FOR SUSTAINABLE AGRIC., AUSTL., NASAA ORGANIC STANDARD § 3.2.9 (2004)). The judge concluded that the GM volunteer plants could have been quickly and easily removed at the time of discovery without violating any NASAA guidelines, thus preventing any further contamination of the

Following this decertification, Marsh filed suit, seeking approximately AU\$84,000 and a permanent injunction against further planting of GM canola near his property.<sup>122</sup> Marsh stated two common law claims for recovery: negligence and private nuisance.<sup>123</sup> In pleading negligence, Marsh claimed Baxter owed him a duty of care to act reasonably to ensure that swaths were not blown from Sevenoaks to Eagle Rest and to ensure that Marsh did not suffer loss as a result of GM canola blowing between the farms.<sup>124</sup> Marsh pleaded that Baxter acted unreasonably in both his harvesting methods and his decision to grow GM canola on the property adjacent to Eagle Rest.<sup>125</sup> In pleading private nuisance, Marsh alleged that the blowing of GM swaths and seeds from Sevenoaks onto Eagle Rest constituted “an unlawful interference<sup>126</sup> with the use and enjoyment of the land” and “was, and remains, a nuisance.”<sup>127</sup>

## 2. *Holding*

Judge Martin J. Kennen, presiding over the Supreme Court of Western Australia, denied Marsh’s actions for damages and injunctive relief, finding Baxter owed no duty of care to the defendant and had caused the defendant no actual damage.<sup>128</sup> Additionally, the judge suggested that

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property. *Id.* at 28. Additionally, the judge felt that the certifiers seemed to make a quick and brash decision to decertify the land without considering any alternative solutions after the contamination occurred. *Id.* at 144–45.

122. *Id.* at 61. The judge stated that, due to the small sum and the high expense of litigation, it could be assumed that the main relief sought was an injunction. *Id.* However, Marsh continued to modify the type of injunctive relief sought, moving from a permanent injunction against GM corn on neighboring fields to a three-kilometer break and finally a one-kilometer break, without giving any reasoning behind these calculations. *Id.* at 143.

123. *Id.* at 61.

124. *Id.* at 67.

125. *Id.* at 62.

126. The judge noted that while Marsh used the term “unlawful,” “no breach of any statute law ha[d] been contended for, let alone identified in th[e] trial.” *Id.* at 74. Therefore, the judge concluded that Marsh used the term “unlawful” in the wider sense to refer to some tortious wrong. *Id.* at 75. The judge contended that a more appropriate pleading would be that the actions of Baxter “substantial[ly] and unreasonabl[y]” interfered with Marsh’s enjoyment of his land. *Id.* This description bears a striking resemblance to a US common law action for private nuisance. *See* RESTATEMENT (SECOND) OF TORTS § 828 (1979).

127. *Marsh*, [2014] WASCA 187, at 73. The judge stated that the focus of this pleading was “the event of the movement out of Sevenoaks on the wind of GM canola swaths and specifically their seeds into Eagle Rest, rather than upon the mere growing of GM canola generally.” *Id.* at 74. In the judge’s view, this cured many of the defects in the pleadings made by Marsh as to the negligence claim, which suggested that the very act of growing GM canola on Sevenoaks in and of itself was the cause of the economic loss. *Id.* at 67–68.

128. *Id.* at 149. On appeal, the court upheld the lower court finding that there was no duty of care under the circumstances presented by the case. *Marsh v Baxter* [2015] WASCA 169, at 159 (Austl.).

Marsh had sued the wrong defendant.<sup>129</sup> He indicated that, under the facts of the case, the most plausible action Marsh might succeed on would be a contract claim against NASAA for the improper handling of the decertification which followed the incursion of GM swaths.<sup>130</sup>

Judge Kenneth denied Marsh's action for damages based on common law negligence.<sup>131</sup> In his attempt to establish the existence of a duty of reasonable care in the circumstances giving rise to the case, Marsh argued that GM canola was *per se* dangerous.<sup>132</sup> A duty to act reasonably does exist under Australian law when handling or using a lethal or toxic substance that would cause "calamitous consequences for neighbours" upon escape.<sup>133</sup> The judge refused to impose such a duty of care on the grower of a GM crop approved by the federal government and its regulatory bodies.<sup>134</sup> Additionally, he stated that he was not convinced that the swathing of the field was the cause of any losses alleged by Marsh.<sup>135</sup> On this point, Marsh argued that the 2008 Event established a historical precondition that established the growing and swathing of canola as both

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The court then went further, stating that even if a duty existed, the court was not persuaded that "a reasonable person in the position of [Baxter] would have taken the precaution, for the benefit of [Marsh], of direct heading rather than swathing his GM canola crop in early November 2010." *Id.* at 167.

129. *Marsh*, [2014] WASC 187, at 146. The appeals court denied Marsh's appeal on the nuisance claim, finding that "the appellants could not, by putting their land to an abnormally sensitive use, thereby 'unilaterally enlarge their own rights' and impose limitations on the operations of their neighbors to an extent greater than would otherwise be the case." *Marsh*, [2015] WASCA 169, at 177.

130. *Marsh*, [2014] WASC 187, at 146. ("The legal cause of the economic loss was the work of NCO in unreasonably (erroneously, it presents) applying NASAA Standard 3.2.9."). The appeals court chose not to reach final views on the construction and application of the contractual arrangements between NASAA and the appellants, due to the fact that NASAA was not a party to the litigation. *Marsh*, [2015] WASCA 169, at 101-02.

131. *Marsh*, [2014] WASC 187, at 146. This finding was unsurprising, given that the judge characterized the negligence claim, in its entirety, as "travers[ing] into legally uncharted territory" compared with the private nuisance claim argument. *Id.* at 62. In his pleadings, Marsh specifically included the term "economic loss" in describing Baxter's duty to prevent his loss. *Id.* at 67. The judge described the climate in Australia for the recoverability of a wholly economic loss as "unwelcoming." *Id.* at 136. To this point, the judge refers to the current "conceptual problem" with a common law negligence action seeking to recover only financial loss, even if such loss was foreseeable. *Id.* at 71. The judge, quoting *Tame v New South Wales; Annetts v Australian Stations Pty. Ltd.* [2002] HCA 35, stated, "the practical consequence of such a rule would be to impose an intolerable burden upon business and private activity." *Id.*

132. *Id.* at 69.

133. *Id.*

134. *Id.* "This is not a case then, in my view, for an application by analogy of some of the earlier negligence duty of care cases reflecting an underlying policy in the law imposing strict controls for the uses of premises, where dangerous substances have been introduced, or dangerous activities are carried on." *Id.* "These canola swathes were all physically benign. They posed no health risk or a risk of any a GM genetic trait transfer to any species." *Id.* at 137.

135. *Id.* at 146.

legal and factual cause of the harm suffered in the 2010 Contamination.<sup>136</sup> The judge found that Marsh had not met the applicable standards of causation to sustain a common law negligence action.<sup>137</sup> Instead, the judge concluded that the movement of GM swaths between the farms in the 2010 Contamination was an “unexpected first-time event” and an act of nature.<sup>138</sup>

Judge Kenneth also denied Marsh’s petition for damages based on an action for private nuisance.<sup>139</sup> Relying on Australian common law, the judge examined the facts to attempt to strike a balance “between the right of Mr Baxter to commercially utilise his rural land against the rights of his neighbours, Mr and Mrs Marsh, not to be unreasonably interfered with . . . in their enjoyment and use of Eagle Rest.”<sup>140</sup> In applying this balancing test, the judge examined a number of factors, including the extent of harm, the value of the defendant’s activity, the hypersensitivity (if any) of the plaintiff or the plaintiff’s land, the social value in the defendant’s activity, and the damage done.<sup>141</sup> After examining these factors, the judge determined that there was no physical damage.<sup>142</sup> Instead, the court held

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136. *Id.* at 133.

137. *Id.* The *Marsh* judge cited to § 5C of the *Civil Liabilities Act 2002 (WA)*. *Id.* at 134. He noted that § 5C requires both factual and legal causation in the case of negligence. *Id.* However, the judge found that Marsh met neither § 5C standard by refusing to find that the precondition of growing GM canola constituted causation simply by being a necessary element leading to the swathing, the stacking, the blowing, and the eventual incursion. *Id.*

138. *Id.* at 146. The judge concluded that the movement of swaths in the 2008 Event did nothing to forewarn of later incursions, as it was “non-specific and very general.” *Id.* Therefore, he found that this previous incursion did not establish a duty of care on the defendant. *Id.* On appeal, the court found that the test of reasonable foreseeability was to the risk of economic harm, not to the mode of transportation. *Marsh v Baxter* [2015] WASCA 169, at 157 (Austl.). However, the appeals court found that this did not change the outcome, as the risk of economic loss “was not in itself sufficient to generate a duty of care in these circumstances.” *Id.*

139. *Marsh*, [2014] WASC 187, at 138 (“I conclude that there was no unreasonable interference by Mr Baxter with the Marshes’ enjoyment of Eagle Rest merely by his growing RR canola on Sevenoaks during 2010.”).

140. *Id.* at 139. The court relied on *Sedleigh-Denfield v O’Callaghan* [1940] AC 880 (Austl.) as quoted by the High Court of Australia in *Elston v Dore* (1982) 149 CLR 480 (Austl.): “A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society.” *Id.* at 75–76.

141. *Id.* at 139–40. “In making that judgment, regard is had to a variety of factors including: the nature and extent of the harm or interference; the social or public interest value in the defendant’s activity; the hypersensitivity (if any) of the user or use of the claimant’s land; the nature of established uses in the locality (eg residential, industrial, rural); whether all reasonable precautions were taken to minimise any interference; and the type of damage suffered.” *Id.* (quoting *S. Props. (WA) Pty. Ltd. v Exec. Dir. Dep’t of Conservation & Land Mgmt.* [2012] WASCA 79 (Austl.)).

142. *Id.* at 140. The judge determined that any damage arose out of the contractual relationship between Marsh and NCO. *Id.* Additionally, the judge mentioned that the swaths were benign and

that Baxter had legitimate reasons for swathing his GM canola, and this method of harvesting was not a novel method.<sup>143</sup> Additionally, Baxter made a fully informed decision to swath his lands.<sup>144</sup> The judge also determined that the airborne incursion of swaths and seeds into Eagle Rest was a first time novelty that was not reasonably anticipated or expected by Baxter prior to the 2010 Contamination.<sup>145</sup> On these facts, the judge concluded that there was no unreasonable interference by Baxter with Marsh's enjoyment of Eagle Rest.<sup>146</sup>

The judge also denied two actions for a permanent injunction, one against the growing of GM crops on Sevenoaks in a buffer zone bordering Eagle Rest and the other against the swathing of future crops in that zone.<sup>147</sup> The judge commented that a permanent injunction is a remedy in equity and remains at the discretion of the court.<sup>148</sup> Additionally, the *Marsh* decision made a special note about the haphazard and disorganized manner in which the plaintiff submitted his action for permanent injunction, including numerous edits and a distinct lack of expert evidence.<sup>149</sup> Ultimately, these deficiencies led the judge to decline to grant

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“posed no health risk or a risk of any a GM genetic trait transfer to any species.” *Id.* at 137. The judge did mention that if the invasion was “of a physically dangerous substance such as, for instance, burning embers, or a pesticide or herbicide, thereby causing physical damage,” the private nuisance claim would be decided much differently. *Id.* at 144. This is very similar to US court treatment of pesticide overspray cases. *See supra* notes 74–81 and accompanying text.

143. *Id.* at 140. It was found that “swathing itself is not a novel or aberrant method for harvesting a canola crop. Indeed, on the trial evidence, swathing presents as generally the preferred method of harvest, albeit circumstances vary.” *Id.*

144. *Id.* The *Marsh* court determined that Baxter made the decision to swath his crops based on the recommendation of a local agronomist. *Id.* The agronomist conceded in cross-testimony that he did not know about Mr. Marsh's notice to Mr. Baxter of his intent to take legal action and had he known this information, he might have suggested that Baxter use a different harvesting technique. *Id.* However, the court found that this possibility, along with the abnormally strong winds that led to the incursion of swaths into Eagle Rest, did not tip the balance in favor of Marsh and his farming operation. *Id.* at 140–41.

145. *Id.* at 141–43. As in the action for negligence, the judge found that any incursion occurring in the 2008 Event did not give Baxter any reasonable anticipation of the incursion that occurred in the 2010 Contamination. *Id.* at 141. This is primarily due to the fact that following the 2008 Event, Marsh communicated that the volunteer seeds grew from the droppings of rabbits who ate the canola seeds, a wholly different mode of transportation. *Id.* The judge further found that the 2010 Contamination occurred as a result of unseasonably strong winds that could not have been predicted by either party. *Id.*

146. *Id.* at 139–44.

147. *Id.* at 147–49.

148. *Id.* at 147.

149. *Id.* at 147–48. The plaintiff first submitted a minute for a permanent injunction against the planting or swathing of GM canola within 1 km of the plaintiff's land. *Id.* at 147. On the eleventh day of the trial, the plaintiff submitted an edited minute, narrowing the injunction to only the swathing of GM canola within 1 km of the plaintiff's land. *Id.* Finally, the plaintiff filed a final minute asking for an injunction against the planting of GM canola by Baxter “within 2 km, alternatively 1.5 km,

a permanent injunction in the absence of any supporting empirical evidence.<sup>150</sup>

In addition to denying all of the plaintiff's claims for damages and his prayer for injunctive relief, Judge Kenneth concluded that, in his opinion, the damage suffered by the plaintiff occurred as a direct consequence of the actions taken by NCO/NASAA.<sup>151</sup> While neither NCO nor NASAA were parties to the litigation, the conclusions reached by the judge could be important to future decertification cases in both Australia and the United States. The judge implied, to some degree, that the proper defendants in this case would be NCO/NASAA for their improper interpretation of the National Standard and the resulting decertification of Marsh's fields.<sup>152</sup> He felt that NCO "acted well beyond the scope of its contractual rights with the Marshes in decertifying 70% of Eagle Rest . . . on 29 December 2010."<sup>153</sup> The judge outlined a number of options that NCO could have pursued under both the National Standard and third-party standards of NASAA before decertifying the majority of Eagle Rest.<sup>154</sup> Because there was no actual damage to the land or possibility of cross-pollination, the judge concluded that there was no legitimate contractual basis for NCO to decertify any portion of Eagle Rest that was exposed to GM materials.<sup>155</sup>

#### IV. LESSONS FROM *MARSH* FOR THE UNITED STATES

*Marsh v. Baxter* should stand as an example for the US judiciary to consider during future GM contamination cases. Importantly, it represents a vast improvement over the existing *StarLink* precedent. Unlike previous US cases, *Marsh* involved a suit brought by a single organic farmer against a neighboring GM farmer.<sup>156</sup> For this reason, the holding in *Marsh*, while foreign, has a more direct relationship with future contamination proceedings in the United States than previously examined domestic cases

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alternatively 1.1 km" of the plaintiff's land. *Id.* at 148. In addition to this injunction against planting, the plaintiff offered an injunction against the future swathing of GM canola on Baxter's land in the same alternative, descending order of 2 km to 1.1 km. *Id.*

150. *Id.* at 149.

151. *Id.* at 144–45.

152. *See id.*

153. *Id.*

154. *Id.* at 145.

155. *Id.* The judge noted that decertifying paddocks seven to thirteen of Eagles Rest for three full years, regardless of use for pasture or growing crops, following such limited exposure to GM materials was unwarranted. *Id.*

156. *Id.* at 7.

concerning manufacturers of GM products or spray drift contamination. The *Marsh* court successfully and efficiently applied Australian common law remedies to a GM contamination case without special remedies or defenses for organic farmers. Even though the court in *Marsh* dismissed all claims on the grounds that the plaintiff-farmer suffered no actual damages, the theories of recovery addressed strongly suggest the possibility of recovery, through private nuisance or contract claims, in the case of actual damages resulting from GM contamination.<sup>157</sup>

Therefore, US courts should take four main lessons from the *Marsh* ruling. First, *Marsh* stands for the proposition that a court has the ability to apply common law standards to a complex GM contamination case. Second, *Marsh* indicates that pollen drift contamination cases cannot be considered analogous to spray drift cases. Third, *Marsh* provides strong precedent for rejecting negligence claims by plaintiff organic farmers against defendant GM farmers. Finally, *Marsh* shows a possible alternate route of recovery for organic farmers against third-party certifying organizations that could help keep the damages from contamination events to a minimum.

US courts should look to *Marsh* when deciding future GM contamination cases, as *Marsh* shows that the common law can be applied to farmer-vs-farmer GM contamination cases. The *Marsh* lawsuit emerged out of a dispute between two farmers,<sup>158</sup> whereas the *StarLink* case was a consolidated class action between numerous farmer-plaintiffs and a number of large corporations.<sup>159</sup> Most future contamination cases in the United States will likely not have the unique factors that were present in the *StarLink* case.<sup>160</sup> Furthermore, *Marsh* provides proof that a judge can delve into the complex facts of a GM contamination case without specific legislative guidance. Detractors may point to the fact that the judge in *Marsh* chose to dismiss all claims in the case and granted no damages to the plaintiff.<sup>161</sup> However, the judge provided a thoughtful and well-reasoned argument for the dismissal of each claim.<sup>162</sup> Furthermore, he

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157. *See id.* at 139–46.

158. *See supra* 112–127 notes and accompanying text.

159. *See supra* notes 49–56 and accompanying text.

160. *See supra* notes 63–73 and accompanying text. All GM products released on the market to date (except for cotton) have been approved for human consumption and do not have the unique restrictions placed on the *StarLink* variety. Jones, *supra* note 6, at 634. There would be little to no negligence or strict liability for producers of GM products in the event of a contamination. This is evidenced by the *Marsh* case in which only the grower of the GM crops was sought out for liability. *See Marsh*, [2014] WASC 187, at 7.

161. *Marsh*, [2014] WASC 187, at 149–50.

162. *Id.* at 138–50.

noted at several points where, had the circumstances been different and the plaintiff suffered actual harm, he would have allowed the case to proceed in favor of the plaintiff.<sup>163</sup> Such a ruling, combined with the viability of a nuisance claim, suggests full recovery may be available to organic farmers through the common law.<sup>164</sup>

Second, *Marsh* helps to resolve the ongoing argument in the United States regarding the application of precedent from judgments concerning the drift of pesticide spray to cases that concern GM pollen and other material contaminating an organic field.<sup>165</sup> In dismissing the plaintiff's nuisance claim, the *Marsh* judge described the incursion of the swaths onto the plaintiff's land as a "wholly benign substance."<sup>166</sup> He continued by distinguishing these swaths from other "physically dangerous substances" that might cause physical damages, such as "burning embers, or a pesticide or herbicide."<sup>167</sup> The judge also indicated that the pollen spread by the defendant's GM crops or the volunteers found on the plaintiff's land would not be considered an inherently dangerous substance analogous to pesticide spray. The reasoning behind this decision was that the pollen could only possibly cause damage when it interacts with another compatible species.<sup>168</sup> Therefore, pollen drift from GM crops is wholly unlike the drift of pesticides or herbicides, which are sprayed with the intent to kill certain bugs and plants, and should not be subject to any heightened liability.

Third, *Marsh* gives US courts strong precedent for rejecting negligence claims in suits between organic and GM farmers. The *StarLink* court imposed heightened liability on the defendants and allowed a negligence claim to proceed because of the unique circumstances surrounding the limited approval of the StarLink product.<sup>169</sup> The *Marsh* judge correctly indicated that in a case between two farmers over the contamination of an organic field by GM material, any successful negligence claim would require the court to find that a farmer was negligent in choosing to grow

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163. The judge indicated that if there had been some sort of cross-pollination or if the plaintiff had been growing organic canola, then there might have been some damages for which the plaintiff could have sought legal remedy. *Id.* at 109-11. Furthermore, the judge noted that any damages from dispersal of seeds by volunteers into the affected fields was not caused by the contamination event but by the failure of the plaintiff to remove the GM volunteers. *Id.*

164. *See supra* notes 82-92 and accompanying text.

165. *See supra* notes 74-81 and accompanying text.

166. *Marsh*, [2014] WASC 187, at 144.

167. *Id.*

168. *Id.* at 47-48.

169. *See supra* notes 68-73 and accompanying text.

and harvest GM crops.<sup>170</sup> Such a finding would be extremely unlikely, given that all GM crops grown in the United States, with the exception of non-edible cotton, are regulated by the federal government and are fully approved for wide use and consumption.<sup>171</sup> Additionally, a finding of negligence would unreasonably restrict a farmer's choice of crops and means of harvest. *Marsh* suggests that weed control is a valid reason to grow legal GM crops and that the ability to choose a unique, but accepted, harvesting method should not expose a farmer to liability for negligence.<sup>172</sup> As a result, the court in *Marsh* decided that such decisions remain in the hands of the farmers and not in the hands of a court system removed from the day-to-day trials of the field.<sup>173</sup>

Finally, *Marsh* provides US courts with a precedent to both allow recovery for farmers facing contamination and to ensure the certifying decisions made by third-party certifiers are equitable. In the case of wrongful decertification, equity means that farmers are allowed to pursue third-party contract claims against certifying agencies for damages in the case of wrongful decertification. Unlike *StarLink*, *Marsh* explores the relationship between farmers and the certifying agency, including the actions taken in the wake of a contamination event.<sup>174</sup> Both the United States and Australia rely on a system in which the government sets minimum requirements for organic certification and third-parties grant certification based on private requirements.<sup>175</sup> Like Australia,<sup>176</sup> US federal regulations do not require decertification in the event of limited contamination of organic products.<sup>177</sup> Therefore, allowing contractual claims against third-party certifiers would hold certifiers accountable for their decisions in the wake of a contamination and ensure that they fairly and evenhandedly follow the regulations that they create. Farmers would have a decision to make based not only on the marketing schemes of the individual third-party certifiers, but also on their reputation and the regulations they choose to promulgate.

## CONCLUSION

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170. *Marsh*, [2014] WASC 187, at 145–46.

171. Jones, *supra* note 6, at 634.

172. *See Marsh*, [2014] WASC 187, at 72–73.

173. *See id.*

174. *See supra* notes 151–55 and accompanying text.

175. *See discussion supra* Parts II.A., III.A.

176. *See supra* note 104 and accompanying text.

177. *See supra* notes 40–41 and accompanying text.

It is in the best interests of both farmers and the US organic food industry for a reliable and satisfactory remedy to exist for organic farmers who experience GM contamination. Some have argued for a legislative solution, while others propose imposing strict liability on those growing GM crops.<sup>178</sup> Both arguments are unnecessary and overly restrictive on the farmer's choice to grow legal and federally-regulated crops. Instead, the US judiciary should look to Australia's *Marsh v. Baxter* as precedent for relying on existing common law to remedy these contamination events. In these situations, organic farmers can recover using claims of common law nuisance. This allows courts to apply a balancing test, weighing the plaintiff-farmer's interests against those of the defendant.<sup>179</sup> In a private nuisance claim, the court will also look into the source and type of contamination. Such a robust and flexible test can be effectively applied to the unique situations in which GM contamination cases usually arise.

Furthermore, US courts should allow contractual claims against certifiers for damages following hasty decertification as a low-cost method of regulating third-party certifying agencies. Applying these lessons from *Marsh* allows for the efficient use of US farmland while also protecting organic farmers and the organic food industry. This common law approach would allow the legal system to continue to adapt and change with the introduction of new technology in a way not possible in a static statutory system.

*Jeremy A. Tripp\**

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178. See *supra* notes 6–7, 67 and accompanying text.

179. See *supra* notes 87–92 and accompanying text for a discussion of the tort claim of private nuisance in the United States.

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