

Impacts of National Cotton Council v. EPA: Wheat Growers May Need NPDES Permits to Apply Pesticides

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American agriculture suffered a major defeat last month when a federal appeals court overturned an EPA rule governing the spraying of pesticides on waterways and on nearby fields. This stunning reversal of EPA policy, which protected farmers and applicators as long as they applied pesticides in accordance with federal law, will likely result in thousands of farmers needing Clean Water Act permits.

On January 7, 2009, the Cincinnati-based U.S. Court of Appeals for the Sixth Circuit issued its opinion in *National Cotton Council of America v U.S. Environmental Protection Agency*. The National Cotton case concerned challenges to a November 27, 2006, EPA Final Rule filed by industry and environmental groups in eleven federal appellate courts. The Final Rule concluded that pesticides applied in accordance with FIFRA labels were exempt from the Clean Water Act's NPDES permitting requirements. The text of the Final Rule can be reviewed on the EPA's website at http://www.epa.gov/npdes/regulations/pest_final_rule.pdf. The Sixth Circuit struck the Final Rule, concluding that it was inconsistent with the language used by Congress in enacting the Clean Water Act, as well as the general goals of restoring and maintaining the integrity of the country's waters. The text of the opinion can be reviewed on the Sixth Circuit's website at <http://www.ca6.uscourts.gov/opinions.pdf/09a0004p-06.pdf>

Review of the definitions crafted by Congress and the EPA under the Act is critical to understanding the potentially far-reaching impacts on American agriculture. The Clean Water Act, passed by Congress during the Nixon administration, prohibits the discharge of pollutants into navigable waters from any point source without a permit. "Pollutants" are defined in the Act to include "chemical wastes" and "biological materials." "Point sources" were broadly defined and include any "discernible, confined and discrete conveyance," including pipes, ditches, tunnels, conduits, wells, containers, CAFOs, vessels from which pollutants may be discharged. Congress, however, specifically excluded "agricultural stormwater discharges and return flows from irrigated agriculture" from the definition of pollutant when it amended the Clean Water Act in 1987.

"Navigable waters" are defined as "waters of the United States, including the territorial seas." Although Congress declined to define "waters of the United States" in the Clean Water Act, the EPA crafted an extremely broad definition which includes waters which are used, were used, or which could be used in interstate or foreign commerce, all waters subject to the ebb and flow of the tide, all lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds which could affect interstate or foreign commerce waters, and even non-navigable tributaries. Recent Supreme Court cases have confirmed the broad reach of federal jurisdiction over virtually all waters and wetlands, even if hundreds of miles from the ocean and entirely within one state.

Agricultural run-off has been treated by the EPA and viewed by the courts as non-point source pollution, which is generally addressed by best management practices. The National Cotton decision likely upsets the apple cart which has been in place for decades with respect to farmers' proper application of pesticides, herbicides and insecticides to crops, even if conducted in accordance with the FIFRA label. The Sixth Circuit rejected the EPA's conclusions that pesticides are generally not "pollutants" and that pesticide residues are not subject to the NPDES permitting system because these residues were not

discharges from a point source. The Court concluded that all biological pesticides are potentially subject to the permitting requirements of the Clean Water Act. The issue of whether chemical pesticides may be subject to the Clean Water Act's permitting process was treated differently; only if any chemical pesticide residues or excess portions remain after performing their intended purposes are they potentially subject to the Act's regulatory scheme. However, most chemical pesticides are not fully utilized, leave residues and thus may be subject to regulation under the Act.

The Sixth Circuit also strongly rejected the EPA's argument that application of aquatic pesticide do not require Clean Water Act permits as long as they are used in accordance with the FIFRA label. The Court noted that the EPA and federal courts generally agree that pesticides are applied by point sources. Under the EPA's theory, pesticide residues are not discharged from point sources because only pesticides, not residues, exist at the time of application; therefore, because any residues come into being long after application, they should be treated as non-point source pollution. The Court found the EPA's contentions to be unsupportable and contradictory to the directive given by Congress regarding the protection of water quality.

While the Final Rule was directed towards direct applications of aquatic pesticides and applications near waters of the United States, the potential impacts to production agriculture of the National Cotton decision are enormous. Serious tension exists between the Sixth Circuit's conclusion that pesticide residues are discharges of pollutants from point sources and farmers' long-held reliance upon the Congressional exclusion of agricultural stormwater discharges from the definition of point source. Steep penalties may be imposed for the failure to obtain a NPDES permit -- up to \$27,500 per day per violation. Moreover, the EPA and delegated states' will likely be swamped by farmers seeking protection from federal or state enforcement actions or from citizen's suits if the pesticide residues have the potential to be discharged into waters of the United States. This is likely true notwithstanding a farmer's use and application in accordance with the FIFRA label and the agricultural stormwater discharge exemption. Governmental pesticide offices are ill-equipped to handle a deluge of permit applications during these dire economic times and near-universal state governmental personnel and funding cutbacks.

Finally, while various agricultural groups, including the NAWG, are contemplating whether to file an amicus brief in support of a motion for rehearing en banc by the entire Sixth Circuit, such motions are infrequently granted and rarely lead to a different result. A legislative fix may be required, although the likely views of the Obama administration and the current composition of Congress will likely make that another uphill battle. Either way, this decision represents a significant victory for environmental groups seeking tighter regulation of agricultural production in the United States.

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