Impacts of *National Cotton Council v. EPA*: NPDES Permits Are Likely Needed Prior to Routine Application of Pesticides

By Stewart D. Fried

American agriculture suffered a major defeat earlier this year when a federal appeals court overturned an Environmental Protection Agency (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. EPA*. The *National Cotton* case concerned challenges to a November 27, 2006, EPA final rule filed by industry and environmental groups in 11 federal appellate courts. The final rule concluded that pesticides applied in accordance with Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) labels were exempt from the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permitting requirements.[1] 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.[2]

Review of the definitions crafted by Congress and the EPA under the act is critical to understanding the potentially far-reaching impacts of this decision on American agriculture. The Clean Water Act 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, concentrated animal feeding operations, and 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.

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"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 that includes waters that 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 that 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 runoff 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 that 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 used, 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 pesticides does not require Clean Water Act permits as long as the pesticides 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

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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 toward 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 storm water discharges from the definition of "point source." Steep penalties may be imposed for the failure to obtain an 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 citizens' 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 storm water 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.

This decision represents a significant victory for environmental groups seeking tighter regulation of agricultural production in the United States. The industry petitioners asked the Sixth Circuit to rehear the case en banc; over 20 other affected agricultural groups filed a joint amici brief requesting similar relief. Notwithstanding written requests by U.S. Department of Agriculture Secretary Vilsack and two U.S. senators urging the EPA to seek rehearing, the government declined to do so and instead filed a motion to stay issuance of the Court's mandate for two years to provide, inter alia, EPA with time to develop, propose and issue a final NPDES general permit for pesticide applications.

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Endnotes

1. The text of the final rule can be reviewed on the EPA's website at www.epa.gov/npdes/regulations/pest_final_rule.pdf.

2. The text of the opinion can be reviewed on the Sixth Circuit's website at www.ca6.uscourts.gov/opinions.pdf/09a0004p-06.pdf.