

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

THE NATIONAL COTTON COUNCIL	)	
OF AMERICA, <i>et al.</i>	)	
	)	
<i>Petitioners,</i>	)	
	)	
v.	)	Case No. 06-4630
	)	(and consolidated cases)
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY, <i>et al.</i> ,	)	
	)	
<i>Respondents,</i>	)	
	)	
and	)	
	)	
AMERICAN FARM BUREAU	)	
FEDERATION, <i>et al.</i> ,	)	
	)	
<i>Respondent-Intervenors.</i>	)	

**DECLARATION OF DON PARRISH**

I, Don Parrish, hereby declare as follows:

1. I am the Senior Director of Regulatory Affairs at the American Farm Bureau Federation (Farm Bureau). I have worked with farmers through Farm Bureau for over 20 years on issues related to water quality and pesticides.
2. Farm Bureau is a voluntary general farm organization dedicated to the betterment of agriculture and agricultural communities. Farm Bureau is comprised of 50 State Farm Bureaus and Puerto Rico Farm Bureau, which function jointly as a federation through a membership agreement.
3. A large number of Farm Bureau farmer members depend for their livelihood on the production of crops whose efficient and economic production requires the use of pesticides. Farm Bureau members produce every type of crop produced in the

United States. Because Farm Bureau's members produce crops on land and sometimes in water, they use both terrestrial and aquatic pesticides applied through both ground and aerial applications.

4. Many – if not most – farmers produce crops on lands that contain some “wetland” areas or that adjoin a wetland, stream, or roadside ditch that could be viewed as “waters of the United States” because they arguably have a hydrologic connection to “navigable waters.” *See Rapanos v. U.S.*, 547 U.S. 715, 778-83 (2006). For this reason, even aside from crops produced in water, a tremendous number of farmers are affected by the Court's decision vacating EPA's rule that excluded from National Pollutant Discharge Elimination System (NPDES) permitting requirements pesticide application, in accordance with all relevant label requirements, to control pests “over waters of the United States, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively.” *See* 71 Fed. Reg. 68,483, 68,492 (Nov. 27, 2006).

5. The responsible use of pesticides is a key component of many successful agricultural operations. According to the USDA's National Agricultural Statistical Service (“NASS”) survey, about 947,279 farms reported the use of pesticides in 2007. The NASS survey also tells us that there are about 347,760 corn farmers in the nation, and 95.8 percent of the 93,527,000 acres of corn are treated with at least three pesticides to produce our nation's corn crop. Similarly, there are 18,286 cotton producers in the U.S. and about 98.2 percent of the 10,827,000 acres of cotton are treated with at least 13 pesticide treatments. While I have only provided two examples, this illustrates the vast

number of pesticide applications in the U.S. each year that are potentially affected by the court's ruling.

6. It is my understanding that EPA has never required NPDES permits for pesticide applications and has never issued such a permit. I am aware of several Clean Water Act lawsuits and threats of lawsuits by citizens groups since the late 1990s, in which citizens claimed that pesticide application is subject to NPDES permitting requirements. I am also aware of farmers who, faced with a citizen's "notice of intent to sue" under the Clean Water Act alleging that pesticide application was a "discharge" of a "pollutant" to waters of the U.S., have been unable to obtain NPDES permits either under their state's delegated NPDES permitting agency or directly from EPA. Because there was no EPA regulation explicitly stating that these activities do not require NPDES permits, farmers have been vulnerable for the past decade to citizen suits or threats from activists seeking to stop the use of pesticides.

7. Farmers using pesticides understand that they must follow pesticide labels because "the label is the law" and they face significant liability for not following the label. Even if farmers follow the label, it is expected that some residual amount of pesticide – even if only a trace amount – may remain on the landscape. Indeed, pesticides are often registered and approved with an understanding that residuals are part of the application process. Even where pesticide is applied only to dry land, residuals can ultimately find their way into waters of the U.S. through forces such as wind and stormwater runoff. Pesticide can also fall or be blown by wind during application into ditches (including dry ditches), streams, or other features that may qualify as waters of

the U.S. Under the Court's January 7 ruling, many of these otherwise-lawful pesticide applications will require an NPDES permit.

8. Farmers are concerned about the effect of the Court's ruling and how it could interject a regulatory and permitting system into the very precise technical and science-based process of effectively utilizing pesticides. Farmers use pesticides for the purpose of keeping our food supply safe by preventing infestations and crop losses from weeds, insect pests, and disease. Any delay in applications can result in less effective crop protection, the spread of pests and disease, and a significant reduction in the efficacy of crop production tools. Farmers need the flexibility to use the appropriate pesticide applied at appropriate rates – a task that farmers fear would be unduly complicated by an additional layer of government involvement and NPDES permit restrictions. In fact, United States Department of Agriculture (“USDA”) Secretary Thomas Vilsack and the National Association of State Departments of Agriculture (“NASDA”) have expressed similar concerns about the implications of the Court's ruling for American agriculture. *See* Letter from USDA Secretary Thomas J. Vilsack to EPA Administrator Lisa P. Jackson (Mar. 6, 2009) (true copy at Exhibit A); Letter from NASDA President Ron Sparks to EPA Administrator Lisa P. Jackson (Apr. 7, 2009) (true copy at Exhibit B).

9. Methods of pesticide application vary depending on several factors. For example, because ground applicators can become stuck in mud during wet conditions, causing environmental harm to the land, farmers sometimes must turn to aerial applications. Sometimes farmers can spot treat with ground equipment to prevent an infestation from spreading, but often aerial spraying is needed for entire fields or regions when pest and disease outbreaks threaten to expand exponentially in a matter of hours.

Thus, on-the-ground conditions may require immediate action and may dictate certain methods of application for successful pest control.

10. The timing of a pesticide application is probably the most important factor in effective crop protection. If farmers are to use pesticides effectively to save crops, they must have the flexibility to act quickly, without the need to wait for government approval before application. Once a weed, insect, or disease on a crop reaches a certain size, the range of available pesticide options can change significantly. While small outbreaks of insects or weeds can often be eliminated, large ones often cannot. In addition, early detection and control can be essential to avoiding crop loss, because advanced outbreaks often result in total crop failure.

11. The type of crop to be protected is also important. Certain crops cannot be harvested within a time period after treatment. For this reason, pre-harvest intervals can dictate the timing of pesticide application.

12. Pest and disease outbreaks are not always easy to predict. Farmers who are fortunate have a known and fixed set of pests and weeds they know must be controlled every year. In this narrow circumstance, the farmer meets with certified crop advisors through local extension offices, which advise the farmer on product options and application timing and methods. For most farming operations, pests and disease do not follow a set pattern that can be scheduled in advance. There are timing issues, and application methods, that change by the hour and day.

13. In my experience, most farmers at least occasionally face unforeseen and unpredictable pest control needs. In fact, the pests, insects, and disease infestations that are most devastating to crops are unpredictable. For example, army worms, corn bores,

and boll weevils are unpredictable pests that can devastate crops in a short period of time. Under favorable climactic conditions, these pests will multiply quickly and require immediate corrective action to destroy the pests before they destroy the crop. Army worms, capable of defoliating everything in their path, thrive in hot dry conditions found during parts of the year in the Southern States. The worms eat corn, peanut, cotton, soybeans, and any vegetative growth. Once the worm is discovered, a farmer only has hours or at most days to respond with the appropriate chemical or the crop is lost. NPDES permitting requirements to spray for such an outbreak would very likely delay the farmer's action under these very common circumstances. Farmers who find such infestations will not have days, weeks, or months to obtain an NPDES permit. Nor would the farmer have the necessary information in advance of an outbreak (application rates, times, and climactic conditions) to seek a permit.

14. For vegetable producers, the threat from disease can have impacts that last much longer than just the immediately diseased crop. Phytophthora blight is one of the most destructive diseases affecting vegetable plants and can leave a residual contamination of the soil that leaves the soil unproductive for years. A farmer who detects Phytophthora blight cannot be delayed by permit requirements without serious crop losses for years to come.

15. Other pests, such as corn ear worms, if not controlled, lead to diseases such as Aflatoxin. This leads to human safety and food safety concerns. Outbreaks of diseases, such as wheat rust or soybean rust, if not controlled in a timely manner will lead to quarantines, embargos, and significant shifts in world trade.

16. Delays resulting from permit requirements would increase the risk of wide-spread outbreaks that could have been prevented by the first farmers affected. Farmers depend on their neighbors to act quickly to protect crops from infestations and disease. For example, soybean rust, once identified, must be treated immediately because it spreads through the wind to other farms. The entire farming community in vulnerable areas must actively look for signals of disease because it can spread across an entire region and several states in a matter of hours.

17. From the farmer's perspective, pesticides are costly, but often necessary. For some farmers, the best option is to use natural methods of pest control before turning to chemicals. One commonly used scientific methodology for controlling pests is called "Integrated Pest Management" (IPM). Under IPM, farmers balance pest populations and use "just-in-time" production management techniques to maximize the use of "natural" preventative pest control. This minimizes pesticides and controls pests and disease. However, in order to minimize the use of pesticides, IPM requires quick action within hours, not delay, once preventative methods fail. Otherwise, the pest will multiply and more pesticides will be needed to control the greater threat, defeating the purpose of IPM. IPM users are dedicated to minimizing pesticides unless nature fails. For these reasons, IPM would be complicated or rendered ineffective by NPDES permit requirements.

18. The use of IPM may be jeopardized by NPDES permitting. Farmers will be forced to use pesticides at the maximum rate allowed under the permit to avoid the risk of crop loss associated with a sudden and unexpected insect or disease outbreak.

19. Adding another regulatory requirement will slow real time production decisions made by farmers every day. Waiting for a regulatory approval for

unanticipated pest control needs will lead to the loss of crops because farmers will not have the flexibility to make daily, hourly decisions on how to protect their crops. Ironically, delays will also likely lead to the use of more pesticides to control larger weed, pest, and disease infestations. A small worm or weed takes less pesticide to control than a large one.

20. Increased regulatory requirements for pesticide application will push farmers to seek less heavily regulated options for controlling pests whenever and wherever possible. For example, as NPDES permits increase the cost of controlling weeds with pesticides, farmers will be driven to use mechanical methods to control weeds where possible. Today, farmers use “no till” weed control on half of the nation’s cropland. This method of production reduces soil loss from erosion, increases organic carbon storage in the soil (decreasing greenhouse gas emissions), and requires the use of herbicides rather than a plow to control weeds. Today, over 172 million acres are farmed using no till. Permits and the threat of Clean Water Act citizen suits, however, will result in fewer no till farms, more mechanical plowing, more soil erosion, increased releases of the soil’s organic carbon.

21. Based on my experience with other EPA NPDES permit requirements for agriculture (such as NPDES permits for animal feeding operations), I am greatly concerned about the time it could take to develop NPDES permits for pesticide application in the first instance. Even if EPA and the States develop “general permits,” such permits often take months or even years to develop. Lawsuits, such as the lawsuit that followed California’s recent issuance of a general permit for aquatic pesticides for vector control, will likely further delay permit issuance.

22. Most farming operations, however, face a host of pests and diseases that require a flexible response in order to save the crop. The needs of a farmer vary by region, climate, and crop and do not fall neatly into categories. Based on my experience with pesticide applications and NPDES permits in other agricultural areas, I have great concern that the regulatory restrictions of an NPDES permit will prevent effective pest control.

I declare under penalty of perjury, that the foregoing is true and correct to the best of my knowledge, and that this declaration was executed on this 3 day of April, 2009 at 4:20 p.m.

Dr. Parvath

# **EXHIBIT A**



DEPARTMENT OF AGRICULTURE  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20250

March 6, 2009

The Honorable Lisa P. Jackson  
Administrator  
U.S. Environment Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

Subject: The National Cotton Council of America, et al., v.  
United States Environmental Protection Agency,  
Nos. 06-4630; 07-3180/3181/3182/3183/3184/3185/  
3186/3187/3191/3236 (6th Cir. Jan. 7, 2009).

Dear Ms. Jackson:

The United States Court of Appeals for the Sixth Circuit recently invalidated the Environmental Protection Agency's (EPA's) Final Rule entitled, "Application of Pesticides to Waters of the United States in Compliance With FIFRA." 71 Fed. Reg. 68,483 (Nov. 27, 2006) (Final Rule). A petition for rehearing or for rehearing en banc before the Sixth Circuit is due on April 9, 2009. I would very much appreciate your taking into consideration the significant adverse effect that the court's decision will have on American farmers, as well as on U.S. Department of Agriculture (USDA) agencies, and therefore request that you seek further review of this decision by the Sixth Circuit.

In its Final Rule, the EPA reasonably interpreted the term "pollutant" in the Clean Water Act (CWA) as generally excluding pesticides that are applied in compliance with the relevant requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The Final Rule established that the application of pesticides in compliance with FIFRA would not require a National Pollutant Discharge Elimination System (NPDES) permit when they are applied directly into waters of the United States in order to control pests, or when they are applied to control pests that are present over waters of the United States, including near those waters, when a portion of the pesticides unavoidably will be deposited into the water in order to target the pests effectively. The EPA specifically concluded that the terms "chemical wastes" and "biological materials" in the CWA's definition of pollutants do not encompass the types of pesticide applications addressed in the Final Rule. 71 Fed. Reg. 68,486.

The Court of Appeals for the Sixth Circuit concluded that the Final Rule was contrary to the plain language of the CWA. Although the court agreed with the EPA that chemical pesticides applied directly to water to perform a useful purpose are not chemical wastes, it held that excess pesticides and pesticide residue meet the common definition of waste, and therefore are pollutants under the CWA. The court held that the EPA is required to regulate the residue of chemical pesticides when the pesticide is applied to land or air, and the residue finds its way into the navigable waters of the United States, and when the pesticide is applied directly to the water and the residue has a lasting effect beyond its intended purpose. The court also found that Congress intended for "biological materials" to encompass more than "biological wastes." The court held that all biological pesticides are biological materials, and therefore pollutants under the CWA.

The court's adverse decision will have profound implications for American farmers. The panel's ruling effectively broadens the potential application of the CWA to reach agricultural activities that the EPA has never regulated under the provisions of the CWA. By broadening the Act's reach, the court burdens American agriculture with a newly minted NPDES permit requirement for the application of all FIFRA-compliant biological pesticides whenever those pesticides might find their way into waters of the United States, and for all FIFRA-compliant chemical pesticides whenever the residues of those pesticides find their way into waters of the United States. The permit requirement could reach almost any pesticide application, requiring farmers to navigate a permitting system that is ill-suited to the demands of agricultural production. Failure to obtain a timely permit for pesticide application could cripple American farmers' emergency pest management efforts and hamper their ability to respond quickly to new pest infestations or threats of infestations, thus increasing the risk of crop losses.

Additionally, several USDA agencies engage in the ground and aerial application of pesticides, and would be adversely affected by the panel's decision. The Forest Service (FS) and the Animal and Plant Health Inspection Service (APHIS) now will be required to obtain NPDES permits, which could compromise the agencies' ability to respond with efficiency and flexibility to emerging threats and emergency situations. The delay and expense associated with complying with the NPDES permitting requirement could substantially curtail the agencies' use of pesticides. For the FS, this could result in diminished efforts to protect the National Forests from pest infestation and could potentially increase the risk and severity of wildfires. It could also significantly hamper aerial spraying programs such as APHIS's Mormon Cricket and Grasshopper Program, undertaken in cooperation with western states. Additionally, research programs involving both the conventional and the experimental applications of pesticides undertaken by the Agricultural Research Service (ARS) also will be detrimentally affected by the panel's decision. The time-consuming and costly process of negotiating the NPDES permit application process will diminish the efficiency with which the ARS will be able to undertake its initiatives, and may, in some instances, curtail the agency's projects entirely.

The Honorable Lisa P. Jackson

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The Sixth Circuit's decision encumbers the American farmers' and the agencies' ability to do business, while reaping little or no environmental benefit in exchange. Subjecting FIFRA-compliant pesticides to the additional regulatory regime of the CWA is duplicative and will not help protect the environment. FIFRA mandates that the EPA approve and issue a registration for a pesticide product only after the EPA has determined that the product will not cause "unreasonable adverse effects on the environment." The pesticide registration and re-registration process under FIFRA considers the effects of pesticides on both human health and aquatic resources. If the EPA has concluded that a pesticide satisfies FIFRA and will not have an "unreasonable adverse effect on the environment," then it is reasonable to exclude the application of that pesticide from the permitting requirements of the CWA.

In short, I am concerned that the court's decision will compromise American farmers' and USDA agencies' ability to respond efficiently and effectively to emergency threats, while providing little or no additional environmental protection in return. Thank you for taking these issues into account as you consider seeking further review of this case.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas J. Vilsack". The signature is written in a cursive, flowing style.

Thomas J. Vilsack  
Secretary

# **EXHIBIT B**