

**No. 06-4630 (and consolidated cases)**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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NATIONAL COTTON COUNCIL OF AMERICA, *et al.*

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent.

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On Petition for Review of Final Action  
of the United States Environmental Protection Agency

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**RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY'S RESPONSE TO PETITION FOR REHEARING EN BANC**

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June 3, 2009

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In accordance with this Court's request, the United States Environmental Protection Agency ("EPA") responds to the Respondent-Intervenors' petition for rehearing en banc.

## **INTRODUCTION**

EPA argued before this Court that ambiguity exists in the Clean Water Act's definition of "pollutant" in the context of pesticide applications to or over, including near, waters of the United States. Although the Court did not defer to EPA's interpretation of this ambiguous statutory term, EPA decided not to seek rehearing en banc because it did not believe the Panel's decision involved a question that justified rehearing en banc under the standards of Fed. R. App. P. 35.

Respondent-Intervenors seek rehearing based on an overly broad reading of the Panel's opinion. This case presented for judicial review an EPA rule (the "Final Rule") addressing the application of pesticides to or over, including near, waters of the United States in two specific circumstances. 71 Fed. Reg. 68,483 (Nov. 27, 2006). Although the Panel's opinion contains certain statements that some could try to read to expand significantly (and improperly) the regulatory scope of the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") permit program, EPA believes that the Panel's statements should be read as being

limited to the issues that were before it: pesticide applications to or over, including near, waters of the United States that were addressed by the Final Rule. Properly read this way, EPA believes it can conform its conduct to comply with the Panel's decision, as EPA articulated in its separate Motion for Stay of Mandate. The Motion for Stay of Mandate requests the Court to stay issuance of the mandate in this case for 24 months to allow EPA and NPDES-authorized States time to develop and issue NPDES permits to authorize pesticide discharges to waters consistent with Clean Water Act requirements.

### **DISCUSSION**

The Panel's opinion should be read as deciding only those issues presented for its review under the Clean Water Act and Administrative Procedure Act. The petitioners in this case challenged an EPA rule that addressed the discharge of pesticides in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act to waters of the United States in two specific circumstances: (i) the discharge of pesticides directly to waters to control pests; and (ii) the application of pesticides to control pests that are present 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. 71 Fed. Reg. 68,483,

68,485 (Nov. 27, 2006). This Court's role is limited to determining whether this Final Rule is arbitrary, capricious, an abuse of discretion or contrary to law. 5 U.S.C. § 706. It may set aside the rule if it finds it unlawful, but may venture no further. *See FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) (“the function of the reviewing court ends when an error of law is laid bare”); *PPG Industries, Inc. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995) (same). The Court does not have authority to issue binding legal opinions outside the scope of the rule under review. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (relief under the Administrative Procedure Act focuses on the challenged decision, not on the agency's activities as a whole).

Respondent-Intervenors offer in their petition for rehearing an overly broad reading of the opinion that reaches far beyond the limited issues presented by the Final Rule. Respondent-Intervenors focus on the portion of the opinion that seems to suggest a “but for” test to determine when the addition of a pollutant is from a point source. Respondent-Intervenors' Petition at ii, 7-8, 13. They argue that this “but for” test “would sweep into the NPDES permitting program virtually any industrial, commercial, recreational, residential or personal activity that can be identified as a ‘but for’ cause of future pollution to waters.” Respondent-Intervenors' Petition

at 7-8. By latching onto this ‘but for’ phrase in the decision, Respondent-Intervenors predict that any substance that at any prior time was released from a point source may now trigger a requirement to obtain NPDES permit coverage. This broad reading of the opinion enables Respondent-Intervenors to claim the decision is of exceptional importance and merits en banc review.

An appropriately narrow reading of the opinion avoids this dilemma. The Panel’s “but for” discussion occurs in the context of the pesticide applications addressed by the Final Rule. Specifically, the Panel offered a “but for” standard in the context of pesticide applications to or over, including near, waters of the United States, where the act of discharging the pesticide and the presence of the residual or excess pesticides in the water are both temporally and geographically close. *See Nat’l Cotton Council v. EPA*, 553 F.3d 927, 940 (6<sup>th</sup> Cir. 2009) (“but for the application of the pesticide, the pesticide residue and excess pesticide would not be added to the water; therefore, the pesticide residue and excess pesticide are from a ‘point source.’”) The Panel was simply not presented with, and therefore did not address, any question of whether such a “but for” test should apply to other, geographically or temporally dissimilar contexts, such as automobile tailpipe emissions or applications of lawn fertilizer, where a significant

amount of time may pass between the release of a substance and its eventual entry into a water of the United States or where there may be one or more intervening mechanisms of transport or conveyance. *See* Respondent-Intervenor's Petition at 8. EPA has never interpreted the Clean Water Act's NPDES program in such a broad fashion, and it does not read the Panel's opinion as establishing the new, expansive scope of Clean Water Act NPDES permit coverage that Respondent-Intervenors anticipate.

The Panel's opinion also briefly ventures into the area of terrestrial applications of pesticides but, again, Respondent-Intervenors base their petition on an expansive rather than appropriately narrow reading of the Panel's statements. *See* Respondent-Intervenor's Petition at 13-14. The Final Rule expressly did not address terrestrial applications of pesticides. 71 Fed. Reg. at 68,486 (Final Rule does not address "applications of pesticides to terrestrial agricultural crops"); 68,488 ("EPA does not believe it is appropriate to broaden the scope of the regulation to include additional types of pesticide applications at this time.")

EPA does not believe that the one paragraph in the opinion discussing terrestrial application of pesticides somehow removes statutory exemptions from NPDES permitting requirements set forth in the Clean Water Act. The Panel's opinion suggests that terrestrial pesticide applications that later

affect waters meet the Clean Water Act's definition of "chemical waste." *Nat'l Cotton Council*, 553 F.3d at 936-37. This one statement, however, should not place into doubt long-standing statutory and regulatory standards applicable to pollutants contained in runoff from agricultural and forest lands. For example, Congress expressly exempted return flows from irrigated agriculture and agricultural storm water discharges from NPDES permit requirements even if they may contain residual pesticides from terrestrial applications. *See* 33 U.S.C. §§ 1342(1)(1); 1362(14). All parties -- Respondent-Intervenors, Environmental Petitioners, and EPA -- agree that the Panel's decision should not, and cannot, extend NPDES permit requirements to these exempt activities. Respondent-Intervenors' Petition at 13-14; Environmental Petitioner's Response at 2; EPA Motion for Stay of Mandate at 4, note 2. Thus, the Panel's reference to terrestrial application of pesticides beyond the scope of the two circumstances in the Final Rule -- an issue not presented by the Final Rule under review -- should not justify rehearing en banc.

EPA agrees with Respondent-Intervenors that the Panel's decision to vacate the Final Rule will cause significant disruption among the hundreds of thousands of persons and businesses nationwide who apply pesticides to or over, including near, waters of the United States without NPDES permits

and now, as a result of the Panel's decision, will need to obtain permits in order to continue doing so consistent with the Clean Water Act. *See* Respondent-Intervenors' Petition at iii. As EPA explained in its Motion for Stay of Mandate, this new permitting requirement will result in substantial disruption to permitting authorities and pesticide applicators if the mandate issues before appropriate NPDES permits are available. This disruption, however, should not require en banc review of the Panel decision. In order to avoid the disruption to permitting authorities, mosquito abatement programs, farmers, foresters, and others, EPA has requested the Court to exercise its equitable discretion and stay its mandate until April 9, 2011 to allow EPA and authorized permitting authorities sufficient time to develop and issue Clean Water Act permits containing appropriate terms to govern the discharge of pesticide pollutants to waters of the United States.

Respectfully submitted,

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June 3, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 3<sup>rd</sup> day June 2009 I caused a true and correct copy of the foregoing Respondent United States Environmental Protection Agency's Response to Petition for Rehearing En Banc to be sent by United States mail, first class postage prepaid, addressed to the following counsel for all other parties in the consolidated petitions for review:

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