

**Defending Agriculture** 

Legal, environmental hot button issues that impact U.S. farmers.

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**Got an EPA Permit?**

Posted on November 04, 2009 at 11:24 AM

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Environmental groups won a major victory against farmers in January of this year when the 6th Circuit of the United States Court of Appeals issued an Opinion in a case called National Cotton Council of America v. EPA.

Trade groups such as the American Farm Bureau, and other commodity groups, have tried desperately to figure out how to deal with this case and its impact on production agriculture. In one article I wrote about the case, I said, "American agriculture suffered a major defeat." As I look at what a colleague and I wrote at the time and review a new document from EPA, I have not changed my opinion.

This case carries serious implications for any producer who sprays fungicides, herbicides, and pesticides. If you do your own spraying or have an ag retailer service conduct it, you are very careful to follow the label on the product. The product is approved by EPA as well as the directions on the label. Currently you are not concerned about obtaining a Clean Water Act (CWA) permit to conduct the spraying in spring or fall. Now you may have to obtain some type of permit to spray if there is a likelihood your spray drift may end up in a water of the United States. This includes a lot of waterways.

Exemption? If your pesticide is washed into a water of the U.S. by normal rainfall, the agricultural storm water exemption should still give you some protection. But again,

Here's EPA quote from the National Cotton Council case, with which the court agrees. I think you will see that EPA and the environmental groups really want to control your spraying to protect water from being polluted. EPA and the Court say:

"[P]esticides applied to land but later contained in a waste stream, including storm water regulated under the Clean Water Act, could trigger the requirement of obtaining an NPDES permit.... In addition, if there are residual materials resulting from pesticides that remain in the water after the application and its intended purpose has been completed, the residual materials are pollutants because they are substances that are no longer useful or required after the completion of a process." (This language destroys the agricultural storm water exemption and never acknowledges there is such an exemption.)

This is the language many farm organizations are now fighting in the Courts. This is not some far off battle. This is not an academic or theoretical dispute. This case will affect your production operation!!

I suggest you consider contacting your commodity organization or your state Farm Bureau. Find out what they are doing to protect your interests.

More power With this case, EPA gains more power over your farming operation. Review the new preliminary agency policy position under consideration, which is entitled "CLEAN WATER ACT PERMITTING OF DISCHARGES FROM PESTICIDE APPLICATIONS." ([www.epa.gov/npdes](http://www.epa.gov/npdes))

Last month EPA unveiled its thinking in terms of requiring permits for pesticide application. Remember that EPA operates under a very broad Clean Water Act mandate. EPA considers virtually any ditch, crevice, or pipe a point source which, if discharging pollutants into waters of the U.S., requires a discharger to obtain a permit from either EPA or your friendly state EPA.

If you must get a permit, it will either be an individual or general permit. Even under a general permit there must be a notice of intention submitted by each permittee to a regulatory authority...probably your state EPA. It appears EPA is considering requiring 46 of the states to issue general permits for spraying on you farm!

Will you have to get a permit for each field? Each time you spray? Will the commercial spray operator be required to have a permit? The nozzle is a point source.

The National Cotton Council case said that pesticides include biological pesticides and chemical pesticides and that includes biological materials and chemical wastes. As a result, if any of this material ends up in a water of the United States it will be considered excess residual material or surplus material and farmers will be required to have a Clean Water Act permit. (Your GMO corn pollen is a biological material. Will it be considered a pollutant under this case if it gets into waters of the United States?)

This potential permitting requirement is serious for agriculture. EPA will spend the next eight months, through April, 2010, discussing the impact of the EPA Pesticide General Permit Proposal. After April 10 through December 10, 2010, EPA will start drafting proposed permits for all of you to comply with in your operation.

The National Cotton Council case will probably be appealed to the U. S. Supreme Court but the chance of the Supreme Court accepting this case, I would guess, is slim and none.

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Thanks to a court ruling, you may need to get a Clean Water Act permit every time you spray herbicides or fungicides.

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