MCFA

Minor Crop Farmer Alliance

March 24, 2009

Honorable Lisa Jackson
Administrator
US Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: The National Cotton Council of America et al. v. United States Environmental Protection Agency Nos. 064630;07/3180/3181/3182/3183/3184/3185/3186/3187/3191/3236

Dear Administrator:

The Minor Crop Farmer Alliance (MCFA) is an alliance of national and regional organizations and individuals representing growers, shippers, packers, handlers, and processors of various agricultural commodities, including food, fiber, nursery, and horticultural products, and organizations involved with public health pesticides. Our members are extremely interested in the development of pest management tools and techniques that are environmentally sound. While our commodities are often called "minor crops," they are vitally important components in our diets and they contribute to safe and aesthetic surroundings for our homes, schools, and places of business. U.S. farmers grow more than 250 types of fruit, vegetable, tree nut, flower, ornamental nursery, and turf grass crops in addition to the major bulk commodity crops. Specialty crop production accounts for more than $45 billion, or greater than 40% of total U.S. crop receipts.

This is to request your assistance in a matter of great importance to the Nation's food, fiber, nursery stock and horticultural industries and to those entities involved in protecting the public's health and welfare. Specifically, this involves the decision issued by the Sixth Circuit in the subject case. The circuit court invalidated the Agency's rule involving the need for obtaining National Pollutant Discharge Elimination System (NPDES) permits when pesticides are applied in certain situations. The Agency's rule reflected the Agency's long standing interpretation of the Clean Water Act (CWA) which, as you know, it administers. The rule provided that NPDES permits were not required for certain applications of pesticides, including both chemical and biological pesticides. Those circumstances generally involved the use of pesticides for public health and welfare purposes. The EPA's rule simply codified in the regulations, the historical approach of both the EPA and the states that NPDES permits were not required under the circumstances prescribed by the rule. The MCFA believes that there is a substantial basis supporting the Agency's interpretation of the CWA as expressed in the invalidated rule. The

application of pesticides in general accordance with label directions, constitutes a beneficial use or purpose. Such products applied in the manner prescribed in the rule are not wastes and therefore, are not pollutants. Consequently, their application is not a discharge of a pollutant within the meaning of the CWA and should not be subject to the requirements of an NPDES permit.

Unfortunately, the court's decision essentially ignores the way the NPDES permit program has been administered for more than 30 years. It also ignores the intent of Congress when it established the CWA. Congress recognized that the use of pesticides was adequately regulated by another law also administered by the Agency, namely the Federal Insecticide, Fungicide and Rodenticide Act, as amended. Consequently, there is no need to duplicate the regulation of the application of such pesticides when applied in general accordance with label provisions, even when such application may result in some deposition of the pesticide into waters of the United States.

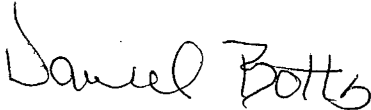
The Court's opinion goes well beyond simply invalidating the Agency's rule. Its reasoning would extend the scope of the NPDES permit program well beyond anything ever envisioned by the Congress. Not only is it disruptive to the operations of the Office of Pesticide Programs and potentially to growers who use pesticide products, but it also substantially can serve to overburden the EPA and the States in carrying out the legitimate operations of the CWA.

The sixth circuit's decision places in question a number of other activities which historically have not been regulated under the NPDES permit program. For those in the agriculture sector it places them in potential jeopardy if, for example, pesticide residues from their lawful agricultural pesticide applications are detected in navigable waters. In such circumstance, the grower would not have a NPDES permit and potentially would face the threat of criminal and civil liability, including citizen suits for not having such a permit. If the grower did try to obtain such a permit, that process would likely not be completed in time for the growing season. In fact, it is understood that there is a general resource problem throughout the nation and the states in being able to address the current pending applications for NPDES permits. Placing NPDES permit requirements on the agriculture sector is unfair to the agricultural community. It is acknowledged that there are certain agriculture exemptions established by the express provisions of the CWA. The circuit court's decision cannot be allowed to neuter the express exemption provisions of the Act. However, we do believe that the court's decision does potentially afford an opportunity for third parties to seek to add liability to farmers because of their lack of an NPDES permit for their operations. Further, the court's decision can only serve to place the public's safety and welfare at issue. The scope of the circuit court's ruling certainly implicates a wide range of activities including for example fighting forest fires. In those circumstances, state and federal agencies may release fire retardant chemicals from airplanes to fight a fire. Under the circuit court's reasoning, securing an NPDES permit in such circumstance would be compelled if detectible residues of the chemical would be expected to find their way into water.

However, it is equally likely that securing such a permit in a timely manner would be impossible. We are confident that you would agree that requiring an NPDES permit under the foregoing circumstances is a fruitless exercise and inconsistent with Congress's objectives in setting the program up initially. In this instance, requiring an NPDES permit would not provide any increase in environmental protection. It merely would serve to divert scarce resources from more critical problems.

The circuit court's decision cannot be left to stand. It must be challenged, either through a request for re-consideration by the entire sixth court, or through an appeal to the United States Supreme Court. Your timely assistance is needed to accomplish either approach. We understand that the Secretary of Agriculture has already communicated with you regarding the significant potential adverse impacts to the food and agriculture sector if an appeal is not taken. We remain confident that you will assure that the appropriate steps are taken to challenge the subject decision of the Sixth Circuit. Thank you for your consideration of this request.

Very truly yours,



Daniel Botts
Chairman of the MCFA
Technical Committee