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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

BETTINA POIRIER, STAFF DIRECTOR
RUTH VAN MARK, MINORITY STAFF DIRECTOR

July 22, 2010

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Draft National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit for Point Source Discharges from the Application of Pesticides, 75 Fed. Reg. 31,775 (June 4, 2010)

Dear Administrator Jackson:

For more than 30 years, the Clean Water Act (CWA) has been correctly interpreted not to require NPDES permits for the application of pesticides. Instead, the application of pesticides has been regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). However, on January 7, 2009, the Sixth Circuit Court of Appeals struck down a 2006 Environmental Protection Agency (EPA) rule exempting pesticide applications from being required to obtain National Pollutant Discharge Elimination System (NPDES) permits when those pesticides were applied in accordance with FIFRA. The Court's ruling in *National Cotton Council, et al. v. EPA* has caused a fundamental change in the regulation of pesticides.

The EPA rule in question had rightly exempted pesticides from NPDES permits—both for agricultural use and public health protection—applied near or into waters of the U.S. if those pesticides were applied in accordance with FIFRA label requirements. In vacating the rule, the court ruled that sprayers and nozzles are point sources, and that residues and excess pesticides that remain in water after the beneficial use (i.e., pest control) is completed are “pollutants” to be regulated under the CWA.

In response, on June 4, 2010, EPA proposed the pesticide general permit (PGP) under the CWA, which governs the application of pesticides “to, over, or near waters of the United States.” As you review the comments submitted for the record, we request that you ensure the PGP address only the specific issues addressed in *National Cotton Council, et al. v. EPA* and not attempt to cover any additional activities.

We are pleased that the proposed PGP does not cover pesticide applications to agricultural crops, regardless of whether those crops are grown in or adjacent to “waters of the U.S.” The CWA is clear that the production of agricultural crops, including the use of pesticides, is not subject to federal NPDES permit requirements.

However, we remain concerned that these new CWA permits for pesticides will bring, among other problems, greater regulation and heavier economic burdens on farmers and states. Specifically, we ask that EPA carefully review the proposed record keeping and annual reporting requirements for permittees. We request that EPA accurately determine the cost burden of such requirements on the operator, and attempt, to the greatest degree possible, to minimize record keeping and reporting requirements for this program. Additionally, we request that EPA work to ensure that the permit is not duplicating any other requirement that has been already imposed under FIFRA or other environmental regulations.

Additionally, we are concerned that EPA is seeking comment on what effluent limitations or other permit conditions would be appropriate if agricultural pesticide use were covered. Again, we believe that the intent of Congress is clear: the production of agricultural crops, including the use of pesticides, is not subject to federal NPDES permit requirements. If EPA proposes any expansion of pesticide uses covered by the PGP, further public notice and comment and new economic analysis should be required.

As you know, there is very little time between when EPA issues the general permit, and when states must issue theirs. We remain very concerned about the short time that will be available to states to implement the program. States may need to change their laws to revise their own general permits. We encourage you to work closely with states that have delegated authority and, if necessary, request an extension from the courts.

Thank you for your attention to these issues. We appreciate your staff keeping us updated on your progress with the PGP and expect these updates to continue as the permit is finalized.

Sincerely,

Sam M. Chiles

Giff Borg

Orl Vitter

Mike Cray

George V. Voinovich

John Barrasso

Lamar Alexander