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GEORGIA AGRIBUSINESS COUNCIL

COUNCIL MISSION: "To advance the business of agriculture through economic development, environmental stewardship and education to improve the quality of life for all Georgians."
March 19, 2009

The Honorable Lisa Jackson
Environmental Protection Agency
Ariel Rios Federal Building
1200 Pennsylvania Avenue, NW, Room 3000
Washington, DC 20460

Dear Administrator Jackson:

I write to you today as the President of the Georgia Agribusiness Council and on behalf of the more than 700 member companies of the Council to request your assistance. Due to recent action by the 6th Circuit Court of Appeals, farmers in Georgia and across our nation will enter into future growing seasons with threats of litigation unless your Agency takes appropriate legal action to appeal the decision.

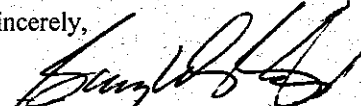
As you and EPA staff are aware, EPA's 2007 rule exempted certain pesticide applications that are compliant with FIFRA from the NPDES provisions of the Clean Water Act. The rule stated a permit was not required for application of pesticides directly into, over, or near waters of U.S. (e.g., application to forest canopy), provided the application is in compliance with relevant FIFRA requirements. In these circumstances, EPA found that the pesticide application is not a discharge of "pollutant" as defined under the Clean Water Act because the pesticide is a useful product, not a "waste" when it is released from the application equipment. The Clean Water Act definition of "pollutant" includes "chemical waste" and "biological material," but does not include any other terms that might apply to pesticides.

Vacating the rule, the court held that if some pesticide enters waters of the U.S. as a result of pesticide application, the application is a discharge of a "pollutant." An exception is made only for applications of aquatic chemical pesticide that "leaves no excess portions after performing its intended purpose." Further, the Court held there was an exception where pesticide residue remains following direct application of pesticides to the jurisdictional waters. Both statements by the Court are in direct conflict with the agriculture exemptions in the CWA [Sec. 402(l)(1) and Sec. 502(14)].

Although EPA's rule focused on the application of pesticides into, over, or near waters, the Panel extended its analysis to terrestrial applications. According to the Court, pesticide application is a discharge of a "pollutant" "from a point source" whenever pesticide enters waters and would not have entered waters "but for" the original application. In the Court's words, "It is clear that but for the application of the pesticide, the pesticide residue and excess pesticide would not be added to the waters, therefore, the pesticide residue and excess pesticide are from a 'point source.'"

By extending the Court's decision to terrestrial applications, the Court has placed farmers in legal jeopardy under Clean Water Act citizen-action provisions. Unless EPA appeals the decision before an en banc panel, farmers will go into the next growing season under the threat of lawsuits as EPA has no permitting system in place. Additionally, the panel's decision can be construed to apply to non-agricultural/non-pesticide applications and emissions, including spraying for mosquito control, vegetation management, and chemical deicing of roads and highways.

Due to the potentially significant ramifications of this court decision to U.S. agriculture, I strongly urge you to file a petition for rehearing before the deadline of April 9. Our agricultural producers are at risk due to the decision of the courts. Your consideration of our request and prompt action in filing a petition is appreciated. Please contact me if I can be of assistance.

Sincerely,

Gary W. Black
President

