

United States Senate

WASHINGTON, DC 20510

May 9, 2003

The Honorable John Ashcroft
Attorney General
U.S. Department of Justice
Washington, D.C.

Dear Attorney General Ashcroft:

We write to request the U.S. government seek review by the United States Supreme Court of the recent ruling by the U.S. Court of Appeals for the Ninth Circuit in *League of Wilderness Defenders v. Forsgren*, No. 01-35729 (9th Cir. Nov. 4, 2002), *rehearing denied* (March 14, 2003). This decision requires a National Pollutant Discharge Elimination Systems (NPDES) permit under the Clean Water Act (CWA) for aerial pesticide application to protect forest lands from a destructive moth outbreak. We are greatly concerned with the consequences of this opinion, which likely extend far beyond the health of our national forests to the health of our citizens. It will dramatically increase the risk of lawsuits and liability for a wide range of routine forestry and agricultural activities nationwide. It will also create tremendous uncertainty and risk for many beneficial pest control activities that protect public health by preventing the spread of pests, insects, and diseases.

The court's holding that EPA *lacks authority* to draw clear distinctions by defining categories of activities as nonpoint sources has potentially broad impacts to American agriculture. EPA has regulations of this sort for both agriculture and aquaculture. In fact, months prior to the *Forsgren* decision, the Ninth Circuit upheld an EPA regulation using the identical authority to define aquaculture activities below a certain size as nonpoint sources and those above that size as point sources. *Association to Protect Hammersley*, 299 F.3d 1007, 1018-19 (9th Cir. 2002). Yet the *Forsgren* ruling now states that EPA is powerless to define any incidental spray or drift from agricultural, or other, activities into nearby streams (e.g., from crop-dusting) as a nonpoint source. The ruling would also encompass any direct application of pesticide, fertilizer, or other materials in forested or farmed wetlands subject to CWA jurisdiction.

With respect to forestry, the court's decision eliminates the bright-line distinction EPA had established by defining four specific types of operations as potential "silvicultural point sources" and all other forestry activities as "nonpoint sources." For more than twenty-five years, EPA's "silvicultural point source" rule has provided the Forest Service and private landowners with a measure of security from unfounded CWA lawsuits challenging routine forestry activities. The *Forsgren* decision now invites continual case-by-case litigation as to whether particular activities in specific circumstances require an NPDES permit.

The Honorable John Aschcroft
May 9, 2003
Page 2

Beyond forestry and agriculture, this troubling court decision creates dangerous legal precedent by characterizing the use of pesticide products for their intended purpose as a discharge of "pollutants" requiring an NPDES permit, notwithstanding the rigorous risk assessments conducted by EPA when it approves use of a pesticide. This is a novel legal issue that has nothing to do with EPA's authority to issue regulations defining activities point sources requiring a permit and nonpoint sources. The court reached out to rule on this issue even though it was not addressed by the district court or by the parties in their legal briefs.

This ruling will have enormous implications for the health of our public and private forests and for innumerable beneficial pest control activities nationwide, e.g., gypsy moths in communities and forests throughout the east, boll weevils in cotton fields, fire ants and noxious weeds in pastures and other rangelands, and a variety of pests in orchards and agricultural fields. Strong concerns are mosquito control programs that prevent the spread of the deadly West Nile virus and other public health threats. At least one district court has held that spraying EPA-registered pesticides in the air to control mosquitoes does *not* require an NPDES permit. *No Spray Coalition v. City of New York*, 2002 U.S. Dist LEXIS 22936 (S.D.N.Y. Nov. 26, 2002).

In addition to seeking reversal of the Ninth Circuit's ruling on EPA authority, we strongly urge that the government seek to have this extraneous and ill-informed aspect of the *Forsgren* decision vacated to avoid considerable confusion, litigation, delay, and expense to critical programs for the protection of forest, crop and human health. The court assumed facts not in evidence, analyzed arguments not briefed by the parties and ruled on issues that were not in the appeal. This critical issue affecting both public health and food supplies should not be decided in such a cavalier manner.

Thank you for your consideration of our request. Please let us know if we can be of any further assistance.

Sincerely,

Mike Cryer

Blanche L. Lincoln

Jan McLaughlin

Gene Miller

Paul Eassey

Pat Williams

Robert F. Bennett

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